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Docket: T-471-07

Citation: 2008 FC 1412

Ottawa, Ontario, December 23, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MASTERPIECE INC.

Applicant

and

ALAVIDA LIFESTYLE INC.

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Masterpiece Inc. and Alavida Lifestyle Inc. both operate in the retirement residence business. Masterpiece Inc. claims that it has been using various trade-marks that include the word “Masterpiece” for about five years. However, in 2007, Alavida registered the trade-mark “Masterpiece Living” for use in its business. Masterpiece Inc. was unaware of Alavida’s registration and failed to oppose it. Now, Masterpiece Inc. seeks to expunge Alavida’s trade-mark from the register on grounds that Masterpiece Inc. had already acquired rights to it and because Alavida’s trade-mark is likely to be confused with Masterpiece Inc.’s. Masterpiece Inc. relies on s. 57 of the *Trade-marks Act*, R.S.C. 1985, c. T-3 (relevant provisions are set out in an Annex).

[2] I am not satisfied that Masterpiece Inc. had acquired rights to the word “Masterpiece” or that confusion between the two trade-marks is likely. Accordingly, I must dismiss Masterpiece Inc.’s application for expungement.

[3] There are two questions to be decided: (1) Did Masterpiece Inc. use or make known its trade-marks before Alavida applied to register the trade-mark “Masterpiece Living”? (2) If so, was Alavida’s registered trade-mark, “Masterpiece Living” likely to be confused with Masterpiece Inc.’s trade-marks?

I. Factual Background

[4] Masterpiece Inc. was incorporated in 2001. It operates primarily in Alberta but plans to expand. Masterpiece Inc. maintains that it has been using the word “Masterpiece” in its advertisements, its dealings with suppliers and customers, and in trade-shows since 2001. The word “Masterpiece” has been used alone, as well as with other words, including the word “living”. Examples include “Masterpiece the Art of Living”, and “Masterpiece the Art of Retirement Living”.

[5] Masterpiece Inc. also claims that it developed and began using the trade-mark “Masterpiece Living” in December 2005. It attempted to register the trade-marks “Masterpiece” and “Masterpiece Living” in 2006 but its application was refused by the Canadian Intellectual Property Office on the basis that Alavida had already applied to register “Masterpiece Living”.

[6] Alavida was incorporated in 2005 and operates mainly in Ottawa. It claims that it hired a firm to conduct a search for other companies using “Masterpiece” and did not find Masterpiece Inc. On December 1, 2005, Alavida applied to register the trade-mark “Masterpiece Living” and began using it in early January 2006 on its website. Alavida’s trade-mark application was granted in March 2007. It uses the words “Masterpiece Lliving” in its advertising along with its corporate name.

II. Legal Framework

[7] To expunge Alavida’s trade-mark from the register, Masterpiece Inc. must show that Alavida was not entitled to register “Masterpiece Living” (s. 18). A person is not entitled to register a trade-mark for proposed use if, at the time the application was filed, it was confusing with a trade-mark that had been previously used or made known in Canada (s. 16(3)(a)).

[8] The parties dispute how this provision should be interpreted. Masterpiece Inc. argues that s. 16(3)(a) involves looking at the likelihood of confusion both at the time of the trade-mark application and into the future. Alavida submits that the wording of the provision makes clear that the analysis of confusion must be made as of the date of the trade-mark application, in this case, on December 1, 2005.

[9] I agree with Alavida on this point. The provision clearly states that a person is entitled to register a proposed trade-mark “unless *at the date of filing* of the application it *was* confusing” with a previously used mark. In turn, s. 57 of the Act states that a trade-mark can be expunged if it “does not accurately express or define the existing rights of the person appearing to be the registered owner of the mark”. Read together, where a person has registered a mark for proposed use and, at the time of the registration, the mark was likely to be confused with a pre-existing mark, it can be expunged from the register. The interpretation Masterpiece Inc. urges on me would require me to overlook the words “at the date of filing of the application” and to expand the past tense “was” to include the future “will be”. I see no basis for doing so. Indeed, the case law confirms that the relevant date is the date of filing of the application: *Hugo Boss AG v. Paragon Clothing Ltd.* (1994), 58 C.P.R. (3d) 504 (F.C.T.D.); *California Fashion Industries, Inc. v. Reitmans (Canada) Ltd.* (1991), 38 C.P.R. (3d) 439 (F.C.T.D.). Accordingly, I will confine myself to evidence and events relating to potential confusion up to December 1, 2005.

