

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-125038-235

DATE: March 28, 2025

BY THE HONOURABLE PATRICK OUELLET, S.C.J.

NEW SKINNY MIXES, LLC, d/b/a JORDAN'S SKINNY MIXES
Plaintiff

v.

9335-5147 Québec inc., d/b/a CAPITAL NUTRITION and d/b/a HEALTH FOOD INC.
and
CAPITAL NUTRITION INC.
Defendants

and

MOISHE HARTSTEIN
Impleaded Party

JUDGMENT ON INTERLOCUTORY INJUNCTION

CONTEXT

[1] The Plaintiff ("**Skinny**") is a company incorporated in the United States of America, which manufactures sugar free coffee syrups, low-calorie cocktail mixes and other specialty beverages ("**Skinny Syrups**"). Skinny Syrups are sold globally, mainly through distributors operating in targeted markets.

[2] The Defendants 9335-5147 Québec inc. ("**9335**") and Capital Nutrition inc. ("**Nutrition**") are Quebec corporations having the same address and are both controlled by the Impleaded Party ("**Hartstein**").

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[3] Skinny alleges that it developed and has been using a number of trademarks, trade dresses and product designs since 2009. One of those marks is Skinny Syrups, used in connection with low-calorie, sugar free specialty syrups and mixes. Skinny also alleges that it owns various trademark applications and registrations in relation thereto, in Canada and abroad.

[4] In November 2018, the parties began discussions which would eventually lead to 9335 becoming the Canadian distributor of the Skinny Syrups.

[5] In April 2019, Skinny and 9335 entered into a Trademark Licence Agreement,¹ thereby allowing 9335 to use Skinny's licenced marks "in connection with the promotion, advertising, distribution and sale"² of Skinny Syrups in Canada. At article 4.1 of this agreement, 9335 acknowledges that Skinny "is the owner of the Licensed Marks [in Canada] and all goodwill related thereto" and that all use of such marks and "goodwill accruing therefrom shall inure solely to the benefit" of Skinny.

[6] In connection with its distribution of the Skinny Syrups in Canada, the Defendants created a Canadian web site for the sale of such products, found at skinnymixes.ca. It is not disputed that to this day, it is the Defendants and Hartstein that control this domain name, and the email addresses associated thereto.

[7] In August 2022, Skinny advised 9335 that it was terminating the distribution agreement and the Trademark Licence Agreement. The latter provided that, upon termination, 9335 "shall cease all use of the Licensed Marks".³

[8] A few months thereafter, the Defendants began to develop their own brand of syrups, called Slim Syrups. This is what ultimately gave rise to this litigation.

HISTORY OF THE CASE

[9] On May 5, 2023, a few days after Skinny was apprised of the sale of Slim Syrups by the Defendants, the Plaintiff filed its Originating application for the issuance of injunctive relief, seeking a provisional, interlocutory and permanent injunction. It thereby sought orders to enjoin the Defendants to cease their unfair competition and parasitic actions, as well as their unauthorized use of Skinny's intellectual property.

[10] Skinny had indeed discovered, among other things, that the Defendants had posted a notice⁴ on the skinnymixes.ca web site stating the following:

¹ Exhibit P-9.

² *Id.*, art. 2.1.

³ *Id.*, art. 6.2.

⁴ Exhibit R-2.

"Skinny Mixes Canada

We are excited to announce that **Skinny Mixes Canada will be officially relaunching as Slim Syrups.**

This change reflects our commitment to providing our customers with delicious, sugar-free, keto-friendly syrups that are fully compliant in Canada.

Our new name and product line will not change our commitment to providing our customers with high-quality products and excellent customer service. We remain dedicated to delivering the same level of quality and care that you have come to expect from us.

We would like to take this **opportunity to thank you for your loyalty and support over the years. We hope that our new products will meet and exceed your expectations, and we look forward to serving you under our new brand name, Slim Syrups. [...]**

[Emphasis added]

[11] On May 11, 2023, Justice Immer, S.C.J. (as he then was) heard Skinny's Application for the issuance of a provisional injunction. The next day, Justice Immer rendered judgment⁵ ("**Immer Order**") and partially granted Skinny's application. He ordered, for a duration of ten (10) days, the Defendants and Impleaded Party to:

