

CITATION: Biosteel Inc. v. Cizzle Brands Ltd., 2024 ONSC 5515
COURT FILE NO.: CV-24-00723115-0000
DATE: 2024-10-18

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
BIOSTEEL INC. and D.C. HOLDINGS LTD.)	
)	<i>Jason M. Berall, Melissa M. Dimilta, and</i>
Plaintiffs)	<i>Marshall Torgov, for the Plaintiffs</i>
)	
- and -)	
)	<i>Gavin H. Finlayson and Benjamin Pearson,</i>
CIZZLE BRANDS LTD. and CIZZLE BRANDS INC.)	<i>for the Defendants</i>
)	
Defendants)	
)	
)	
)	
)	
)	
)	HEARD: August 12, 2024

PARGHI J.

REASONS FOR DECISION

- [1] The parties are manufacturers of sports hydration drinks and powder mixes. The Plaintiffs allege that the Defendants have been operating their brand and product known as CWENCH Hydration (“Cwench”) in a manner that passes off on the goodwill of the Plaintiffs’ brand and product, BioSteel. They call Cwench an “obvious rip-off of BioSteel.” They say its products and flavors are the same as BioSteel’s, and that the “get-ups,” meaning the packaging and overall look, of its products are virtually identical to those of BioSteel. They seek an interlocutory injunction against the Defendants based on the tort of passing off.
- [2] For the reasons below, I dismiss the Plaintiffs’ request for injunctive relief.

Background

- [3] The BioSteel brand was founded in 2009 through BioSteel Sports Nutrition Inc. (“BSNI”). Its founders included John Celenza, who was the Chief Executive Officer and a director of BSNI until March 2023. BioSteel has developed and sold sports hydration drinks and powder mixes since its founding. Its drinks are sold in ready-to-drink cartons and its hydration mixes

are sold in powder form in packages and containers. The drinks and hydration mixes come in approximately 29 flavours. Over time, BioSteel's revenues grew to tens of millions of dollars annually and its market share grew to 12% of the Canadian sports beverage market.

- [4] In September 2023, BSNI filed for creditor protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). Various parties, including the Plaintiff D.C. Holdings Ltd., and Mr. Celenza through the Defendant Cizzle Brands Inc., submitted bids to acquire BSNI's assets through the CCAA proceeding.
- [5] D.C. Holdings Ltd. was successful in its bid and, in November 2023, acquired certain BSNI assets for \$10 million. The purchased assets included BSNI's intangible assets and intellectual property. The Plaintiff BioSteel Inc. was incorporated and entered into a bare trust agreement with D.C. Holdings Ltd. through which it received the purchased assets and all rights, title, and interest in the asset purchase agreement.
- [6] In May 2024, Mr. Celenza and other former BSNI executives launched the Cwench product through the Defendant companies. Cwench sells sports hydration drinks in four flavours, in ready-to-drink cartons and in powdered hydration mixes in containers. The Plaintiffs state that Cwench passes off on the goodwill of the BioSteel product. They seek an interlocutory order for an injunction restraining the Defendant from doing the following:
- i. using any slogan imitative of BioSteel's slogan "Clean. Healthy. Hydration.";
 - ii. using, selling, distributing or advertising products, product packaging or product names, including as part of any marketing or promotional materials for the Defendants' products or services, that are confusingly similar to any products, product packaging or product names used for BioSteel, including, but not limited to various product names and packaging identified by the Plaintiff;
 - iii. directing public attention to their goods, services or business in such a way as to cause or be likely to cause confusion in Canada between the Defendants' goods, services or business and the goods, services or business of BioSteel, including without limitation by adopting or using a slogan confusingly similar to "Clean. Healthy. Hydration", selling, distributing, using or advertising products, product packaging or product names that are confusingly similar to the products, product packaging and product names used by BioSteel; and
 - iv. using BioSteel-branded fridges or vending machines to distribute the Defendants' products, or for any other purpose.