[10] Alavida also argued that Masterpiece Inc.’s application for expungement was premature. Masterpiece Inc.’s notice of application was filed before Alavida had actually obtained its registration. However, by the time of the hearing of the application, Alavida’s trade-mark had certainly been registered. I see no basis, therefore, for Alavida’s challenge to the Court’s jurisdiction to deal with Masterpiece Inc.’s application.

[11] For Masterpiece Inc. to succeed in this proceeding, it must show that Alavida was not entitled to register “Masterpiece Living” because, prior to Alavida’s application (December 1,

2005), Masterpiece Inc. had been using and making known a trade-name and trade-marks with which Alavida's mark would be confused. I have split this test into two parts and analyze them separately below.

[12] Confusion exists if the use of the trade-mark or trade-name in issue would likely cause the average consumer to infer that the goods or services offered by two different companies actually have the same source (s. 6). One must consider the "first impression in the mind of a casual consumer somewhat in a hurry" who has an "imperfect recollection" of another trade-mark (*Veuve Clicquot Ponsardin v. Boutiques Clicquot Ltée*, [2006] 1 S.C.R. 824, at para. 20). In essence, the question is whether "ordinary casual consumers somewhat in a hurry are likely to be deceived about the origin of the wares or services" (*Mattel Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, at para. 58). This is consistent with the objective of trade-mark law, which is to ensure that consumers know from whom they are buying products and services (*Mattel Inc.*, above, at para. 21).

1. Did Masterpiece Inc. use or make known its trade-marks before Alavida applied to register the trade-mark "Masterpiece Living"?

[13] Masterpiece Inc. must show that it used or made its trade-marks known before December 1, 2005.

[14] Masterpiece Inc. maintains that, since 2001, it has used extensively both its trade-name "Masterpiece" as well as various trade-marks, such as "A Living Masterpiece", "Masterpiece

Clubs”, “Masterpiece the Art of Living”, and “Masterpiece the Art of Retirement Living”. It also began using “Masterpiece Living” in late December 2005, but this is irrelevant as it post-dates Alavida’s trade-mark application.

[15] Masterpiece Inc. explains that it has used “Masterpiece” and the variations on it in relation to its operation of seniors’ residences and assisted-living facilities. The evidence shows, however, that this use was not extensive during the relevant period (2001-2005).

[16] To constitute “use” of a trade-mark in relation to a service, the mark must have been used or displayed in the performance of the service or in advertising the service. If the latter, the service must have been available when it was advertised (s. 6).

[17] Masterpiece Inc.’s evidence on this point consists of the following:

- various business documents and invoices;
- brochures of a companion company (called “Club Sierra”) with the words “Masterpiece – The Art of Living” on the back;
- a building sign saying “Dedicated to the Seniors of Medicine Hat by Medican and Masterpiece”;
- two articles in the Medicine Hat News;
- an article posted on Masterpiece Inc.’s website (www.clubsierra.ca) referring to “Masterpiece – The Art of Living”;

- brochures containing the words “Masterpiece – The Art of Retirement Living”.

[18] Little of this evidence supports the use of “Masterpiece” or its variants in respect of the performance of services or in advertising those services. For example, contracts and prospectuses are not advertising; nor do they display any particular connection with the services Masterpiece Inc. actually provides. Having reviewed the evidence put forward by Masterpiece Inc., it appears to me that the use of “Masterpiece” and the related marks was rather sporadic. Masterpiece Inc. seems to have given more priority to the trade-name “Club Sierra” and to its association with partner companies. Further, where the word “Masterpiece” was used, the emphasis was clearly on that word alone, not on the other associated words described above (*e.g.*, “the Art of Retirement Living”), which were in much smaller type.

[19] Still, Masterpiece has shown *some* use of its trade-name and marks in respect of its services prior to December 1, 2005. The question, then, is whether there was likely to be confusion between Masterpiece Inc.’s trade-name or marks and Alavida’s registered trade-mark “Masterpiece Living” on that date.