- 11.1. Refrain and cease distributing, selling, offering for sale or marketing a series of Slim syrups depicted in exhibit R-5 in support of the application before him;
- 11.2. Remove or make unavailable those syrups on the slimsyrops.ca and slimsyrops.com websites;
- 11.3. Make the skinnymixes.ca website unavailable;
- 11.4. Refrain and cease to make any statement similar or identical to those reproduced at paragraph 10 of this judgment;
- 11.5. Notify in writing any and all distributors or retailers to whom they have sold, distributed or delivered syrups, which notice shall contain:
 - 11.5.1. The conclusions of the Immer Order;
 - 11.5.2. A mention that Skinny syrups have not been replaced nor changed their name to Slim Syrups and that they are indeed two distinct products produced by two distinct manufacturers;

⁵ Exhibit R-4.

11.5.3. A demand that they cease selling the Slim Syrups immediately and to remove those products from their shelves;

[12] The Immer Order also reserved the Defendants' rights to petition a judge of this Court to modify the Immer Order as soon as they significantly modify the trade dress of the Slim Syrups.

[13] Following the Immer Order, the Defendants significantly modified the trade dress of their Slim Syrups products and represented that they fully complied with the Immer Order.

[14] Skinny thereafter sought the renewal of the provisional injunctive order, at a hearing held on May 25, 2023, before Justice Gregory Moore. The next day, Justice Moore decided not to renew the order. Some extracts of his reasons for judgement ("the **Moore Judgment**") are reproduced below:

"13. Justice Immer writes that the plaintiff's appearance of right comes from compounding many items drawn from the defendants' knowledge of the plaintiff's products and business. Since May 12th, the defendants have amended their ways to the extent that the bottle shape is the only remaining item of the compounded items listed by Justice Immer [...].

14. The plaintiff has not demonstrated that the unwary customer somewhat in a hurry will be confused by the defendants' proposed new labelling. [...]

18. As for the website, the right to the skinnymixes.ca domain name is an issue for a later stage in these proceedings.

19. The plaintiff's concerns about the skinnymixes.ca website are not founded. Justice Immer ordered that the website be made unavailable, and that distributors and retailers be notified that they are not to sell SKINNY MIXES syrups.

20. Exhibits MH-10 and MH-11 are screenshots of the skinnymixes.ca website. They consist of a note that the site is under construction and that users may log in to their accounts to check the status of their previous orders or their refunds. Alternatively, users may write to info@skinnymixes.ca with their questions or concerns. This appears to be a way to manage the consequences of Justice Immer's order that SKINNY MIXES syrups not be sold by the defendant or its distributors or retailers. The defendants are not using the info@skinnymixes.ca email for anti-competitive purposes but to comply with Justice Immer's judgment. Its use should further underline the distinction between the parties' companies and products.

21. Because the plaintiff has not demonstrated that it will suffer serious or irreparable harm unless a provisional injunction is issued, its application is dismissed.

(Emphasis added)

[15] On July 4th, 2023, the Plaintiff was heard by Justice Bisson on a new Application for the issuance of a provisional injunction. Justice Bisson dismissed this Application. His reasons for judgment were rendered verbally.⁶

[16] On July 18, 2023, Hartstein was examined out of Court by Skinny's lawyers and was asked to provide numerous answers to undertakings, many of which were objected to. The debate on those objections was presided by the undersigned, immediately following the hearing on Plaintiff's Application for the issuance of an interlocutory injunction. Most of the objections were dismissed, thereby forcing the Defendants to disclose more information and documents to the Plaintiff, which were not available for the purposes of the present judgment.

ANALYSIS

1. THE TEST IN DECIDING WHETHER TO ISSUE AN INTERLOCUTORY INJUNCTION

[17] The purpose of an interlocutory injunction is to preserve a parties' rights pending the outcome of the litigation, so that "effective relief will be available when the case is ultimately heard on the merits".⁷

[18] In deciding whether to issue an interlocutory injunction, courts employ a three-part test derived from the decision of the British House of Lords in *American Cyanamid*.⁸ The best-known statement of this test is found in the Supreme Court of Canada's decision in *RJR-MacDonald*.⁹

"First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."¹⁰

[19] The first and second steps aim at evaluating the risk of harm for the plaintiff if the injunction is not granted. At the third step, this risk is compared to the risk of harm to the defendant if an injunction is issued but the defendant later prevails on the merits.

[20] "The three prongs of the RJR test should not be applied in a mechanistic fashion. While each of the three prongs must be met, strength on one prong may compensate

⁶ The Court listened to the recording of Justice Bisson's reasons for judgment. They have no impact on the present judgment.

