

## EVIDENCE IN TRADE MARK CASES

by  
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### 1. PRELIMINARY REMARKS

#### KNOWLEDGE OF THE LAW

Knowledge of the rules of evidence is useless if one has no knowledge of the substantive law. Before considering the evidence of the opposite side or preparing any evidence for your own side (*viva voce* or written declaration), a precise evaluation of what your side and the other side must prove is needed. Who bears the burden of proof? What presumptions will operate and in which party's favour?

#### CONSIDERATION OF THE PLEADINGS.

- Statement of claim, statement of defence, reply in a court case.
- Application, statement of opposition, counterstatement in opposition proceedings.

It is important to remember that both sides will eventually try to prove what was alleged in their written proceedings.

### 2. BURDEN OF PROOF IN TRADE MARK CASES

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## A) INFRINGEMENT ACTIONS

(sections 19-20, Trade Marks Act, R.S.C., 1985, c. T-13).

- . Possible factual situations.
- . Identical marks for identical wares or services.
- . Clear infringement of the trade mark owners rights.
- . Application of section 19 of the Act

- . *Bonus Foods Ltd. -vs- Essex Packers Ltd.* (1964) 43 C.P.R. 165, at page 171.

- . Different mark, identical wares or services.
- . Same mark, different wares or services.
- . Different mark, different wares or services.
- . Application of section 20 of the Act.

In cases where section 19 will apply, plaintiff will have to prove its statutory right, by filing the certificate of registration pursuant to section 54 of the Act.

- . *Decosol (Canada) Ltd. -vs- PVR Co. Ltd.* (1973), 10 C.P.R. (2d) 222, at page 227.

The legal burden lies with the plaintiff. Plaintiff will have to prove use by the defendant of the trade mark as registered, in association with wares or services appearing on the certificate of registration. Finally, at trial or subsequently, plaintiff will have to prove damages.

- . *Cordon Bleu International Ltée -vs- F.G. Bradley Co. Ltd.* (1982), 60 C.P.R. (2d) 71, at page 82

In cases where section 20 will apply, in addition to the above, plaintiff will have to prove that the trade marks in issue are confusing or, put in other words "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" (section 6 of the Act). The burden on the plaintiff in an infringement action is to show reasonable probability of confusion, while an applicant for registration must establish, if challenged, the absence of all reasonable prospect of confusion.

. *Pepsi-Cola Company of Canada, Limited -vs-. The Coca-Cola Company of Canada, Limited* (1940) S.R.C. 17, at page 32

. *Oshawa Group Ltd. -vs- Creative Resources Co. Ltd.* (1982), 61 C.P.R. (2d) 29, at page 36

In order to find whether the trade marks are confusing, the Court will rely on the criteria found in section 6(5) of the Act. Plaintiff will benefit from a certain number of presumptions since the certificate of registration is *prima facie* proof of the facts found therein (section 54(3) of the Act). Hence, a presumption exists that the trade mark is in use in Canada since the date of first use found in the certificate or since the date of filing of the declaration of use when dealing with a mark filed on a proposed use basis. Furthermore, it will be presumed that the mark is in use in association with each and every ware listed in the certificate.

To benefit from a broader ambit of protection, plaintiff will have to show that its trade mark is well known (substantial sales, substantial advertising, survey evidence). This kind of evidence is important to show likelihood of confusion.

The evidence filed must allow the Court to draw a subjective conclusion based on an hypothetical situation.

. *Bonus Foods Ltd. -vs- Essex Packers Ltd.* at page 183.

Plaintiff will benefit from the presumption of section 20 when it shows that the trade marks in issue are likely to cause confusion. It is almost impossible to reverse when the evidence filed by the plaintiff shows that the essential element of the trade mark adopted by a trader established in the market for a long period of time, has been taken by the defendant.

