



SOLE DIRECTOR OF A RESTAURANT BUSINESS FOUND PERSONALLY LIABLE FOR TRADEMARK INFRINGEMENT AFTER FAILING TO COMPLY WITH A DELAY IN THE JUDICIAL PROCEEDINGS

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In a judgment rendered on September 4, 2009 by Justice Russel W. Zinn in *2045978 Ontario Inc. (Chaps the Original) v. Chaps Aldershot Inc. (Lezley's Chaps)*, 2009 FC 872 (CanLII), the Federal Court of Canada found that Chaps Aldershot Inc. and its president, secretary, treasurer and sole director Kevin Saunders (the “Defendants”), have infringed the Canadian trade-mark CHAPS, registered by the Plaintiff on March 30, 2005 in association with restaurant services.

The Plaintiff operates a restaurant under the name “Chaps The Original” in the town of Burlington, Ontario and the evidence shows that it is well-known and has been active since 1981.

In 2006, the defendant Chaps Aldershot Inc. purchased a restaurant business from a third party, which included the goodwill and trade name associated thereto. The Defendants then started to carry on the business as “Lezley’s Chaps” and the restaurant was on the same street as “Chaps The Original”, with only 6 kilometres between the two.

The Plaintiff filed a motion for summary judgment to obtain a permanent injunction against the Defendants restraining them from (i) infringing the Plaintiff’s CHAPS trade-mark; (ii) using the trade-mark Lezley’s CHAPS or any trade-mark or trade-name that causes confusion with the Plaintiff’s CHAPS trade-mark and (iii) directing public attention to their services or business in such a way as to cause or be likely to cause confusion with the Plaintiff’s services or business.

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According to a timetable agreed upon by the parties and approved by the Court, the Plaintiff had until July 27, 2009 to serve and file its Motion Record and the Defendants then had until August 7, 2009 to file their responding Motion Record. However, the Defendants failed to comply with their delay: they filed, on August 24, 2009, an affidavit from the defendant Kevin Saunders dated August 12, 2009 and served the next day, without an affidavit to explain, under oath, why the affiant was unable to swear the affidavit prior to August 12, 2009.

Given that the Defendants did not requested permission from the Court to allow the late filing, erroneously assuming that it would not be a problem, the Court refused that the affidavit be part of the evidence on the motion. However, even if the Court had accepted the affidavit, it would not have been sufficient to show that there was a genuine issue requiring a trial.

In light of the evidence before it, the Court, allowing the motion for summary judgment, concluded that the Defendants were liable of trade-mark infringement and passing off, and that the defendant Kevin Saunders “engaged in a deliberate, wilful and knowing pursuit of a course of conduct that he knew constituted infringement of the Plaintiff’s trade-mark”.



