KERRY MORRIS

May 22, 2015

Via Email

Bull Housser
1800 - 510 West Georgia Street
Vancouver, BC, V6B 0M3

Attention: Mat Brechtel, Solicitor - City of North Vancouver

Re: Your Letters Dated May 15th & 20th, 2015

Dear Sir:

I am in receipt of your letter dated May 20th, 2015, apparently issued in response to my email of the same date. I say 'apparently' because despite a request for specific clarification on various aspects of your clients claim, as described in your letter of May 15th 2015, those answers were not forthcoming in your reply. Instead you have chosen to respond with legal argument. Accordingly I will provide my response and my corresponding legal argument.

By email dated May 20th 2015, I requested the following specifics in respect of your May 15th 2015 allegations, and threat of legal action:

1. Has the City of North Vancouver made formal registration of a trade-mark?
2. What is the precise trade-mark to which the City claims all rights and privilege?
3. Please provide copies of all trade-mark registration documents?
4. Please provide a full colour hardcopy of all trade-mark to which the City claims ownership?
5. An accounting of all economic damage caused to the business of the City by the alleged breach?
6. Declaration of the truthfulness or untruthfulness of the contents of the documents to which the alleged trade-mark breach is attached?

First, while you fail to admit that the City has never sought or received a registered trade-mark, that failure is implied within your refusal to provide a clear and precise answer to my enquiry. This determination is further supported by the fact that your legal argument describes a right to claim trade-mark despite a failure to make formal registration. While there is jurisprudence to support the recognition of trade-marks in circumstances where timely registration has not occurred, I can find no jurisprudence which speaks to the refusal of a party to register where economic hardship is not the cause. In the City's case, the failure to register appears to be caused by laziness or poor business practice. Similar matters involving claims of Copyright in relation to music, where the law is well known, but the registration requirements by the artists or producers have purposefully not been met, have resulted in the inability of an artist to bring a claim for damages where timely correction has not occurred, even in circumstances where economic damage can be proven. The jurisprudence which I have located in this area is principally the result of decisions taken in the USA, which were formally rendered in relation to the *Copyright Act* of 1976, which provisions remain in force today.

Second, I have requested a precise identification of the trade-mark over which you claim I have trodden. You have failed to provide a sample of that trade-mark and thus I lack sufficient knowledge as to the precise details of the alleged trade-mark infringment.

784 East 15th Street, North Vancouver, B.C., V7L 2S4

Third, I have requested from you copies of the City's trade-mark registration documents and you have failed / refused to provide any documents of what-so-ever kind or nature. This failure / refusal further bolsters the argument that the City has never applied for or received a formal trade-mark Registration.

Fourth, trade-marks can be words, sounds, colour sequences, art, etc, and in each case, the precise nature of these designs are the focus of the 'Mark'. Deviation from these artistic components which would detract from a claim of 'passing-off' will reduce the potential for such a claim to be determined valid. The greater the deviation, the less likely a claim of passing-off is provable in law. Therefore the provision of a full colour hardcopy description of the trade-mark against which infringement is claimed by the City is very necessary to determine the degree to which any alleged breach is real. You have refused to provide any version of the alleged trade-mark over which you claim infringement, and so I am uncertain as to which (words, sounds, pictures, etc.) you actually make reference.

Fifth, You were requested to provide an accounting of economic damage, to support a claim of infringement, the need for which is spoken to in the relevant jurisprudence where a claim of "...passing-off..." is to be made-out. I note that no allegation of economic damage has been made in your reply of May 20th 2015. I must therefore assume no damage has actually occurred.

Sixth, you were asked to identify if the contents of the document referenced in your letter are alleged as false, contain untruths, or statements which in any way might be misleading or damaging to the reputation of the City. The provision of 'no-answer' is taken to mean that no claim of damage to reputation can be properly brought. The complete failure of the reference document to direct recipients to a competing economic product, coupled with the fact that recipients were asked to contact the City, and the further fact that recipients were directed to an active City email address suggest that no attempt at passing-off has occurred, and thus no claim for damages could honestly be brought.

I have consulted the applicable jurisprudence on this issue and I find a number of important legal principles and tests which must be met in order to bring the claim of 'Passing-off' to which you refer.

In the matter of *PharmaCommunications Holdings Inc. v. Avencia International Inc.*, 2009 FCA 144 (CanLII), the court examined the tests which must be met to prove a case of passing-off. The relevant paragraphs in that decision have been included below (para 6-12):

> [6] The main issue in this appeal is whether the applications judge applied the correct test to the claim under paragraph 7(b) of the Act. Specifically, in the present case, this involves determining whether it is necessary in a passing-off action for the plaintiff to establish actual or potential damage as a result of the alleged infringement. This is an issue of law reviewable by this court on a standard of correctness (Housen v. Nikolaisen, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235 at para. 8). Although the appellant raised other issues, unless it is successful on this issue, the court need not address the other subsidiary issues raised by the appellant.
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> [7] The appellant argues that the applications judge erred by applying the common law test to a statutory claim for passing-off. In its submission, paragraph 7(b) does not require that the court find actual or potential damage to the claimant. It acknowledges that this court held otherwise in BMW Canada Inc. v. Nissan Canada Inc., 2007 FCA 255 (CanLII), 380 N.R. 147 at para. 30, but argues that that case should not be followed.
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> [8] However, the appellant has not demonstrated that BMW Canada was manifestly wrong. Paragraph 7(b) of the Act is a codification of the common law of passing-off, and there are no longer any “significant differences” between the statute and the common law (Kelly Gill and R. Scott Joliffe, eds., Fox on Canadian Law of Trade-Marks and Unfair Competition, 4th ed., looseleaf (Toronto: Thomson Carswell, 2002) at §4.1 and §4.2(e)).