The Law on Passing Off

- [7] At its core, the tort of passing off is concerned with one individual passing off their goods as those of another. The Federal Court has described passing off as "piggybacking" by "a misrepresentation through which a competitor creates an illusion of sameness or similarity to its wares or services" (*Diageo Canada Inc. v. Heaven Hill Distilleries, Inc.*, 2017 FC 571, at para. 66, citing *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, at para. 273). The Supreme

Court of Canada has observed that the tort's underlying purposes include protecting a manufacturer's right to the goodwill of its business and protecting consumers from unfair competition practices: "The customer expects to receive a given product when he asks for it and should not be deceived" (*Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120, at p. 137).

- [8] The Supreme Court has identified the three elements of passing off as goodwill attached to the plaintiff's goods, deception of the public due to the defendant's misrepresentation, and potential or actual damages (*Ciba-Geigy*, at p. 132). In explaining these elements, the Court has quoted with approval the following passage from the House of Lords decision in *Reckitt & Colman Products Ltd. v. Borden Inc.*, [1990] 1 All E.R. 873:

The law of passing off can be summarised in one short general proposition, no man may pass off his goods as those of another. More specifically, it may be expressed in terms of the elements which the plaintiff in such an action has to prove in order to succeed. These are three in number. First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Second, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. ... Third, he must demonstrate that he suffers or, in a quia timet action, that he is likely to suffer damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff. [Emphasis added by Supreme Court.]

- [9] I consider these elements of the tort below.

The Legal Test for an Injunction

- [10] A party may seek an interlocutory injunction pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and Rule 40 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.
- [11] The test for interlocutory injunctive relief is well-established: the moving party must establish that their action raises either a serious issue to be tried or a strong prima facie case, that they will suffer irreparable harm if an injunction is not granted until the completion of the trial, and that the balance of convenience favours granting the relief sought because they would suffer greater harm than the responding party if the injunction is not granted (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 348-349; *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, [2018] 1 S.C.R. 196, at paras. 12-13). The three criteria are not to be viewed as self-contained: they are inter-related considerations, and weakness in one may be compensated for by strength in another (*Circuit World Corp. v. Lesperance* (1997), 33 O.R. (3d) 674 (C.A.)).

Serious Issue to be Tried or Strong Prima Facie Case

The Standard to be Applied

- [12] The parties disagree on the standard to be applied to the first part of the *RJR-MacDonald* test for injunctive relief.
- [13] The Plaintiffs call for the application of the “serious issue to be tried” standard, on the basis that they are seeking a prohibitory injunction – that is, they only seek to stop the Defendants from doing what they are currently doing and are not requiring them to perform any new affirmative act. As such, say the Plaintiffs, they need only show that there is a serious issue to be tried in respect of passing off. This less onerous standard is assessed “on the basis of common sense and an extremely limited review of the case on the merits” (*RJR-MacDonald*, at p. 348). Essentially, it requires a determination that the case is not frivolous or vexatious (*RJR-MacDonald*, at p. 337). The Plaintiffs cite previous cases involving requests for interlocutory injunctions for passing off, in which the courts applied this standard (e.g. *Car-Wal Garage Doors Inc. v. On Track Door Systems Canada Inc.*, 2018 ONSC 6078, at paras. 33-37; *Carey Industries v. Carey*, 2013 ONSC 5607, at paras. 28-29, 35; *Source Perrier (Societe Anonyme) v. Canada Dry Ltd* (1982), 36 O.R. (2d) 695 (S.C.), at p. 5).
- [14] I am, respectfully, unable to agree. *Canadian Broadcasting Corporation*, which post-dates the authorities relied on by the Plaintiffs, makes clear that in determining which standard applies, I must consider the substance and the practical consequences of the injunction sought (at para. 16). In my view, the injunction would, as a practical matter, require the Defendants not only to stop selling their products, but also to actively remove their products from the market. The latter of these is an affirmative act that the Defendants would otherwise not perform. As such, the injunction is rightly characterized as a mandatory injunction and is subject to the more onerous “strong prima facie case” standard, under which the Plaintiffs must show “a case of such merit that it is very likely to succeed at trial” based on the law and the evidence presented (*Canadian Broadcasting Corporation*, at para. 17).
- [15] If I am wrong about the appropriate test to be applied, however, I have also applied the “serious issue to be tried” standard in my analysis.
- [16] As discussed below, I find that the Plaintiffs have not demonstrated a strong *prima facie* case that the Defendants have “passed off” their products. As such, I am not satisfied that there is a strong likelihood on the law and the evidence presented that, at the hearing of the action, the Plaintiffs will succeed in proving their allegations against the Defendants. If I am wrong about the appropriate test to be applied, I find that the Plaintiffs have not raised a serious issue to be tried in respect of their allegations of passing off.