. *C. Turnbull Co. Ltd. -vs- Dominion Wollens & Worsteds, Ltd. et al* (1932) Ex. C.R. 218, at page 234

. *Regal Toy Ltd. -vs- Star Doll Mfg. Co. Ltd.* (1970), 1 C.P.R. (2d) 208, at page 211

. *Mr. Submarine -vs- Haralombos Voultzos et al* (1977), 36 C.P.R. (2d), 270

. *Société pour l'Expansion des Tissus Fins -vs- Marimac, Inc.* (1984) 78 C.P.R. (2d) 112, at pages 129 and 130

When plaintiff shows that the trade marks in issue are likely to create confusion, plaintiff will benefit from a presumption of infringement, a presumption that can be rebutted. The burden of proof lies on the defendant to rebut the presumption.

**B) THE ORIGINATING NOTICE OF MOTION TO EXPUNGE A TRADE MARK**  
(Section 57, Trade Marks Act)

The applicant will have to allege and prove that it is "an interested person" as defined in section 2 of the Act.

- . *Burmah-Castrol (Canada) Ltd. -vs- Nasolco Inc.* (1974), 16 C.P.R. (2d) 193, at pages 195 and 196

The burden of proof lies with the applicant, the registration being presumed valid in view of section 19 of the Act.

- . *Manhattan Industries Inc. -vs- Princeton Manufacturing Ltd.* (1971), 4 C.P.R. (2d) 6, at page 13
- . *Tubeco, Inc. -vs- Association Québécoise des Fabricants de Tuyau de Béton, Inc.* (1980), 49 C.P.R. (2d) 228, at page 230

The applicant must allege in its motion and eventually prove by way of affidavit or solemn declaration, one of the grounds of invalidity found in section 18:

- a) Section 18(1)a): the trade mark was not registrable at the date of registration. Reference must be made to section 12 (evidence must be at the relevant date).
- b) Section 18(1)b): the trade mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced.
- c) Section 18(1)c): the trade mark was abandoned. Proof of abandonment must be made by the applicant and it must be shown that the owner had the intention to abandon. A long period of non-use creates a presumption of abandonment.
- . *Marineland Inc. -vs- Marine Wonderland* (1975), 16 C.P.R. (2d) 97, at pages 110 and 111
- d) Section 18(1) *in fine*: the applicant was not the person entitled to registration. The person entitled to registration is defined in section

16 and generally, it is the person who at first use, made known or filed an application for registration for a trade mark that is not confusing with another trade mark previously used, made known, or filed in Canada.

If the ground of invalidity raised is prior use, section 17(1) will operate. This ground can only be raised by the previous user or its successor in title and it must be shown that the prior user had no intention to abandon its trade mark at the publication date of the trade mark it is seeking to expunge. Pursuant to 17(2) of the Act, if the trade mark has been on the register for more than five years, it cannot be expunged on the ground of prior use by another unless it is shown that the owner had knowledge of the prior use when its trade mark application was filed.

The expungement of a trade mark can also be obtained by counterclaim to an infringement action. The above comments apply to such a situation.

### **C) APPLICATION FOR REGISTRATION OF A TRADE MARK** (section 38(2), Trade Marks Act)

In all cases, the opponent has the burden of proving the essential elements of its allegations. Once this burden met, the applicant must show that its trade mark should be registered, notwithstanding the objection of the opponent.

When the opposition is based on a registered trade mark and the opponent alleges that the mark applied for is likely to create confusion with its trade mark, the burden of proof lies with the applicant. There is no onus on the objecting party.

- . *Conde Nast Publications Inc. -vs- Gozlan Brothers Ltd.* (1980), 49 C.P.R. (2d) 250, at page 253
- . *Berry Bros. & Rudd Ltd. -vs- Planta Tabak-Manufactur Dr. Manfred Oberman* (1981), 53 C.P.R. (2d) 130, at page 143
- . *Molnlycke Aktiebolag -vs- Kimberly-Clark of Canada Ltd.* (1982), 61 C.P.R. (2d) 42, at page 45;
- . *Sunshine Biscuits, Inc. -vs- Corporate Foods Ltd.* (1982), 61 C.P.R. (2d) 53, at page 55;

When an appeal against the decision of the registrar is filed (section 56 of the Act), the appellant has the onus of showing that the registrar erred.

The burden of proof with respect to the merit of the appeal remains unchanged.