[9] In Ciba-Geigy v. Apotex Inc., 1992 CanLII 33 (SCC), [1992] 3 S.C.R. 120 at 132, the Supreme Court established a tripartite test for establishing passing-off: 1) the existence of goodwill; 2) the deception of the public due to a misrepresentation; and 3) actual or potential damage to the plaintiff. Although Ciba-Geigy was a common law passing-off case, this test has been applied by the Federal Court in numerous statutory claims (see for example Prince Edward Island Mutual Insurance v. Insurance Co. of Prince Edward Island (1999), 159 F.T.R. 112 at para. 26 (T.D.), aff'd (2000), 2000 CanLII 20270 (FCA), 9 C.P.R. (4th) 520 (F.C.A.)).

[10] More recently, in Kirkbi AG v. Ritvik Holdings Inc., 2005 SCC 65 (CanLII), [2005] 3 S.C.R. 302 at para. 66, the Supreme Court affirmed the tripartite test, including the requirement of actual or potential damage (at para. 66). It also confirmed that the same principles inform both the common law and the statute (at para. 63).

[11] This court's decision in BMW Canada is thus consistent with the Supreme Court's jurisprudence on passing-off and we are of the view that it should be followed.

[12] Alternatively, the appellant argues that it is unnecessary to lead evidence of actual or potential damage, and that the court is entitled to presume damages where a likelihood of confusion has been demonstrated. However, this argument was also rejected in BMW Canada at paras. 33-35. The appellant has not given any reason why BMW Canada should not be followed for this proposition. It has also not challenged the finding below that it led no evidence of actual or potential damage. Therefore, it is evident that its claim for statutory passing-off cannot succeed. This is sufficient to dispose of the appeal.

In my mind, it is clear that the materials to which you make reference at: (http://kerrymorris.ca/wp-content/uploads/2015/05/democracy-dashed.pdf), would never be confused by a reasonable person as being a document produced by the City. This fact, coupled with the fact that no insult, false statement, or omission of fact is located in the subject document, makes it clear there can be no claim of damage to reputation, even if such confusion did occur, which confusion we specifically deny.

Finally, the fact that the distribution of the subject document can not be shown to have created economic damage or damage to reputation causes the claim of passing-off to fail in any event, in accordance with the decision of the SCC in *Kirkbi AG v. Ritvik Holdings Inc.*, which relied upon *BMW Canada Inc. v. Nissan Canada Inc.* There has been "*...no evidence of actual or potential damage...*", a requirement necessary where a common law principle of 'passing-off' is to be successful.

It is clear that what has actually brought this matter to a head is not anything to do with an action taken on my part. Rather the issue would appear to be the fact that the City was unable to sneak through an alteration effecting the fundamental democratic right of City residents to question the truthfulness and actions of their municipal government. These are principles for which some 80 million people fought and died in WW-II, and the City's attempt to make fast work of their demise was stopped by the many people whose knowledge of this matter coming before council was the result of the distribution of the subject document. I believe the real issue to which the City, through the office of the CAO, takes offence is the fact that the residents rose up and demanded this proposed alteration to our democratic rights be cancelled. Now on this point we can agree to disagree, but I think we both know the truth.

What I find egregious is the fact that one of the pillars of the Staff Report to deny residents their democratic right was the claim of 'Bullying'. I would argue that this latest legal threat, one of 4 brought against me by the City since July of 2014, exemplifies the very act of Bullying, which was recently described by a local News organization wherein they cited Merrium Webster's 'BULLY' verb

: to frighten, hurt, or threaten (a smaller or weaker person) : to act like a bully toward (someone)

: to cause (someone) to do something by making threats or insults or by using force

It is clear that in this relationship, I am the smaller weaker person, who is being threatened using force in the form of legal assault. In this context I believe it is clear the City is acting the part of the Bully, and it needs to stop.

I respectfully request you cease and desist this abusive conduct. It is unwarranted, and a poor use of taxpayer monies. Given that RS-1 homeowners City-wide are facing as much as an 8% property-tax increase this year alone, the City should stop wasting taxpayer monies on petty activities such as this. It is behaviour unbecoming of a professional organization, and if anything is doing damage to the City's reputation, it is this kind of conduct.

Respectfully,

"Kerry Morris"

Kerry Morris

Cc Christy Clark, Premier
Coralee Oakes, Minister Responsible
ElectionsBC, Campaign Finance