Goodwill attached to BioSteel's goods

- [17] I find that the Plaintiffs have not established a strong *prima facie* case that there is goodwill or reputation attached to the get-ups of their goods. In the alternative, they have not raised a serious issue to be tried in this regard.
- [18] In considering this question, I am informed by the Supreme Court of Canada's analysis in *Ciba-Geigy*, which considered a claim of passing off in the pharmaceutical industry. As discussed above, the Court quoted with approval the House of Lord's explanation of the goodwill requirement in *Reckitt & Colman*. That explanation makes clear that it is not sufficient for a plaintiff claiming the tort of passing off to simply establish a broad goodwill or reputation in its brand name or logo. Rather, the plaintiff must demonstrate that the goodwill or reputation attaches to the get-up of its products, with the result that that get-up is associated with the plaintiff alone:
- [H]e must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying "get-up" (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. [Emphasis added by Supreme Court.]
- [19] The Court in *Ciba-Geigy* went on to discuss the meaning of "get-up" as "the whole visible external appearance of goods in the form in which they are likely to be seen by the public before purchase. If the goods are sold in packages, then their get-up means the appearance of the pack taken as a whole" (Christopher Wadlow, *The Law of Passing-off* (London: Sweet & Maxwell, 1990), quoted at p. 138).
- [20] Elaborating on the concept of goodwill in the get-up of a product, the Court explained, "The product's appearance or its packaging — shape, size or colour — may be characteristic of a particular manufacturer and have the effect of marking out the product or making it recognizable as his own." It went on to provide the following example: "when [the consumer] needs removable self-stick notes, he will look for small blocks of yellow paper. He may not know the name of the product or manufacturer, but he does not need to in order to recognize what he wants to buy. What he has noticed and what he has retained is the specific colour of the merchandise" (at p. 138).
- [21] Thus, the goodwill requirement refers to reputation or goodwill in the get-up specifically, and not just in the logo or brand. This analytical focus on the get-up is essential to the claim. For instance, in *Kraft Jacobs Suchard (Schweiz) AG v. Hagemeyer Canada Inc.* (1998), 78 C.P.R. (3d) 464 (Ont. S.C.), the court found that the Plaintiffs had established a reputation in the specific get-up of Toblerone chocolate bars, which have a unique design of sectioned "peaks" or "treads" and triangular packaging (at para. 20).
- [22] Conversely, in *Unitop v. Exclusive Candy*, 2023 ONSC 4363, the court found that no such goodwill or reputation was demonstrated in the plaintiff's get-up. *Unitop* involved a claim

of passing off in connection with Sesame Snaps bars. The plaintiff argued that the product's packaging was distinctive and served as a source indicator. The court disagreed, holding that there was "no evidence establishing that the purported 'distinctive blue, white, red and clear cellophane wrapping'" in the product's packaging had "become distinctive in the minds of ordinary consumers" (at paras. 43 and 48). While this case arose in the context of a motion for default judgment, that distinction is of little import. The court was concerned with the evidence required to demonstrate goodwill in a get-up for the purposes of a passing off claim. Its analysis is squarely applicable to this matter.

[23] The Plaintiffs have not made out a strong *prima facie* case that there is goodwill or reputation in the get-ups of BioSteel's products. Nor have they raised a serious issue to be tried in this regard. To the extent that the Plaintiffs have offered evidence of goodwill, they have done so in relation to the BioSteel brand at large. Thus, they have provided evidence on the growth of net annual sales of BioSteel products in the years prior to its CCAA proceedings; its net annual sales revenue for the last full fiscal year before the CCAA proceeding; its endorsement deals with prominent athletes, sports teams, and sports leagues; and its share of the sports drink market in Canada during that time period. They also offer affidavit evidence confirming that the goodwill associated with the BioSteel brand was a primary driver in their decision to pay what they did for BioSteel.