⁷ *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824, para. 24.

⁸ *American Cyanamid Co v. Ethicon Ltd.*, 1975 CanLII 2598 (FC), [1975] AC 396.

⁹ *RJR-MacDonald inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. ["*RJR*"].

¹⁰ *Id.*, page 334.

weakness on another".¹¹ In the end, the "fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific".¹²

[21] In Quebec, the test for the issuance of an interlocutory injunction is codified at articles 510 and 511 C.C.P.:

510. Interlocutory injunction - A party may ask for an interlocutory injunction in the course of a proceeding or even before the filing of the originating application if the latter cannot be filed in a timely manner. An application for an interlocutory injunction is served on the other party with a notice of its presentation.

Provisional injunction - In an urgent case, the court may grant a provisional injunction, even before service. A provisional injunction cannot be granted for a period exceeding 10 days without the parties' consent.

511. Conditions - An interlocutory injunction may be granted if the applicant appears to have a right to it and it is judged necessary to prevent serious or irreparable prejudice to the applicant or to avoid creating a factual or legal situation that would render the judgment on the merits ineffective.

Suretyship - The court may grant an interlocutory injunction subject to a suretyship being provided to cover the costs and any resulting prejudice.

Suspension or renewal - It may suspend or renew an interlocutory injunction for the time and subject to the conditions it determines.

[22] The Court will now analyze each prong of the test and apply it to the facts of the present matter.

[23] This analysis must be performed bearing in mind each of the conclusions sought by the Plaintiff, as the appearance of right, the prejudice and the balance of convenience may vary from one conclusion to the other.

[24] The conclusions sought by the Plaintiff may be broken down into five (5) distinct categories:

24.1. **Category 1:** Conclusion c) of Plaintiff's Application for the issuance of an interlocutory injunction dated July 8 2024, as verbally modified during the hearing ("**Plaintiff's Application**") aims at preventing the Defendants and Impleaded Party from copying the Plaintiff's copyrighted materials and other publications. It reads as follows:

¹¹ *Telus Communications Inc. v. Vidéotron Ltée*, 2021 FC 1127 (CanLII), para. 27. See also *Favre c. Hôpital Notre-Dame*, [1984] C.A. 548, 1984 CanLII 2824 (QC CA), para. 16; *9162-5327 Québec inc. c. 9422-5075 Québec inc.*, 2024 QCCS 81, para. 12.

¹² *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34, [2017] 1 S.C.R. 824, para. 25.

"c) refrain and immediately cease reproducing, in whole or in part, Skinny Mixes' website, social media publications, marketing or promotional material, logos, slogans, taglines, trade communications, product descriptions, images and photographs, recipes and any other work of the same nature"

24.2. **Category 2:** Conclusions f), g) and h) of Plaintiff's Application aim at forcing the Defendants and Impleaded Party to transfer to the Plaintiff control over the skinnymixes.ca domain name and associated email addresses and refrain from using them in the future. They read as follows:

f) immediately transfer and cede control to Plaintiff over the domain name "@skinnymixes.ca";

g) immediately transfer and cede control to Plaintiff over any and all email addresses with the domain name "@skinnymixes.ca";

h) refrain from using "@skinnymixes.ca" email addresses or creating any other "@skinnymixes.ca" email addresses;"

24.3. **Category 3:** Conclusions a), b), d) and e) of Plaintiff's Application aim at forcing the Defendants and Impleaded Party to stop using the name "Slim Syrups", stop selling its products under this name, make the websites using this name unavailable and refrain from using domain names associated thereto. The read as follows:

a) refrain and immediately cease, directly or indirectly, in any capacity whatsoever, from manufacturing, reproducing, communicating to the public by telecommunications, copying, importing, distributing, selling, offering for sale, marketing, in whole or in part, syrups, mixes and other related beverages under the name "Slim Syrups", or directing public attention to such goods in such a way to cause or be likely to cause confusion between their goods and those of the Plaintiff;

b) refrain and immediately cease any use of the trademarks and/or names "Slim Syrups", "Slim Syrups and design" (logo) or any other similar or identical variant that may create confusion with Skinny Syrups or depreciate the goodwill of Skinny Mixes;

d) immediately make unavailable, and suspend access to, the website found at "slimsyrups.com";

e) refrain and immediately cease using the domain names "slimsyrups.ca" and "slimsyrups.com";"

