Federal Court Cour fédérale

**Date: 20251217**

**Docket: T-1956-24**

**Citation: 2025 FC 1990**



**Ottawa, Ontario, December 17, 2025**

**PRESENT: Mr. Justice Sébastien Grammond**

**BETWEEN:**

**FRUITICANA PRODUCE LTD.**

**Plaintiff**

**and**

**FRUITOCANA INC.**

**Defendant**

## JUDGMENT AND REASONS

[1] These are my reasons for granting the plaintiff, who operates grocery stores under the registered trademark “Fruiticana” an injunction prohibiting the defendant from operating a similar store under the name “Fruitocana.” Given the close similarity between the marks, the acquired distinctiveness of the plaintiff’s marks and the fact that both parties are in the same line of business, there is a likelihood of confusion between the two marks. The defendant is therefore infringing the plaintiff’s registered trademarks.

## I. Background

[2] Since 1994, the plaintiff has been operating a chain of grocery stores in British Columbia and Alberta under the name “Fruiticana.” The chain, which now comprises 23 stores, caters to the cultural needs of South Asian families. According to its affidavit evidence, the plaintiff has built a strong reputation and has obtained significant recognition for its name, in part through various forms of advertising.



[3] The plaintiff is the registered owner of Canadian trademarks nos. TMA542,764, TMA976,246, TMA959,680, TMA968,941, TMA1,297,932 and TMA1,301,520. They include the word marks “Fruiticana” and “Fruiticana Express,” in relation to, among others, “the operation of a retail store featuring fruits, vegetables and other food products.” They also include design marks where the word “Fruiticana” is displayed in a particular font, in some cases alongside an apple superimposed with the letter “f.” They are depicted in Schedule A to this judgment.

[4] Since at least 2023, the defendant has been operating a grocery store in Toronto, Ontario, under the name “Fruitocana.” The plaintiff has put in evidence Facebook postings made by the defendant, advertising various fruit and vegetables.

[5] The plaintiff sent a cease and desist letter to the defendant, which went unanswered. The plaintiff then brought the present action for an injunction and damages. The defendant did not file a defence. The plaintiff then brought a motion for default judgment.

## II. Analysis

### A. *Default Judgment*

[6] Rule 210 of the *Federal Courts Rules*, SOR/98-106, provides that the plaintiff may bring an *ex parte* motion for default judgment where the defendant has not filed a statement of defence within the prescribed time limit. Even though the defendant is in default, the plaintiff must still prove its claim on a balance of probabilities by way of affidavit evidence: *NuWave Industries Inc v Trennen Industries Ltd*, 2020 FC 867 at paragraphs 16–21. While the judge must carefully review the evidence, it is not the judge's role to raise grounds of defence in the defendant's stead: *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at paragraphs 35-37.

[7] Given that the defendant never appeared nor filed a statement of defence, it is now in default. I must then determine whether the plaintiff has provided evidence of the defendant's infringement of its trademark.

### B. *Trademark Infringement*

[8] In my view, the plaintiff has shown that the defendant is using a mark that is confusing with the "Fruiticana" word mark, contrary to section 20 of the *Trademarks Act*, RSC 1985, c T-13 [the Act]. It is therefore unnecessary to decide whether the defendant also contravened sections 7, 19 and 22 of the Act.

[9] Among other things, paragraph 20(1)(a) of the Act provides that the defendant is infringing the plaintiff's trademark when it "sells, distributes or advertises any goods or services in association with a confusing trademark or trade name." It should be noted that this prohibition applies throughout the country, even if the plaintiff and defendant are operating in different regions: *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at paragraphs 24–33, [2011] 2 SCR 387 [*Masterpiece*].

[10] According to subsection 6(2) of the Act, there is confusion between two trademarks if "the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person." This assessment must be performed "as a matter of first impression in the mind of a casual consumer somewhat in a hurry": *Masterpiece* at paragraph 40. In this analysis, the Court must have regard to the factors listed in subsection 6(5), namely the inherent and acquired distinctiveness of the trademarks, the duration of their use, the nature of the goods or services, the nature of the trade and the degree of resemblance between the trademarks.

[11] I begin with the most important factor, the degree of resemblance: *Masterpiece* at paragraph 49. It is obvious that the trademark "Fruitocana" used by the defendant is strikingly similar to the plaintiff's "Fruiticana" registered trademark. Only one letter differs. Placed in the middle of the word, the difference is easily overlooked.

[12] The “Fruiticana” trademark has low inherent distinctiveness. Using the word “fruit” to describe a grocery store is not distinctive and the suffix “cana” is relatively common. Nevertheless, the evidence shows that it has acquired distinctiveness as it has been used for more than 30 years to describe a successful chain of grocery stores.

[13] Moreover, the services offered by both parties are the same and they are those associated with the plaintiff’s registered trademark, namely, “a retail store featuring fruits, vegetables and other food products.”

[14] Hence, this is a clear case of confusion.

[15] Given my finding regarding the word mark, it is not necessary to address the design marks, other than to say that there is very little evidence supporting a finding of confusion in their respect.

[16] The evidence reveals that the defendant is selling and advertising goods and services in association with a trademark that is confusing with the plaintiff’s registered trademark. It is therefore infringing that trademark.