[24] For the purposes of the passing off doctrine, however, this evidence is not sufficient. The Plaintiffs cannot just provide evidence of goodwill in BioSteel's business, brand, and full suite of products as a whole. They must show that goodwill can be attributed to the get-ups of the BioSteel products at issue. That is, they must demonstrate that consumers exclusively associate the get-ups of BioSteel's products, including its packaging, colouring, and imaging, with BioSteel only, in the same way that the hypothetical consumer in *Ciba-Geigy* associates small blocks of yellow paper with removable self-stick notes, or consumers were found by the court in *Kraft Jacobs* to associate chocolate bars with sectioned "peaks" and triangular packaging with Toblerone itself. The Plaintiffs have not met this burden.

Misrepresentation by Cwench that Causes Confusion between BioSteel and Cwench

[25] I find that the Plaintiffs have not established a strong *prima facie* case that the Defendants have misrepresented their products to the public, intentionally or otherwise, in a way that leads or is likely to lead the public to believe that Cwench products are BioSteel products. In the alternative, they have not raised a serious issue to be tried in this regard.

[26] This branch of the test for passing off raises two distinct questions: whether there has been a misrepresentation by Cwench, which may include having a similar get-up to BioSteel (*Ciba-Geigy*, at pp. 132, 137); and whether that misrepresentation leads or is likely to lead the public to confuse Cwench and BioSteel products (*Ciba-Geigy* at p. 132, citing *Reckitt & Colman*). I consider each of these in turn.

Misrepresentation by Cwench

[27] When assessing whether there has been a misrepresentation in the form of a similar get-up, "[t]he test to be applied is a matter of first impression in the mind of a casual consumer

somewhat in a hurry who... does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences” (*Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] 1 S.C.R. 824, at para. 20; *Diageo*, at para. 69). Courts should not engage in careful side-by-side comparisons of the products, “since the mythical consumer somewhat in a hurry would not do so” (*Diageo*, at para. 133.)

- [28] I need not be persuaded that Cwench copied BioSteel’s get-ups in all respects. I am to be mindful of the oft-repeated warning that “the most successful form of copying is to employ enough points of similarity to confuse the public with enough points of differences to confuse the courts” (*Diageo*, at para. 84 and *Source Perrier*, at para. 18, citing *Baker et al v. Master Printers Union of New Jersey* (1940), 47 USPQ 69). In *Diageo*, for example, the Federal Court considered whether Admiral Nelson's brand rum bottles passed off on Captain Morgan brand rum bottles. The court noted that there were some differences in the labels of both products, including different brand names, but went on to find that the similarities of the characters on the bottles and the same bottle shape were sufficient to create confusion in a consumer's mind (at para. 100). Likewise, in *Source Perrier*, the plaintiff alleged that the defendant had passed off on the colour and shape of the plaintiff's sparkling water bottles. The Court found that the defendant's bottles were similar enough to create confusion even though the plaintiff's bottles were clearly marked with the name "Perrier" (at pp. 2, 10, 11, 15, 16).
- [29] I must also consider whether any asserted similarities between the products are in fact common features in the sports beverage industry, based on functional or utilitarian considerations and not unique to BioSteel. To the extent that they are, they are not properly protected by the passing off doctrine (*Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, at paras. 45-46).
- [30] Applying these considerations here, I am unable to conclude that the Plaintiffs have made out a strong *prima facie* case of misrepresentation by the Defendants or raised a serious issue to be tried in this regard. While there are clear similarities between their respective products, those similarities point to features that are found in sports drinks and other health and wellness beverages generally. These features reflect industry practice and in many cases are based on consumer research. They do not support the assertion that Cwench is representing its products as those of BioSteel.
- [31] For example, the Plaintiffs submit that the names of Cwench’s four flavours are the same or almost the same as four of BioSteel’s 29 drink flavours: Cwench sells “Blue Raspberry,” which the Plaintiffs call a copy of BioSteel’s “Blue Raspberry”; Cwench sells “Berry Crush,” which the Plaintiffs call a copy of BioSteel’s “Mixed Berry”; Cwench sells “Rainbow Swirl,” which the Plaintiffs call a copy of BioSteel’s “Rainbow Twist”; and Cwench sells “Cherry Lime,” which the Plaintiffs call a copy of BioSteel’s “Cherry Lime”.
- [32] I acknowledge the duplication or near-duplication in flavour names, but I am not persuaded that it constitutes misrepresentation. The evidence indicates that there is considerable consistency across the wellness drink industry in terms of flavour offerings. The evidence also shows that fruit-based flavours are common in the industry and that flavour names are often descriptive (for instance, “cherry lime”). In addition, it is an industry practice for third