2. Was Alavida’s registered trade-mark, “Masterpiece Living”, likely to be confused with Masterpiece Inc.’s trade-marks?

- (a) Expert Evidence

[20] Dr. Michael Mulvey, an expert in marketing, believes that there is a possibility, but not a likelihood, of confusion between the trade-mark “Masterpiece Living” and Masterpiece Inc.’s trade-name and marks. He views the word “masterpiece” as being a common, laudatory word. It lacks inherent distinctiveness.

[21] He noted that Masterpiece Inc.’s trade-name and marks do not align exactly with Alavida’s registered mark for “Masterpiece Living”. His view is that the differences between them would be noticed by consumers. For example, in “Masterpiece Living” the emphasis is on “living”. By contrast, in “Masterpiece”, “Masterpiece Clubs” or “Masterpiece the Art of Living”, the emphasis is on “Masterpiece”. This difference is reflected in the way in which the respective companies present themselves in promotional materials. For example, as mentioned, in Masterpiece Inc.’s advertising and brochures, the word “Masterpiece” is predominant. In Alavida’s materials, “Masterpiece Living” is always presented as a whole idea, in distinctive script, with a TM symbol, adjacent to the Alavida Lifestyles logo or website address.

[22] Dr. Mulvey concluded that, taking into account all of the relevant factors, “the differences between the marks overcome any similarities and render the marks non-confusing to the average consumer”. Accordingly, it would be very unlikely that “consumers would believe that wares and services sold by Alavida under the Masterpiece Living trade-mark originate from the provider of services under the Masterpiece, Masterpiece Clubs, or Masterpiece the Art of Living trade-marks.”

[23] Dr. Ruth Corbin was asked by Masterpiece Inc. to respond to Dr. Mulvey's opinion. Her view was that Dr. Mulvey's opinion actually supports a likelihood of confusion, contrary to his stated conclusion. Further, she found that Dr. Mulvey's conclusion was unsupported by survey data.

[24] In general, Dr. Corbin felt that Dr. Mulvey provided an artificial and unrealistic analysis of how consumers would actually perceive the "Masterpiece Living" mark. For example, she doubts that consumers would engage in the kind of "detailed, syllable-by-syllable analysis" described by Dr. Mulvey. His analysis of the various linguistic elements of "Masterpiece Living" simply introduced "unnecessary complication".

[25] I do not believe these criticisms are well-founded. As Dr. Mulvey pointed out in a supplementary affidavit, many of Dr. Corbin's observations are based on an unfair reading of his opinion. I accept Dr. Mulvey's general proposition that the various elements of a trade-mark and the manner in which they are presented can influence the way consumers perceive the mark as a whole.

[26] Dr. Corbin also conducted a survey on behalf of Masterpiece Inc. for the purpose of determining whether consumers were likely to be confused about the source of the "Masterpiece Living" trade-mark. Dr. Corbin surveyed 251 people in Calgary, Toronto and Ottawa who were over 50 years of age and financially capable of purchasing a retirement home. Respondents were presented with the trade-mark "Masterpiece Living" either in block letters on a plain white card, or in the form actually used by Alavida in its promotional material (absent the name "Alavida"). They were asked:

“If you have an opinion, what company promotes retirement residences and retirement services using the brand name ‘Masterpiece Living’?”

[27] Most people (81%) had no idea. As Dr. Corbin reports, only “6% said or speculated that the name of the company was “Masterpiece”. She concluded that this 6% figure represents a “top-of-mind likelihood of confusion”.

[28] Those respondents who did not mention “Masterpiece” in the first survey question, were asked further questions. One group was given a list of companies, which included Masterpiece Inc. They were then asked:

“Here is a list of companies that provide retirement residences and retirement services in Canada. If you have an opinion, which of the companies on the list, if any, uses the brand name ‘Masterpiece Living’ to promote retirement residences or retirement services?”

[29] Among this group of respondents, 42% chose the name Masterpiece Inc. from the list.

[30] Respondents who had not identified Masterpiece Inc. in either of the first two questions were asked a third. They were shown either a photograph of a Masterpiece Inc. trade-show booth or a Masterpiece Inc. advertisement. These respondents were then asked:

“If you have an opinion one way or another, do you think that the brand name ‘Masterpiece Living’ and the exhibit booth/advertisement you just saw are used by the same company or by different companies?”