Under section 56 of the Act, additional affidavits may be filed in appeal (at the time of filing of the notice of appeal). Affidavits may be filed thereafter. In *Immuno Concepts, Inc. v. Immuno AG* (1996), 71 C.P.R. (3d) 525 (F.C.T.D.), Madam Justice Tremblay-Lamer referred to *Munsingwear Inc. v. Provost S.A.* (1992), 41 C.P.R. (3d) 470 and summarized the rules regarding the late filing of affidavit evidence on appeal before the Federal Court from the Opposition Board, as follows at page 531:

"(1) The primary purpose of Rule 704(7) is to enable a party to obtain leave to file affidavits late, and the affidavits to be filed must be attached to the notice of motion;

(2) A party cannot generally apply in advance for an extension of time to file affidavits he or she is not in a position to file forthwith;

(3) A party who finds it impossible to file affidavits at the proper time must inform the opposing party that he or she will subsequently, that is, when the affidavits are ready, file an application for leave to file them late;

(4) A party may in exceptional circumstances apply to the Court in advance pursuant to Rule 3(1)(c) for an extension of time to file affidavits he or she is not in a position to file forthwith;

(5) Where a party relying on exceptional circumstances applies to the Court for an extension of time to file affidavits it is not in a position to file, the Court will be especially scrupulous and will grant the motion only if the party's notice of motion indicates:

(a) the reasons for the delay;

(b) the purpose of the affidavits the party proposes to file and the use he or she will make of them; and

(c) if it is impossible for the party to provide information on the purpose and use of the affidavits, the reasons why he or she is unable to do so."

### **3. COMMON MEANS OF EVIDENCE**

#### **A) EXPERT EVIDENCE**

.Admissible for what purpose? :

"In *William H. Rorer (Canada) Ltd. v. Johnson & Johnson* (1980), 48 C.P.R. (2d) 58 at p. 62, Mr. Justice Mahoney made the following comments regarding the admissibility of opinion evidence in that case:

"In this area, as in any other, opinion evidence is admissible only to assist the adjudicator to make a decision. It is his decision, not the expert's. The adjudicator is not justified in adopting an opinion simply on the basis of an expert's expertise. He must know the facts and/or assumptions upon which the expert based his opinion so that he can assess both the validity of the opinion and the process by which it was reached."

The conflicting opinions of the experts in the present case emphasizes the fact that the Registrar of Trade Marks is not justified in adopting an expert's opinion simply on the basis of his or her expertise. As Mr. Justice Mahoney pointed out in *William H. Rorer (Canada) Ltd. v. Johnson & Johnson* (1980), 48 C.P.R. (2d) 58 (F.C.T.D.) at p. 62, referred to in the above extract from the *Etablissements Leon Duhamel* decision, the adjudicator must know the facts and/or assumptions upon which the expert based his or her opinion so that he can assess the validity of the opinion and the process by which it was reached. In the present case, both experts based their opinions on similar assumptions and yet appeared to reach opposite opinions on the issue of confusion".

. *Coca-Cola Ltd. v. Brasseries Kronenbourg, S.A.* (1994), 55 C.P.R. (3d) 544 (T.M.O.B.) at page 553.

Expert evidence can be given some weight notwithstanding that it may be, in part, based on hearsay.

. *Coca-Cola Ltd. v. Brasseries Kronenbourg, S.A.* (1994), 55 C.P.R. (3d) 544 (T.M.O.B.);

. *MCI Communications Corp. v. MCI Multinet Communications Inc.* (1995), 61 C.P.R. (3d) 245 (T.M.O.B.);

. *Jacobs Suchard Ltd. v. Trebor Bassett Ltd.* (1996), 69 C.P.R. (3d) 569 (T.M.O.B.)