party “flavour houses” to create “flavour profiles” from which drink manufacturers select their flavours, based on market research about consumer preferences, and then customize them. The fact that both BioSteel and Cwench appear to follow these prevalent and research-based industry approaches does not support a claim of passing off. It simply shows that they are both in step with generally accepted industry practices.

- [33] Similarly, the Plaintiffs point to Cwench’s use of Tetra Pak cartons as evidence of its misrepresentation. It is uncontested, that until Cwench entered the market, BioSteel was the only sports hydration drink sold in Tetra Pak cartons. Competitors sold their drinks in plastic bottles. Now, however, Cwench uses Tetra Pak cartons also.
- [34] In my view, the record supports that Cwench’s use of Tetra Pak is a functional and utilitarian choice, not an effort to mimic BioSteel’s packaging. The uncontested evidence of Cwench is that it chose Tetra Pak cartons for functional reasons, including flavour and quality preservation, environmental concerns, and retailer sizing desires. The evidence also indicates there is only one manufacturer of Tetra Pak packaging in Canada. There is only one available shape design for this particular kind of Tetra Pak container in this particular size of 500ml. In these circumstances, I am unable to conclude that Cwench’s use of Tetra Paks constitutes misrepresentation.
- [35] The same may be said of BioSteel’s and Cwench’s use of tub containers to package drink mixes: the evidence shows that this is a functional feature that is common in the industry and not unique to BioSteel.
- [36] The Plaintiffs state that Cwench uses nearly identical colours to BioSteel’s on its packaging, and that this amounts to misrepresentation. I do agree that Cwench’s packaging uses very similar colours. Both BioSteel and Cwench use rainbow colours for their “Rainbow Twist” or “Rainbow Swirl” flavour packaging respectively, although Cwench places orange at the top of its packaging and red at the bottom, while BioSteel does the opposite. They both use green for their “Cherry Lime” flavour packaging, although Cwench adds a red border. They both use blue for their “Blue Raspberry” flavour packaging, although Cwench adds a black border. They both use red for their “Mixed Berry” and “Berry Crush” flavour packaging, although Cwench adds a blue border.
- [37] However, I do not find that this is misrepresentation. The evidence before me makes clear that there is a great deal of consistency across the wellness drink industry in terms of packaging colours. For example, brands other than BioSteel and Cwench use blue for blue raspberry drinks and green for lime-based drinks. The evidence also indicates that these colours choices are driven by the associations consumers draw between particular colours and flavours. Indeed, in cross-examination, the Plaintiffs’ principal did not seriously challenge the suggestion that BioSteel selects its own packaging based on colour-based consumer associations with particular flavours. In my view, this means that Cwench and BioSteel are both following industry practice and the dictates of consumer research, not that Cwench is misrepresenting its products as those of BioSteel.
- [38] The Plaintiffs further state that Cwench uses the same kinds of images on its packaging as BioSteel, and that this amounts to misrepresentation. I accept that the two use similar images:

they each use images of differently coloured fruit for their “Rainbow Twist” or “Rainbow Swirl” flavour packaging, of cherries and limes for their “Cherry Lime” flavour packaging, of blue raspberries for their “Blue Raspberry” flavour packaging, and of various berries for their “Mixed Berry” and “Berry Crush” flavour packaging.