[31] Of this group, 67% gave the answer “same company”.

[32] Looking at the respondents as a whole, and giving equal weight to all of their answers, Dr. Corbin concluded that 74% of them exhibited “apparent confusion” before discounting for irrelevant guessing. She reduced this figure to 53% based on her analysis of the results for a control group.

[33] The control group was set up to test for guessing. Dr. Corbin presented members of the control group with the name “Fine Quality Living” and asked them to name the company that used that trade-mark. The results for this question are not included within Dr. Corbin’s report or her analysis of the control data, but Dr. Chakrapani (whose report is discussed below) analyzed the data from the original questionnaires. He determined that 4% of these respondents named “Fine Quality” as the name of the company using that mark.

[34] As with the main group of respondents, a subset of the control group was also presented with a list of companies and asked whether one of them used the trade-mark “Fine Quality Living”. However, there did not appear to be an analogous company name on the list of possibilities. One would have thought that the list should have included the name “Fine Quality Inc.” in order to test

the degree to which the respondents in the main group might simply have guessed the name “Masterpiece Inc.” after being shown the words “Masterpiece Living.” The closest name to “Fine Quality Living” in the control group was “Quality Lifestyles”. Dr. Chakrapani pointed out that the choice of a two-word modifier (“Fine Quality”) confounded the results of this control group somewhat. “Quality Lifestyles” was chosen by 4 out of 27 respondents (15%). Dr. Corbin, on cross-examination on her affidavit, agreed that more people would have answered “Fine Quality” if that option had been provided to them.

[35] Members of the control group were also shown the Masterpiece Inc. exhibit booth or advertisement. They were then asked whether the trade-mark “Fine Quality Living” was used by the same or a different company. Most of them could not say (32 out of 73, or 44%), but 26 of them (36%) believed it was a different company and 15 (20%) believed it was the same. The results for this group were not part of the calculation of the effect of the control conditions.

[36] Overall, Dr. Corbin concluded that her survey shows that the word “Masterpiece” in Masterpiece Inc.’s trade-name and trade-marks is the dominant element in them and, therefore, that the use of “Masterpiece Living” by another company in the same channel of trade would likely lead to confusion.

[37] Dr. Chuck Chakrapani reviewed Dr. Corbin’s analysis on behalf of Alavida. He concluded that Dr. Corbin’s survey does not provide evidence of a likelihood of confusion as to the source of the “Masterpiece Living” trade-mark. In his view, Dr. Corbin’s work shows that only 11 out of 178

respondents in Ottawa, Toronto, and Calgary thought that “Masterpiece Living” might be owned by a company called “Masterpiece” or “Masterpiece Inc.” (we do not know how many chose one versus the other). Dr. Chakrapani questioned the validity of 5 of the Calgary responses because they all gave virtually identical verbatim answers in perfect sequence. In any case, none of the 11 respondents seemed aware that there was actually a company called “Masterpiece Inc.” Rather, they appeared simply to have speculated that the company using “Masterpiece Living” was called “Masterpiece”. The survey did not analyze the perspective of a consumer who was familiar with, but had an imperfect recollection of, the prior trade-mark.

[38] Dr. Chakrapani found that there was no statistically significant difference between the number of respondents who thought that “Masterpiece Living” was used by “Masterpiece” compared to the number of respondents who inferred that “Fine Quality Living” was used by a fictitious company called “Fine Quality”. This suggests mere word association on the part of respondents, not confusion. In Dr. Chakrapani’s view, the respondents’ verbal explanations for their answers confirmed this.

[39] Dr. Chakrapani also pointed out that those respondents who did not answer “Masterpiece” to Dr. Corbin’s open-ended question about the source of “Masterpiece Living” were, in effect, told in the second question that there was a company called “Masterpiece Inc.” that provided retirement residences and services and then asked whether they thought there was a connection. Others were shown a Masterpiece Inc. trade-show booth or advertisement and asked whether they thought “Masterpiece Living” was used by the same or a different company. Dr. Chakrapani felt that these

respondents were, in effect, prompted to identify Masterpiece Inc. as the company using the “Masterpiece Living” mark.