24.4. **Category 4:** Conclusions i) and j) of Plaintiff's Application aim at forcing the Defendants and Impleaded Party to stop passing off their products as Plaintiff's products and making false statements regarding the Plaintiff's business and products. The read as follows:

"i) refrain and immediately cease from passing off Defendants' business as Plaintiff's business or representing to the public that Defendants' business is or could be affiliated with Plaintiff's business;

j) refrain and immediately cease from making false and/or misleading and/or anti-competitive representations and/or statements with respect to the Plaintiff, its business, its trademarks and the products it offers identical or similar to the ones reproduced in Exhibits R-2, R-6, R-7, R-10, R-12 and R-13;"

24.5. **Category 5:** Conclusion k) of Plaintiff's Application aims at forcing the Defendants and Impleaded Party to recall all products and materials using the name "Slim Syrups". It reads:

"k) immediately recall all products as well as all signage, advertising or other material, whether it be in physical or electronic form, which would violate the above injunctive orders;"

1.1 Part 1 of the test - The appearance of right, or serious question to be tried

[25] The judge seized with an application for the issuance of an interlocutory injunction is generally not called upon to undertake an in-depth analysis of the merits of the case, to decide whether the plaintiff demonstrates a serious question to be tried. The application judge should rather undertake a "preliminary investigation of the merits to decide" this issue, to ensure "that the application is neither frivolous nor vexatious"¹³.

[26] As the Quebec Court of Appeal mentions: "*Ce critère est généralement peu exigeant. Il suffit que la demande ne soit ni frivole ni vexatoire. Par conséquent, un long examen du bien-fondé de la demande n'est souvent ni nécessaire, ni souhaitable*"¹⁴.

[27] An exception to the above principle exists where the plaintiff seeks a mandatory interlocutory injunction, i.e. an injunction that "directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise put the situation back to what it should be, which is often costly or burdensome for the defendant and which equity has long been reluctant to compel"¹⁵. In such a situation, "the

¹³ *R. v. Canadian Broadcasting Corp.*, [2018] 1 SCR 196, 2018 SCC 5 ["CBC"], at para. 12. See also *RJR*, pages 334-335.

¹⁴ *Groupe CRH Canada inc. c. Beauregard*, 2018 QCCA 1063, para. 28.

¹⁵ *CBC*, para. 15.

appropriate criterion for assessing the strength of the applicant's case [...] is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case".¹⁶

[28] It is with these principles in mind that the Court will evaluate the strength of Skinny's case, for each category of conclusions sought in Plaintiff's Application.

1.1.1 Category 1 – Conclusion aiming at preventing the Defendants and Impleaded Party from copying the Plaintiff's copyrighted materials and other publications

[29] This conclusion is not mandatory and is therefore subject to the "serious issue to be tried" criterion.

[30] The plaintiff simply seeks an order to ensure that the Defendants refrain from copying extracts of its promotional materials, including its website, and to use those copies in their own promotional materials.

[31] In the Court' view, the Plaintiff has met this criterion.

[32] In its initial application for the issuance of a provisional injunction, Skinny demonstrated that the Defendants and Impleaded Party had made a literal copy-paste of portions of its website to create the "Recipes" section of their website.

[33] In concluding that Skinny had met the first prong of the *RJR* test, Justice Immer considered that the Defendants and Impleaded Party had "reproduced the product description of the syrups on their web site word for word, although such description is arguably a literary work within the meaning of S. 2 of the *Copyright Act* given the use of lyrical or creative wording such as "the perfect way to make your favorite beverages taste indulgent" or "guilt free flavor".¹⁷ Justice Immer further qualifies the Defendants' conduct as being "shameless copying of the non-generic product description".¹⁸

[34] After Justice Moore refused to renew the Immer Order, and after Justice Bisson's dismissal of the second application for a provisional injunction, the Defendants repeated the same pattern of shameless copying of extracts of Skinny's website to be used on their own website.

[35] A comparison of Skinny's website in December 2023¹⁹ with Defendants' website at the same date²⁰ shows that Defendants once again copied word for word some recipes taken from Skinny to use on their website. The most telling example is the *Mint Mojito*

¹⁶ *Ibid.*

¹⁷ Justice Immer Order, para 13.8.

¹⁸ *Id.*, para 21.

¹⁹ Exhibit P-16.