- [39] Again, however, I find that there is similarity across the wellness drink industry in the images used on beverage and beverage mix containers. Not all the examples of beverages before me have images on the packaging. Those that do have images, however, generally have images that are similar to the ones described above. It is not surprising that manufacturers would identify a product’s flavour by using images of key ingredients associated with the flavour. Based on the record, such images are common features and not indicators that BioSteel is the source of the beverages.
- [40] Accordingly, on the record before me, I find that several aspects of the get-ups of BioSteel products, namely the flavour names, the colouring and images used on the containers, and the use of tub containers for powdered drink mixes, are common features across the industry and not associated specifically with BioSteel. The use of 500ml Tetra Pak containers of a particular shape for drinks, while less common in the industry, is a functional or utilitarian choice. These are therefore not properly protectable by the passing off doctrine.
- [41] I further find that on much of Cwench’s packaging, its logo appears in large, prominent lettering that is difficult or impossible to miss. On its drink cartons, for instance, this lettering reads vertically in large capital letters and occupies most of the front of the carton. This undermines the suggestion that Cwench is representing its goods as those of BioSteel.
- [42] Finally, I note that the Plaintiffs state that the proper comparator for the purposes of this analysis is not the wellness drink industry generally, but the sports drink industry more specifically. They state that some of the examples of drinks before me are not sports drinks and should not be relied on. In my view, similar “channels of trade,” meaning the health and wellness beverage trade generally, are appropriate comparators. Even if I were to look to sports drinks specifically, however, my analysis would remain unchanged. Based on the record before me, sports drinks other than BioSteel and Cwench also commonly use fruit-based flavours, descriptive flavour names, similar colours, and, if they use imaging, similar imaging.

Confusion to consumers

- [43] A plaintiff is required to provide persuasive evidence that an alleged misrepresentation by a defendant leads or is likely to lead the public to confuse the parties’ products with one another. Such evidence may, for instance, consist of direct affidavit evidence from confused consumers (see *Toronto Cricket Skating & Curling Club Townhouses v. Cricket Club Townhouses Inc.*, 2003 CarswellOnt 8408 (C.J.)), direct affidavit evidence of confusion by sellers themselves (see *Wenger S.A. v. Travel Way Group International Inc.*, 2016 FC 347, at paras. 40-42), or expert evidence offering an empirical measure of consumer confusion (see, for example, *Diageo*, at para. 87; *Kirkbi AG v. Ritvik Holdings Inc.*, 2002 FCT 585, at para. 96). In *Diageo*, the plaintiff tendered expert evidence in the form of a statistically significant consumer survey of 629 Canadian adults of legal drinking age, residing in four

Canadian cities, who had recently purchased a bottle of rum. The survey aimed to measure, among other things, whether and to what extent purchasers of rum mistakenly inferred that a bottle of Admiral Nelson's Premium Spiced Rum originated from the same source as Captain Morgan rum. According to the survey, "[t]he most frequent reason given ... for inferring the same source as Captain Morgan was the character displayed on the label" (at para. 87). The court found that the survey was sufficient to establish a likelihood of confusion of 4.8% or greater (at para. 94).

- [44] Applying these considerations here, I am unable to conclude that the Plaintiffs have made out a strong *prima facie* case, or raised a serious issue to be tried, regarding confusion on the part of the purchasing public. The Plaintiffs' evidence on consumer confusion consists largely of comments posted on social media by unnamed individuals about the apparent similarities between BioSteel and Cwench products. This evidence is hearsay and in my view inadmissible. Even if I did admit the evidence, it is not clear on the record that the individuals commenting are members of the Canadian purchasing public. Nor is it self-evident that they are confused: many of them refer both to BioSteel and Cwench, which implies that they are well aware that those are two different brands.
- [45] The social media evidence relied on by the Plaintiffs may be distinguished from the evidence in *Car-Wal Garage Doors* on which the Plaintiffs rely. In *Car-Wal Garage Doors*, the court accepted hearsay evidence that existing and potential customers had contacted the plaintiff, believing they were contacting the defendant; and that existing customers had complained to the plaintiff after contacting the defendant in error, believing it to be the plaintiff. This evidence, combined with additional evidence, supported the court's determination that customers and the public had been confused by the defendant's misrepresentation (at paras. 25 and 54).
- [46] Here, however, the evidence does not clearly reveal customer confusion, as discussed above, in contrast to the evidence in *Car-Wal Garage Doors*. Nor do the comments contained in the social media posts clearly come from potential or existing BioSteel customers, in contrast to the communications at issue in *Car-Wal Garage Doors*. Moreover, the communications in *Car-Wal Garage Doors*, were made directly to the plaintiff, rather than merely being posted on social media.
- [47] The Plaintiffs have not provided the required evidence of consumer confusion. They offer no direct evidence from any of the individuals who posted their comments on social media. Nor do they provide direct evidence from any customer who bought a Cwench product thinking it was a BioSteel product – the "deceived" customer who is the focus of the Court's concern in *Ciba-Geigy*. I note that Cwench's evidence is that not one purchase order has been returned to it on the basis that a consumer confused the two brands. Nor does BioSteel tender direct evidence from vendors who have witnessed or experienced such confusion first-hand, or expert evidence, empirical or otherwise, in support of the claim that consumers are confusing the two products. Such evidence is necessary to make out the claim of passing off.