(b) The Statutory Factors

[40] In order to assess the likelihood of confusion, I must consider all the surrounding circumstances (s. 6(5)). In particular, I must consider:

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

[41] I agree with Dr. Corbin that there is some distinctiveness in the use of the word “Masterpiece” in association with retirement residences or services. While “Masterpiece” is a common word with wide use in naming or describing goods and services available to the public, its use in relation to the particular services at issue here is somewhat distinctive.

[42] As for the extent to which the trade-marks have become known, I have no evidence. Dr. Corbin's survey does not suggest that respondents were aware of a company called "Masterpiece" or had seen the trade-mark "Masterpiece Living" before. I agree with Dr. Mulvey that Masterpiece Inc.'s marks did not acquire distinctiveness, given the time-frame and the inconsistent manner in which they were used, before Alavida registered its mark.

[43] Turning to the nature of the business, both companies operate in the area of expensive retirement residences and services. People take considerable care in choosing a residence and selecting the company that will provide it. In these circumstances, consumers can be presumed to be less susceptible to confusion about the source of the goods or services they are seeking because they are unlikely to make choices based on first impressions. They will generally take considerable time to inform themselves about the source of expensive goods and services (*General Motors Corp. v. Bellows*, [1949] S.C.R. 678).

[44] Alavida suggests that the two companies actually operate in different segments of the retirement services industry. For example, Alavida does not offer the same level of medical assistance to its residents as does Masterpiece Inc. Masterpiece Inc. tends to operate more in the assisted-living market whereas Alavida generally targets persons who do not need assistance. Alavida is an up-market provider, whereas Masterpiece Inc. operates in the middle-market category.

[45] Masterpiece seeks to use its marks in relation to the "operation of seniors' lodges, condominiums and assisted-living facilities." By contrast, Alavida's trade-mark is registered in

relation to a broad range of services: “Real estate development services, real estate management services, residential building construction services, dining services, namely a dining room restaurant, housekeeping services, medical services namely medical clinic services, spa services, fitness services, namely a fitness centre, and concierge services”. Clearly, though, the services and client base of the two companies overlap. Still, people seeking a retirement residence can be expected to research carefully the characteristics of the properties in which they are interested and the services associated with them, and to become knowledgeable about their providers. As Justice Ian Binnie stated in *Mattel, Inc.*, above, at para. 58. “When buying a car or a refrigerator, more care will naturally be taken than when buying a doll or a mid-priced meal”. All the more so when choosing a residence.

[46] There is obviously a degree of resemblance as between Masterpiece Inc.’s trade-name and marks and Alavida’s registered mark for “Masterpiece Living”. However, as part of the overall circumstances, I note that Alavida’s use of “Masterpiece Living” has been in the nature of a slogan accompanying its corporate identity. By contrast, Masterpiece Inc. uses “Masterpiece” to identify the company itself, along with various other words and phrases of far lesser prominence, alongside a distinctive butterfly logo. These differences help reduce the likelihood of confusion.

III. Conclusion and Disposition

[47] Looking at all of the circumstances described above, I am not satisfied that Masterpiece Inc. has established that there was a likelihood of confusion between its trade-name and marks and

Alavida's registered trade-mark on or before December 1, 2005. While there are obvious similarities, Masterpiece Inc's use of its trade-name and marks was clearly limited both in time and scope. Accordingly, they were neither particularly distinctive nor well-known as of December 1, 2005. The nature of the business in which the marks in issue have been used suggests that consumers will be careful in choosing a provider. They are not likely to make choices based on first impression or be easily confused about the source. The expert evidence relied on by Masterpiece Inc. does not, in my view, show a likelihood of confusion.

[48] I would dismiss Masterpiece Inc.'s application with costs.

JUDGMENT

THIS COURT'S JUDGMENT IS that

1. The application for expungement is dismissed, with costs.

“James W. O’Reilly”

Judge

Annex

Trade-marks Act, R.S.C. 1985, c. T-13

When mark or name confusing

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.

Idem

(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.

Idem

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

Idem

(4) The use of a trade-name causes confusion with a trade-mark if the use of both the trade-name and trade-mark in the same area would be likely to lead to the

Loi sur les marques de commerce, L.R., 1985, ch. T-13

Quand une marque ou un nom crée de la confusion

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.

Idem

(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.