²⁰ Exhibit P-15.

Recipe.²¹ Not only did the Defendants copy this recipe word for word, but they also forgot to remove the word “Skinny” from the recipe. In the Directions section of the recipe, one could read “Add white rum, ice and **Skinny Mojito Mix**”.

[36] Are the Defendants allowed to copy their competitors’ promotional materials in this fashion? This is at the very least a serious question to be tried.²²

1.1.2 Category 2 – Conclusions to force the Defendants and Impleaded Party to transfer control over the *skinnymixes.ca* domain name and associated email addresses

[37] These conclusions are mandatory and therefore subject to the demonstration of a strong *prima facie* case, as per *CBC*.

[38] In the Court’s view, Skinny has met its burden to show such a strong *prima facie* case.

[39] The domain name *skinnymixes.ca* was registered by Hartstein on October 30, 2018.²³ The very next day, he reached out to Skinny to inquire about the possibility for him to distribute Skinny’s products in Canada.²⁴ Those discussions were successful and lead to 9335 becoming the Canadian distributor for Skinny.

[40] During those discussions, Skinny provided Hartstein with voluminous information to help him create the Canadian website for Skinny’s products, including product images, product details, spreadsheets that break out product filters and categories,²⁵ reviews on the products²⁶ and a list of no less than 1,400 potential Canadian clients whose contact had been created on Skinny’s US website.²⁷ Skinny also gave Hartstein permission to “pull the recipes from²⁸” Skinny’s US website.

[41] Around April 1, 2019, 9335 and Skinny entered into a Trademark License Agreement²⁹. This contract provides, *inter alia*, the following:

“2.1 Grant. Subject to the terms and conditions of this Agreement, Licensor [Skinny] hereby grants to Licensee [9335] a non-exclusive right and licence to use the Licensed Marks during the Term in connection with promotion, advertising, distribution and sale of Licensed Products in the Territory.

²¹ Exhibit R-15, page 5.

²² See, by analogy, *Groupe Pages jaunes Cie c. 4143868 Canada inc.*, 2011 QCCA 960, paras. 17 and 21.

²³ Exhibit R-20.

²⁴ Exhibit R-21, page 8.

²⁵ *Id.*, page 6.

²⁶ *Id.*, page 56.

²⁷ *Id.*, page 1.

²⁸ *Id.*, page 56.

²⁹ Exhibit R-9.

4.1 Acknowledgment of Ownership. Licensee acknowledges that (a) Licensor is the owner of the Licensed Marks in the Territory and all goodwill related thereto, and (b) all use of the Licensed Marks hereunder and any goodwill accruing therefrom shall inure solely to the benefit of Licensor.”

[42] Before signing this Agreement, Hartstein acknowledged his understanding of its purpose:

“Quickly looked over and if I read it correctly you are wanting to insure we do not use your brand without your consent for any purpose other than promoting your products and we do not replicate your products/brand. If as above I see no issues or concerns on our end.”³⁰

[43] In August 2022, Skinny informed 9335 that it was terminating the distribution agreement³¹. Despite the terms of the Trademark License Agreement, the Defendants refuse to transfer to Skinny the skinnymixes.ca domain name and all email addresses associated thereto.

[44] Justice Moore refused to order the transfer of the skinnymixes.ca domain name to the Plaintiff because “the right to the skinnymixes.ca domain name is an issue for a later stage in these proceedings”.³² He further adds, as was represented to him at this early stage, that the use of the email addresses associated with the skinnymixes.ca domain name “appears to be a way to manage the consequences of Justice Immer’s order” and that the “defendants are not using the info@skinnymixes.ca email for anti-competitive purposes but to comply with Justice Immer’s judgment. Its use should further underline the distinction between the parties’ companies and products”.³³

[45] Justice Moore, with the limited evidence before him, presumed of the Defendants and Impleaded Party’s good faith, and rightly so.³⁴ However, the Court cannot come to the same conclusion when considering the evidence adduced at the interlocutory stage.

[46] During his examination on discovery held on July 18, 2023, Hartstein mentioned under oath that “we sent out the court-mandated notice to everybody and we stopped answering emails on the Skinny Mixes altogether”.³⁵ No evidence to the contrary was available at the time of the hearing before Justice Moore.

[47] The record now contains extensive evidence demonstrating that Harstein’s answer on discovery was false.

³⁰ Exhibit R-21, page 78. See also pages 69-77.