## **B) SURVEY EVIDENCE**

.Survey evidence is admissible but care must be taken to ensure its reliability

.Affiant must qualify as an expert in conducting and analysing surveys

Mr. Justice Mackay set out the following guidelines in *Joseph E. Seagram & Son Ltd. v. Seagram Real Estate Ltd.* (1990), 33 C.P.R. (3d) 454 (F.C.T.D.) as he dismissed an appeal from a decision of the Registrar:

- The relevancy of a survey may be dependent on the following circumstances:
  1. the time period on which the survey took place;
  2. the questions asked;
  3. where they were asked;
  4. the method of selecting participants.
- It is advisable to have an affidavit from someone actually involved in the survey's completion;
- Direct evidence of the manner in which questionnaires were completed will be looked for;
- Questions and responses should not be given in an artificial environment (i.e. showing a mark on a card);
- The survey should be conducted near the relevant opposition dates;
- The survey must be representative.
- Open ended questions are preferable when conducting a survey:

"As noted by the applicant's agent at the oral hearing, it is difficult to design a survey that approximates the test for confusion without prejudicing the respondents' replies. Although the applicant's survey has minimized the risk of such prejudice, it has done so by unduly restricting the scope of the inquiry. It is preferable to design a survey that elicits a consumer's first impression by the use of open-ended questions such as "What do you think of when you see (or hear) this mark?" or "What word comes to mind when you see this mark?" This allows a respondent to reply in any number of ways. He might state that the mark reminds him of another mark, that it reminds him of a particular company, that he associates it with particular wares or services, that he associates it with a



particular emotion or feeling, etc. Such a question should be followed up by one or more prompts in which the respondent is asked if there is anything else he thinks of when he sees the mark. This allows for a more complete assessment of the respondent's first impression which is the essence of the test for confusion."

. *New Balance Athletic Shoes, Inc. v. Matthews* (1992), 45 C.P.R. 140 (T.M.O.B.) at page 147.

Mr. Justice Pinard proposed the following guidelines to admit survey evidence in *Opus Building Corp. v. OPUS Corp.* (1995), 60 C.P.R. (3d) 100 (F.C.T.D.) at page 105 :

"I find that the survey is admissible for the following reasons:

(a) the survey was conducted by an expert in the field of public opinion research;

(b) the sampling is from the appropriate "universe";

(c) the survey was designed and conducted, and the resulting data was processed, in a professional manner, independent of both the applicant and its counsel;

(d) the survey was not geographically restricted;

(e) the survey was conducted in both national official languages and involved both male and female respondents; and

(f) the survey evidence is put forward as the basis on which the expert assessed the recognizability of the word OPUS in the survey "universe"."

. *R.J. Reynolds Tobacco Co. v. Philip Morris Products Inc.* (1995), 64 C.P.R. (3d) 39 (T.M.O.B.) at page 400

. *DC Comics Inc. v. Canada's Wonderland Ltd.* (1991), 36 C.P.R. (3d) 68 (T.M.O.B.);

. *Scott Paper Co. v. Beghin-Say, S.A.* (1992), 44 C.P.R. (3d) 544 (T.M.O.B.);

- . *Molson Companies Ltd. v. S.P.A. Birra Peroni Industriale* (1992), 45 C.P.R. (3d) 28 (T.M.O.B.);
- . *New Balance Athletic Shoes, Inc. v. Matthews* (1992), 45 C.P.R. 140 (T.M.O.B.);
- . *R.J. Reynolds Tobacco Co. v. Philip Morris Products Inc.* (1995), 64 C.P.R. (3d) 395 (T.M.O.B.);
- . *Molson Breweries. v. John Labatt Ltd.* (1995), 65 C.P.R. (3d) 231 (T.M.O.B.) (on appeal: T-150-96 F.C.T.D.);
- . *Molson Breweries. v. John Labatt Ltd.* (1995), 66 C.P.R. (3d) 218 (T.M.O.B.) (on appeal: T-149-96 F.C.T.D.);
- . *Toronto Blue Jays Baseball Club v. Blue Jay Sprinkler Systems Inc.* (1996), 68 C.P.R. (3d) 277 (T.M.O.B.)

### **C) STATE OF THE REGISTER EVIDENCE**

The general rule regarding state of the register evidence may be described as follows:

"State of the register evidence is only relevant in so far as one can make inferences from it about the state of the market-place: see the opposition decision in *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 (T.M.Opp.Bd.), and the decision in *Welch Inc. v. Del Monte Corp.* (1992), 44 C.P.R. (3d) 205, 56 F.T.R. 249, 34 A.C.W.S. (3d) 1278 (T.D.). Also of note is the decision in *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349, (1992) 3 F.C. 442, 145 N.R. 131 (C.A.), which is support for the proposition that inferences about the state of the market-place can only be drawn from state of the register evidence where large numbers of relevant registrations are located."