Idem

(3) L'emploi d'une marque de commerce crée de la confusion avec un nom commercial, lorsque l'emploi des deux dans la même région serait susceptible de faire conclure que les marchandises liées à cette marque et les marchandises liées à l'entreprise poursuivie sous ce nom sont fabriquées, vendues, données à bail ou louées, ou que les services liés à cette marque et les services liés à l'entreprise

inference that the wares or services associated with the business carried on under the trade-name and those associated with the trade-mark are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

What to be considered

(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

(a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;

(b) the length of time the trade-marks or trade-names have been in use;

(c) the nature of the wares, services or business;

(d) the nature of the trade; and

(e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

Registration of marks used or made known in Canada

Proposed marks

16. (3) Any applicant who has filed an application in accordance with section 30 for registration of a proposed trade-mark that is registrable is entitled, subject to sections 38 and 40, to secure its registration in respect of the wares or services specified in the application, unless at the date of filing of the application it was confusing with

(a) a trade-mark that had been previously

poursuivie sous ce nom sont loués ou exécutés, par la même personne, que ces marchandises ou services soient ou non de la même catégorie générale.

Idem

(4) L'emploi d'un nom commercial crée de la confusion avec une marque de commerce, lorsque l'emploi des deux dans la même région serait susceptible de faire conclure que les marchandises liées à l'entreprise poursuivie sous ce nom et les marchandises liées à cette marque sont fabriquées, vendues, données à bail ou louées, ou que les services liés à l'entreprise poursuivie sous ce nom et les services liés à cette marque sont loués ou exécutés, par la même personne, que ces marchandises ou services soient ou non de la même catégorie générale.

Éléments d'appréciation

(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) le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;

b) la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;

c) le genre de marchandises, services ou entreprises;

d) la nature du commerce;

e) le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le

used in Canada or made known in Canada by any other person;

When registration invalid

18. (1) The registration of a trade-mark is invalid if

- (a) the trade-mark was not registrable at the date of registration,
 - (b) the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced, or
 - (c) the trade-mark has been abandoned,
- and subject to section 17, it is invalid if the applicant for registration was not the person entitled to secure the registration.

Exception

(2) No registration of a trade-mark that had been so used in Canada by the registrant or his predecessor in title as to have become distinctive at the date of registration shall be held invalid merely on the ground that evidence of the distinctiveness was not submitted to the competent authority or tribunal before the grant of the registration.

Exclusive jurisdiction of Federal Court

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.

Restriction

(2) No person is entitled to institute under this section any proceeding calling into question any decision given by the Registrar of which that

son, ou dans les idées qu'ils suggèrent.

Enregistrement des marques employées ou révélées au Canada

Marques projetées

16. (3) Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce projetée et enregistrable, a droit, sous réserve des articles 38 et 40, d'en obtenir l'enregistrement à l'égard des marchandises ou services spécifiés dans la demande, à moins que, à la date de production de la demande, elle n'ait créé de la confusion :

- a) soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;

Quand l'enregistrement est invalide

18. (1) L'enregistrement d'une marque de commerce est invalide dans les cas suivants :

- a) la marque de commerce n'était pas enregistrable à la date de l'enregistrement;
- b) la marque de commerce n'est pas distinctive à l'époque où sont entamées les procédures contestant la validité de l'enregistrement;
- c) la marque de commerce a été abandonnée.

Sous réserve de l'article 17, l'enregistrement est invalide si l'auteur de la demande n'était pas la personne ayant droit de l'obtenir.

Exception

(2) Nul enregistrement d'une marque de commerce qui était employée au Canada par l'inscrivant ou son prédécesseur en titre, au point d'être devenue distinctive à la date d'enregistrement, ne peut être considéré comme invalide pour la seule raison que la preuve de ce

person had express notice and from which he had a right to appeal.

caractère distinctif n'a pas été soumise à l'autorité ou au tribunal compétent avant l'octroi de cet enregistrement.

Jurisdiction exclusive de la Cour fédérale

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.

Restriction

(2) Personne n'a le droit d'intenter, en vertu du présent article, des procédures mettant en question une décision rendue par le registraire, de laquelle cette personne avait reçu un avis formel et dont elle avait le droit d'interjeter appel.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-471-07

STYLE OF CAUSE: MASTERPIECE INC. v. ALAVIDA LIFESTYLE INC.

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 17-18, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: December 23, 2008

APPEARANCES:

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