³¹ Exhibit MH-1.

³² Justice Moore Judgment, para. 18.

³³ *Id.*, para. 20.

³⁴ Article 2805 C.C.Q. states that “Good faith is always presumed, unless the law expressly requires that it be proved.”

³⁵ Examination on discovery of Moishe Hartstein held on July 18, 2023, page 122, lines 22-24.

[48] In early May, 2023, the Defendants posted a notice³⁶ on their website (reproduced at paragraph 10 of this judgment) that lead the reader to believe that Skinny Mixes had simply changed its name for Slim Syrups. The Immer Order forced the Defendants to refrain from making similar or identical statements in the future. The Immer Ordered also forced the Defendants to make the skinnymixes.ca website unavailable. To comply with this order, the Defendants arranged for the skinnymixes.ca website to indicate "Site under maintenance". It also contains a notice inviting customers to "contact us at info@skinnymixes.ca with any questions or concerns".³⁷

[49] Contrary to what was represented to Justice Moore, the Defendants and Impleaded Party did use this email address for anti-competitive purposes, before and after the Moore Judgment.

[50] For example, on May 24, 2023 (two days before the Moore Judgment), a client wrote to info@skinnymixes.ca to inquire as to the possibility to place an order, given that the website was under maintenance. The same day, a representative of the Defendants answered the client, falsely claiming that they were "mandated to go offline due to Canadian compliance issues".³⁸ The Defendants also took this opportunity to direct the client to "another platform that can deliver much superior value and will be resolved sooner". The platform to which the client was directed is controlled by the Defendants.

[51] The record contains numerous examples³⁹ of similar interactions with customers who wrote to info@skinnymixes.ca.

[52] Skinny is faced with a situation where clients are under the impression they are writing to its customer service, and the answers they receive are false assertions that Skinny's products do not meet the requirements of the Canadian Food Inspection Agency⁴⁰ and are redirected to buy products from Defendants.⁴¹ It is difficult to imagine a more anti-competitive way to use this email address.

[53] It is not disputed that nothing in the Trademark Licence Agreement protects the work done by 9335 to develop Skinny's brand in Canada. Quite to the contrary, section 4.1 of this contract specifically provides that all use of Skinny's marks and all goodwill accruing therefrom shall inure solely to Skinny.

[54] Although the domain name skinnymixes.ca was registered by Hartstein, the Defendants were arguably only allowed to use it because of their contractual relationship with Skinny.

³⁶ Exhibit R-2.

³⁷ Exhibit MH-11.

³⁸ Exhibit R-12, page 1.

³⁹ Exhibits R-6, R-10 and R-12.

⁴⁰ See for example, Exhibit R-10, page 5.

⁴¹ Exhibit R-12.

[55] In a decision rendered in 2019,⁴² the Supreme Court of British Columbia ordered the defendant, at the interlocutory stage, to restore control over a domain name and corresponding email addresses to the plaintiff. In the decision rendered on the merits in 2020,⁴³ the same Court ordered that the domain name be permanently transferred to the plaintiff. The Court explained that, as long as the defendant “controls the domain name, users of the internet will associate him with [plaintiff], and he will have the ability to actively misrepresent the status of [the plaintiff]”.⁴⁴

[56] The same reasoning is applicable here. Skinny has demonstrated a strong *prima facie* right to be awarded control over the skinnymixes.ca domain name and associated email addresses.

1.1.3 Categories 3 and 5 – Conclusions to force the Defendants and Impleaded Party to stop using the name “Slim Syrups” and to recall all products and materials using the name “Slim Syrups”

[57] These conclusions are sought based on Skinny’s assertions that the Defendants and Impleaded Party’s faults have caused great confusion in the marketplace, many customers, retailers and wholesalers having confused the Plaintiff’s “Skinny Syrups” with the Defendants’ “Slim Syrups”.

[58] The conclusions sought are mandatory and subject to the demonstration of a strong *prima facie* case, as per *CBC*.

[59] As mentioned by the Supreme Court of Canada in *CBC*, such “an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial”.⁴⁵

[60] There is evidence in the record⁴⁶ showing that much confusion exists in the marketplace, many customers, retailers and wholesalers being confused between the products of both parties. Some of this evidence dates back from several days after the Immer Order, in which the Defendants were ordered to modify the trade dress of their “Slim Syrups”. The more recent evidence also suggests confusion, but it is not clear that this confusion was caused by the Defendants and Impleaded Party’s faults.