- . *Lipton Division of U L Canada Inc. v. Geo. A. Hormel & Co.* (1996), 66 C.P.R. (3d) 543 (T.M.O.B.) at page 549.
- . *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 (T.M.O.B.);
- . *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (T.M.O.B.);

- . *Welch Foods Inc. v. Del Monte Corp.* (1992), 44 C.P.R. (3d) 205 (T.M.O.B.);
- . *Handelsonderneming Piet Rentmeester B.V. v. Wigwam Mills, Inc.* (1995), 63 C.P.R (3d) 258 (T.M.O.B.);
- . *Molson Breweries v. Andres Wines Ltd.* (1995), 66 C.P.R. (3d) 530 (T.M.O.B.) (on appeal: T-374-96 F.C.T.D.);
- . *Lipton Division of U L Canada Inc. v. Geo. A. Hormel & Co.* (1996), 66 C.P.R (3d) 543 (T.M.O.B.);
- . *Champion Products Inc. v. New Games S.r.l.* (1995), 66 C.P.R. (3d) 237 (T.M.O.B.) (on appeal: T-413-96 F.C.T.D.);
- . *T.G. Bright & Co. v. Nicolas Napoleon & Cie Maison, fondée en 1929, S.A.* (1996), 68 C.P.R. (3d) 510 (T.M.O.B.);
- . *Lifeline Systems, Inc. v. Bell Cellular Inc.* (1996), 68 C.P.R. (3d) 407 (T.M.O.B.) (on appeal: T-1347-96 F.C.T.D.)

The Registrar does have the discretion, in view of the public interest to maintain the purity of the register, to check the register in order to confirm the existence of a registration relied upon by the opponent.

Such discretion does not extend to any and all other records in the Trade-marks Office.

- . *Molson Breweries v. Pernod Ricard* (1990), 31 C.P.R. (3d) 42 (T.M.O.B.) (reversed on appeal by (1991) 40 C.P.R. (3d) 102 (F.C.T.D.) (Dubé, J.); however Registrar's decision restored by (1995) 64 C.P.R. (3d) 356 (F.C.A.) (Pratte, Décary and Chevalier JJ.A.));
- . *Cargill Ltd./Cargill Ltée v. Omega Nutrition Canada Inc.* (1995), 61 C.P.R. (3d) 567 (T.M.O.B.);
- . *Synertech Systems Corp. v. MacDonald* (1995), 63 C.P.R. (3d) 272 (T.M.O.B.);
- . *Morsam Fashions Inc. v. H.K. Enterprises Inc.* (1996), 66 C.P.R. (3d) 387 (T.M.O.B.);
- . *National Broadcasting Co. Inc. v. Middle East Broadcasting Corporation* (1996), 69 C.P.R. (3d) 109 (T.M.O.B.)

## D) HEARSAY RULE

. What is hearsay?

In 1996, the Federal Court (in *Labatt Brewing Co. Ltd. v. Molson Breweries* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.; Heald DJ.)) deemed applicable to opposition proceedings the new hearsay rules as outlined by the Supreme Court of Canada in *R. v. Khan* (1990) 2 S.C.R. 531 and *R. v. Smith* (1992) 2 S.C.R. 915.

. Hearsay evidence may now be considered admissible only if it satisfies the test of necessity and reliability.

. See Barry Gamache's commentary *New Hearsay Rules Applied in Trade-Mark Opposition Case* (enclosed) for example.

. *Labatt Brewing Co. Ltd. v. Molson Breweries* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.);

. *Budget Rent a Car International Inc. v. Discount Car and Truck Rentals Ltd.* (1996), 70 C.P.R. (3d) 411 (T.M.);

. Barry Gamache, *New Hearsay Rules Applied in Trade-Mark Opposition Case*, World Intellectual Property Report, 1996, (Vol. 10), p. 243.

## E) AFFIDAVITS

.An "affidavit" which contains a jurat which states that an affidavit was "sworn (or affirmed)" has been judged inadmissible.