C. *Remedies*

[17] The plaintiff is seeking declarations that its trademarks have been infringed, an injunction preventing the plaintiff from infringing upon its trademarks, damages in the amount of $15,000 and solicitor-client costs.

[18] I have reviewed the remedies available in trademark infringement cases, in particular those arising from the sale of counterfeit goods, in *Lululemon Athletica Canada Inc v Campbell*, 2022 FC 194 [*Lululemon*]. For the reasons mentioned in that case, I do not think that it is appropriate to issue declarations restating my conclusions on infringement.

[19] I agree that an injunction is warranted. As in *Lululemon*, it will not merely reproduce the language of the Act, but it will be worded in a way that seeks to balance precision and fair notice of the prohibited conduct, on the one hand, and the need to prevent avoidance, on the other hand. As a practical matter, the injunction will require the defendant to change the name of its store. Given that this may require physical work and a certain amount of planning, I will delay the coming into force of the injunction by 30 days.

[20] I acknowledge that at least a nominal amount of damages is usually awarded in trademark infringement cases. However, this typically happens because the evidence allows the Court to draw an inference that the defendant's infringement caused the plaintiff some damage. This is especially so in cases involving the sale of counterfeit goods, which can be presumed to affect the plaintiff's goodwill: *Lululemon* at paragraphs 40–41. Nominal or lump sum damages are awarded for reasons that include the inherent difficulty in measuring the extent of the damage or the defendant's frequent lack of collaboration in providing evidence of the scope of its infringement. The assumption, however, is that the plaintiff suffered some damage. As this Court said in *Ragdoll Productions (UK) Ltd v Jane Doe*, 2002 FCT 918 at paragraph 45, [2003] 2 FC 120, "once the plaintiffs have proven infringement *and that damages have occurred*, they are entitled to the court's best estimate of those damages" (My emphasis).

[21] In the present case, in contrast, there is simply no evidence allowing me to infer that the plaintiff suffered any kind of damage. The only evidence provided to the Court consists of the plaintiff's director's statement that he sent an "internal spotter" to visit the defendant's store, as well as printouts of the defendant's web site and Facebook page. This evidence allows me to conclude that the defendant is operating a grocery store in Toronto but does not provide any information as to the scope of the defendant's activities and does not allow me to draw any inference as to the damage caused to the plaintiff. In this regard, one must bear in mind that the plaintiff's grocery stores are located in British Columbia and Alberta, while the defendant's is located in Ontario, more than 3,000 km apart. With the exception of one person who inquired with the director of the plaintiff, there is no evidence of actual confusion. It is also difficult to imagine that the defendant's operations have caused a loss of sales to the plaintiff, unless one goes grocery shopping by plane.

[22] I acknowledge that the plaintiff intends to expand and to open stores in Ontario. There is, however, no evidence of any prejudicial effect that the use of the trademark "Fruitocana" by the defendant may have had on the value of the plaintiff's marks in Ontario. I am unable to award damages on that basis.

[23] The plaintiff also seeks an order requiring the defendant to destroy infringing goods, as is often seen in trademarks proceedings. I will not issue such an order in this case because there is no evidence that the defendant used the infringing trademarks on specific goods. In any event, the turnover that one can expect in a grocery store means that infringing goods, if any, would be quickly sold, possibly within the 30-day delay for the coming into force of the injunction.

[24] The plaintiff also claims reimbursement of the fees it paid to its lawyer to bring the present action, in the amount of $7,256. Such a claim is called an award of costs on a solicitor-client basis. However, such awards are only made “where there has been reprehensible, scandalous or outrageous conduct”: *Young v Young*, [1993] 4 SCR 3 at 134. There is no evidence of such conduct on the defendant’s part. In the exercise of my discretion, I conclude that it is appropriate to award costs in the amount of $2,500.

## III. Disposition

[25] The action will be allowed in part, and an injunction will issue prohibiting the defendant from using the trademark “Fruitocana” or any trademark likely to be confusing with the plaintiff’s trademarks.

**JUDGMENT in T-1956-24**

**THIS COURT'S JUDGMENT is that**:

1. The action is allowed in part.

2. Beginning 30 days after the date of this judgment, the defendant is prohibited from operating a store and selling and advertising goods and services using the trademark "Fruitocana" or any trademark likely to be confusing with the trademarks listed in schedule A to this judgment.

3. The defendant is condemned to pay $2,500 to the plaintiff in respect of costs, inclusive of taxes and disbursements.

"Sébastien Grammond"
Judge

Schedule A

| Registration Number | Trademark |
|---|---|
| TMA542,764 | FRUITICANA |
| TMA976,246 |   |
| TMA959,680 |   |
| TMA968,941 |   |
| TMA1,297,932 | FRUITICANA EXPRESS |
| TMA1,301,520 |   |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1956-24

**STYLE OF CAUSE:** FRUITICANA PRODUCE LTD. v FRUITOCANA INC.

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

**JUDGMENT AND REASONS:** GRAMMOND J.

**DATED:** DECEMBER 17, 2025

**APPEARANCES:**

| | |
|---|---|
| Sandip K. Dhaliwal | FOR THE PLAINTIFF |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Buckley Hogan<br>Barristers and Solicitors<br>Surrey, British Columbia | FOR THE PLAINTIFF |