[61] Only a trial on the merits will allow the Court to make this determination. An order forcing the Defendants to cease using the name “Slim Syrup” altogether and to recall all products, signage and advertising using this name is better left for the merits, as it would be equivalent to a final determination of the action in favour of Skinny.

⁴² *Canivate Growing Systems Ltd. v. Brazier*, 2019 BCSC 899.

⁴³ *Canivate Growing Systems Ltd. v. Brazier*, 2020 BCSC 232.

⁴⁴ *Id.*, para. 43.

⁴⁵ *CBC*, para. 15.

⁴⁶ Exhibits R-3, R-7, R-22, R-23, R-24, R-25, R-26 and R-27.

[62] Although the Court finds that Skinny has shown the existence of a serious issue to be tried, it has not met its more stringent burden to show a strong *prima facie* case.

1.1.4 Category 4 – Conclusions to force the Defendants and Impleaded Party to stop passing off their products as Plaintiff's products and making false statements regarding the Plaintiff's business and products

[63] These conclusions are not mandatory and therefore subject to the “serious issue to be tried” criterion.

[64] As noted above, there is more than enough evidence in the record⁴⁷ to show that Defendants have made numerous false statements about Skinny' business and products. Statements of that nature are prohibited by article 7 of the *Trademarks Act*.⁴⁸ They also constitute a civil fault under the usual rules of civil liability.⁴⁹

[65] In the Court' view, the Plaintiff has met its burden to show the existence of a serious issue to be tried.

1.2 Part 2 of the test - The necessity to issue the injunction to prevent serious or irreparable prejudice or to avoid creating a factual or legal situation that would render the judgment on the merits ineffective

[66] Preventing serious or irreparable harm or avoiding the creation of situation that would render the judgment on the merits ineffective is the *raison d'être* of interlocutory injunctions.⁵⁰

[67] In Quebec civil law, the plaintiff must show the that the injunction is necessary to prevent a serious *or* irreparable harm. This is the main difference with the injunction in *common law*, where the plaintiff must show irreparable harm. In Quebec, a serious prejudice is considered sufficient to justify the court's intervention by way of the issuance of an interlocutory injunction.⁵¹ Indeed, an interlocutory injunction can be issued in Quebec if the plaintiff demonstrates a serious prejudice, even if this prejudice in not considered irreparable and may be compensated by an award of damages.⁵²

⁴⁷ Exhibits R-2, R-6, R-7, R-10, R-12 and R-13.

⁴⁸ *Trademarks Act*, R.S.C., 1985, c. T-13.

⁴⁹ *Groupe Pages jaunes Cie c. 4143868 Canada inc.*, 2011 QCCA 960, para. 12-13.

⁵⁰ Art. 511 C.C.P.

⁵¹ *Groupe CRH Canada inc. c. Beauregard*, 2018 QCCA 1063, paras. 31-33.

⁵² *Ibid.*

[68] It has long been recognized by Quebec Courts that a potential loss of clients is considered irreparable prejudice, sufficient to meet the second prong of the *RJR* test.⁵³

[69] In the Court's view, Skinny has met the second prong of the *RJR* test for every category of conclusions sought in its Application for an interlocutory injunction.

[70] The copying of Plaintiff's promotional materials by the Defendants (category 1) can lead to confusion in the marketplace and result in the loss of potential clients.

[71] The dishonest use by the Defendants of the *skinnymixes.ca* domain name and associated email addresses (category 2) contributes to the confusion in the marketplace and has probably already led to a loss of clients for Skinny. Allowing the Defendants to continue to control the domain name and associated emails could exacerbate this loss.

[72] Allowing the Defendants to continue using the name "Slim Syrup" (categories 3 and 5) could lead to an increase in the confusion in the marketplace. Had the Court concluded that the Plaintiff had met its burden to show a strong *prima facie* case for these categories of conclusions, the second prong of the *RJR* test would have been met.

[73] The false and misleading statements made by the Defendants about Skinny's business, trademarks and products, as well as their attempts of passing off their business as Skinny's business (category 4) most likely caused a loss of clients to Plaintiff. Allowing the Defendants to continue doing so would likely increase Plaintiff's prejudice.

1.3 Part 3 of the test – Balance of Convenience

[74] In assessing the balance of convenience, the Court must compare the harm that the plaintiff would suffer if the injunction is denied but the plaintiff ultimately prevails on the merits to the harm suffered by the defendant in the opposite situation.