*Dr. Ing. h.c.F. Porsche AG v. Procycle Inc.* (1992), 45 C.P.R. (3d) 432 (T.M.O.B.);

. Affidavits attached as exhibit to another affidavit do not have independent status as affidavits in opposition proceedings.

. *Scott-Bathgate Ltd. v. Ferrara Pan Candy Co., Inc.* (1993), 49 C.P.R. (3d) 378 (T.M.O.B.)

. Exhibits which are not properly identified or initially attached to an affidavit may simply be treated as technical deficiencies.

. *WWF - World Wide Fund for Nature v. Incaha Inc.* (1995), 61 C.P.R. (3d) 413 (T.M.O.B.)

. Testimony must be in affidavit or statutory form.

. *Menley & James Laboratories, Inc. v. Laboratoire Cogan-Produits Lydia Dainow S.A.* (1993), 51 C.P.R. (3d) 458 (T.M.O.B.)

. *Canadian Graphics West Inc. v. 465775 Ontario Inc.* (1991), 36 C.P.R. (3d) 251 (T.M.O.B.);

. *Dr. Ing. h.c.F. Porsche AG v. Procycle Inc.* (1992), 45 C.P.R. (3d) 432 (T.M.O.B.);

. *Scott-Bathgate Ltd. v. Ferrara Pan Candy Co., Inc.* (1993), 49 C.P.R. (3d) 378 (T.M.O.B.);

. *Menley & James Laboratories, Inc. v. Laboratoire Cogan-Produits Lydia Dainow S.A.* (1993), 51 C.P.R. (3d) 458 (T.M.O.B.);

. *Magyar v. Loblaw's Inc.* (1995), 61 C.P.R. (3d) 267 (T.M.O.B.);

. *WWF - World Wide Fund for Nature v. Incaha Inc.* (1995), 61 C.P.R. (3d) 413 (T.M.O.B.);

. *Empire of Carolina, Inc. v. George Weston Ltd.* (1995), 63 C.P.R. (3d) 420 (T.M.O.B.);

. *Alberta Government Telephones v. Cantel Inc.* (1994), 55 C.P.R. (3d) 116 (T.M.O.B.);

. *Merrill Lynch & Co. Inc. v. Bank of Montreal* (1993), 54 C.P.R. (3d) 473 (T.M.O.B.)

#### **4. PREPARING YOUR WITNESSES AND THEIR STATEMENT.**

When possible, meet the witnesses and go over the facts. Discuss all factual aspects of the case of which they may have knowledge. You should have an extremely good knowledge of the factual aspects of your

case and try to see if, spontaneously, the known facts match the testimony of your witnesses.

Explain to your witnesses what your case is and what you are attempting to achieve with their testimony or their written statement.

Tell all your witnesses that most likely, they will be cross-examined by the other side. Explain totally how a cross-examination is conducted and the purpose of it. Witnesses should listen carefully to the questions asked and the suggestions made. They do not have to agree automatically with the suggestions made. Answers such as "I do not remember" and "I don't know" are acceptable answers when the whole of the testimony is credible.

## **5. CROSS-EXAMINATION**

If you have nowhere to go, stay where you are. If you wish to cross-examine, know in advance what you want to achieve, isolate the statements made by the witness which you want to contradict or at least diminish the impact. Do not cross-examine on every small point or even on something you know to be untrue if it does not hurt your case, unless you want to attack the credibility of the witness.

Cross-examination should be carefully prepared and adapted after you hear what is said.

- Use of the "aim-lock-release technique".
- Contradicting a witness with a previous statement.
- Always be conscious of the person you are cross-examining.

*Nicholas Xavadiuk -vs- Minister of National Revenue* (1967) C.T.C. 447, at page 450.

"I did not find the appellant's evidence persuasive. He was obviously doing his best to put forward a view of the facts that would support his appeal. His evidence seemed to me to be an example of how a person trying to recall events of the past can persuade himself that he actually remembers facts favourable to himself that did not actually occur. This is not an uncommon phenomenon in the courts and, when it occurs, the person involved has frequently brought himself to the point where he honestly believes what he says".

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