Conclusion on misrepresentation causing confusion

[48] The Plaintiffs have not made out a strong *prima facie* case that the Defendants have misrepresented the public, intentionally or otherwise, leading or likely to lead the public to believe that Cwench products are BioSteel products. Nor have they raised a serious issue to be tried in this regard.

Actual or Potential Damages

[49] I find that the Plaintiffs have not established a strong *prima facie* case that they have experienced actual or potential damages due to Cwench's alleged misrepresentation. In the alternative, they have not raised a serious issue to be tried in this regard.

[50] A plaintiff advancing a claim for passing off must demonstrate that "it has suffered or is likely to suffer damage as a result of the erroneous belief created by the defendant's misrepresentation that the source of the goods or services is the same as those offered by the plaintiff" (*Diageo*, at para. 66, citing *Ciba-Geigy*, at p. 132). Actual damages need not be proved; the likelihood of damage is sufficient (*Dentec Safety Specialists Inc. v. Degil Safety Products Inc.*, 2012 ONSC 4721, at para. 35; *Ciba-Geigy*, at p. 132; *HTS Engineering Ltd v. Marwah*, 2019 ONSC 6351, at para. 189).

[51] The Plaintiffs offer no evidence of damages or the likelihood of damages to the Plaintiffs as a consequence of the Defendants' alleged conduct; instead, they urge me to infer the likelihood of damages. They cite *Alliance Laundry Systems LLC v. Whirlpool Canada LP*, 2019 FC 724 as evidence for the proposition that, when two companies engage in the same trade with very similar goods, loss of sales and business can be inferred due to a misrepresentation (at paras. 58-60). The Plaintiffs point to Cwench's sales revenue and urge me to conclude, in this vein, that there is a "strong likelihood that Cwench has drawn confused consumers away from BioSteel, resulting in damages to BioSteel."

[52] I am unable to draw this inference. I have not found a strong *prima facie* case or a serious issue to be tried in respect of misrepresentation or consumer confusion. As such, there is no basis on which I may infer damages arising from such misrepresentation and ensuing confusion. In any event, there is no evidence that would support my drawing such an inference, because there is nothing in the record to demonstrate that the BioSteel has experienced any decreases in sales since Cwench launched its products in May 2024.

Conclusion on Strong *Prima Facie* Case or Serious Issue for Trial

[53] Based on the above, I find that the Plaintiffs have not demonstrated a strong *prima facie* case that the Defendants have committed the tort of passing off. Nor have they raised a serious issue for trial in respect of passing off.

Irreparable Harm

[54] I must also assess whether irreparable harm will result if the injunction is not granted. The burden is on the Plaintiffs to place sufficient evidence before me to show that they will suffer irreparable harm, which is harm that "either cannot be quantified in monetary terms or which

cannot be cured, usually because one party cannot collect damages from the other” (*RJR-MacDonald*, at p. 341). The word “irreparable” describes the nature of the harm, rather than its magnitude (*RJR-MacDonald*, at p. 341). I am to consider the question of irreparable harm in the context of the specific facts of this case. That context includes my assessment that the Plaintiffs have not demonstrated a strong *prima facie* case or a serious issue to be tried in respect of their passing off claim.