[75] The Court is of the view that the balance of convenience weighs in favour of Skinny for the conclusions sought in categories 1, 2 and 4.

[76] The Defendants and Impleaded Party will suffer no harm if they are ordered to refrain and cease the reproduction and copying of Skinny's promotional materials (category 1). They will simply have to come up with their own recipes and wording. This cannot be viewed as a prejudice.

[77] Hartstein admitted, in cross-examination, that he no longer needs the *skinnymixes.ca* domain name, website and associated email addresses (category 2). He refuses to turn them over to the Plaintiff because he does not want to provide Plaintiff with his list of customers. On the other hand, Skinny is presently held hostage by the

⁵³ *Vidéotron Ltée c. Industries Microlec produits électroniques inc.*, [1987] R.D.J. 503 (C.A.), 1987 CanLII 658 (QC CA), paras. 25-26; see also *Multi-marques inc. c. Boulangerie Gadoua Itée*, J.E. 2000-473 (C.S.), para. 20; *Candock inc. c. Stegen*, 2015 QCCS 3193, para. 101.

Defendants, in that they completely control the Canadian website for Skinny's products and they control the emails associated with its client service. The evidence demonstrates that they have used these email addresses to disparage Skinny and its products. The prejudice suffered by Skinny far outweighs that suffered by the Defendants. In addition, the Trademark Licence Agreement states that all goodwill accruing from 9335's use of Skinny's marks inures solely to Skinny.

[78] The Defendants will suffer no prejudice if ordered to stop making false and misleading statements about Skinny's business, trademarks and products, or if they are prevented from passing off their business as Skinny's business (category 4). The prejudice suffered by Skinny far outweighs that suffered by the Defendants.

[79] Conversely, the prejudice that the Defendants would suffer if they were ordered to stop using the name "Slim Syrups" and forced to recall all products using that name, but were eventually successful on the merits, would outweigh the prejudice suffered by the Plaintiff in the opposite situation. This issue will need to be determined on the merits.

PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

[80] Skinny asks the Court to order that the present judgment be executory notwithstanding appeal, based on article 661 C.C.P.

[81] This will not be ordered, as such a conclusion is unnecessary. Article 514 C.C.P. specifically provides that an "injunction remains in force despite an appeal".

FOR THESE REASONS, THE COURT:

[82] **ISSUES** an interlocutory injunction, to be valid until final judgement or earlier settlement between the parties, if any, ordering the Defendants 9335-5147 QUÉBEC INC. d/b/a CAPITAL NUTRITION and d/b/a HEALTH FOOD INC., and CAPITAL NUTRITION INC., their respective directors, officers, shareholders, servants, agents, employees, successors, assigns, affiliates, joint ventures, and any person or entity acting on behalf of or under the authority of the Defendants, as well as the Impleaded Party MOISHE HARTSTEIN ("MORRIS HART"), to:

82.1. refrain and immediately cease reproducing, in whole or in part, Skinny Mixes' website, social media publications, marketing or promotional material, logos, slogans, taglines, trade communications, product descriptions, images and photographs, recipes, and any other work of the same nature;

82.2. immediately transfer and cede control to Plaintiff over the domain name skinnymixes.ca;

82.3. immediately transfer and cede control to Plaintiff over any and all email addresses with the domain name "@skinnymixes.ca";

82.4. refrain from using "@skinnymixes.ca" email addresses or creating any other "@skinnymixes.ca" email addresses;

82.5. refrain and immediately cease from passing off Defendants' business as Plaintiff's business or representing to the public that Defendants' business is or could be affiliated with Plaintiff's business;

82.6. refrain and immediately cease from making false and/or misleading and/or anti-competitive representations and/or statements with respect to the Plaintiff, its business, its trademarks and the products it offers, identical or similar to the ones reproduced in Exhibits R-2, R-6, R-7, R-10, R-12, and R-13;

[83] **PERMITS** the service of this injunctive order outside of legally required hours and days and, if necessary, by whatever means possible, including by email;

[84] **DISPENSES** Plaintiff from posting additional security for costs;

[85] **THE WHOLE** with legal costs against the Defendants and Impleaded Party, in favour of Plaintiff.



PATRICK OUELLET, S.C.J.

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Hearing dates: February 26 and 27, 2025