- [55] I find that irreparable harm will not result if I do not grant the injunction. This finding flows necessarily from my finding that there is no strong *prima facie* case and no serious issue to be tried in respect of any of the elements of the tort of passing off.
- [56] The Plaintiffs state that they will experience irreparable harm without the injunction in part because BioSteel has just emerged from the CCAA proceedings and needs to get back on its feet, which magnifies the impact of the harm caused to it by Cwench.
- [57] There is no evidence before me to support the claim that BioSteel is particularly vulnerable as a result of the CCAA proceedings. Even if it is vulnerable, however, this would not support a finding of irreparable harm given my conclusion that the Plaintiffs have not demonstrated a strong *prima facie* case or a serious issue to be tried.
- [58] The Plaintiffs further state that there is no meaningful method to calculate the portion of Cwench's sales that are attributable to confused consumers.
- [59] They offer no basis for that claim. They do not suggest that they have tried to perform those calculations and been unsuccessful. Indeed, as discussed above, there is no evidence before me that BioSteel has experienced any decreases in sales since Cwench launched. The Plaintiffs simply ask me to assume that there was a decrease in sales and that it is difficult to know how much of it to attribute to Cwench. I am unable to make such an assumption. In any event, any difficulty in calculating damages would not support a finding of irreparable harm given my conclusion regarding the absence of a strong *prima facie* case or a serious issue to be tried.

The Balance of Convenience

- [60] Finally, I must assess the balance of convenience. The Supreme Court of Canada has held that the question to be asked at this stage of the inquiry is which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits (*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 129).
- [61] I find that the balance of convenience favours not granting the injunction. No branch of the test for the tort of passing off has been satisfied. Additionally, the Defendants have provided evidence on the impact an injunction would have on their business, including their revenue stream and relationships with vendors. It is therefore appropriate for the parties to continue on as they are, pending trial.

Conclusion

[62] For the reasons above, I find that the Plaintiffs have not demonstrated a strong *prima facie* case, nor have they shown a serious issue to be tried, in respect of passing off; that irreparable harm will not result if the injunction is not granted; and that the balance of convenience does not favour granting the injunction. Accordingly, I do not grant the injunction.

Costs

[63] In exercising my discretion to fix costs under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c C.43, I may consider the factors enumerated in Rule 57.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194. Those factors include the result achieved, the amounts claimed and recovered, the complexity and importance of the issues in the proceeding, the principle of indemnity, the reasonable expectations of the unsuccessful party, and any other matter relevant to costs.

[64] In the recent case of *Apotex Inc. v. Eli Lilly Canada Inc.*, 2022 ONCA 587, the Court of Appeal for Ontario restated the general principles to be applied when courts exercise their discretion to award costs. The Court held that, when assessing costs, a court is to undertake a critical examination of the relevant factors, as applied to the costs claimed, and then “step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable” (at para. 60). The overarching objective is to fix an amount for costs that is objectively reasonable, fair, and proportionate for the unsuccessful party to pay in the circumstances of the case, rather than to fix an amount based on the actual costs incurred by the successful litigant.

[65] Applying these principles, I find that it is appropriate to award the Defendants their costs on a partial indemnity basis, in the amount of \$109,888.31. They were entirely successful in the motion. Their costs are reasonable and proportionate, having regard to the nature of the motion, the steps it necessarily entailed, and the compressed timeline within which it was heard. The Defendants’ costs are also very close in quantum to costs of the Plaintiffs, which suggests that it is within the reasonable expectations of the Plaintiffs to pay this amount. I accordingly order the Plaintiffs to pay the Defendants their costs in the amount of \$109,888.31, inclusive of disbursements and HST, within 30 days.

Parghi J.

CITATION: Biosteel Inc. v. Cizzle Brands Ltd., 2024 ONSC 5515
COURT FILE NO.: CV-24-00723115-0000
DATE: 2024-10-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

BIOSTEEL INC. and DC HOLDINGS LTD.

Plaintiffs

– and –

CIZZLE BRANDS LTD. and CIZZLE BRANDS INC.

Defendants

REASONS FOR DECISION

Parghi J.

Released: 2024-10-18