

Confusing Times II



The Federal Court of Appeal has recently confirmed the decision of the trial judge and dismissed an appeal from a decision which found that use of the business name “Time Development Group” infringed a registration of the trademark TIMES GROUP CORPORATION. [The decision](#) of the Court of Appeal confirms an important point relating to confusion analysis under the *Trademarks Act*.

The Facts

Times Group Corporation (“Times”) has carried on business as property developer and manager mainly in the greater Toronto area. Its principle target market group is the Chinese community. In 2014 it obtained a trademark registration for the trademark TIMES GROUP CORPORATION for use in association with management and financial services relating to all aspects of the management and financing of residential, commercial and industrial properties and real estate projects and developments and related services based on use since 2011.

Time Development Group Inc. (“TDG”) also carries on business as a property developer and manager. TDG has used the tradename “Time Development Group” initially mainly in Saskatchewan but in 2013 commenced operating in the greater Toronto area. It also targets the Chinese community.

The trial judge found that Times trademark was distinctive and valid and that the trade name used by TDG was confusing with it.

The Appeal

TDG appealed from this decision to the Federal Court of Appeal (“FCA”). TDG asserted that the conclusion there was a reasonable likelihood of confusion was flawed because the trial judge’s analysis failed to take into account the use of other “TIMES” trademarks and tradenames of both the respondent and by third parties.

This issue was factual and the FCA will only intervene if it is established that the judge has made a palpable and overriding error.

When the FCA looked at the confusion analysis as a whole they thought he had taken this evidence into account. His finding on confusion was premised on the fact that there was a very strong resemblance between the registered trademark TIMES GROUP CORPORATION and the

tradename Time Development Group and that the mark and the name were used in similar businesses and in the same vicinity.

At the trial TDG argued that persons seeking to purchase expensive residential properties would take care to ensure they knew exactly from whom they would be buying. Discerning buyers could be expected to choose vendors carefully and note small differences in the respective marks.

The trial judge said this was not the test for confusion. Even for expensive goods, which may have a lower risk of actual confusion, the question is still whether a somewhat rushed casual consumer's first impression would likely to cause him or her to conclude that the party's goods had a common source. Whether serious buyers later conduct further research is irrelevant as the first impression is pertinent.

Where resemblance between the marks or the names in issue is strong and other factors do not point emphatically in the other direction, the likelihood of confusion is not mitigated by the cost of the product in issue. To support this decision the trial judge referred to the decision of the Supreme Court of Canada in the [Masterpiece](#) case. The FCA confirmed that the judge's analysis applied the correct legal principles. As a result the appeal was dismissed.

Comment

This case serves as a reminder that the fact that goods or services are expensive must relate to the attitude of the consumer in the marketplace. Any impact on the likelihood of confusion is premised on the first impression of consumers when they encounter the marks.

As stated by the Supreme Court of Canada, it may not be relevant that consumers are unlikely to make choices based on first impressions or that they generally take considerable time to inform themselves about the source of expensive goods and services. Both of these – later research or consequent purchase – occur after the consumer encounters a mark in the marketplace. The distinction is important because even with increased attentiveness it may still be likely that the consumer shopping for expensive goods and services will be confused by the trademarks they encounter. Careful research and deliberation may dispel any trademark confusion that may have risen. However, it is the confusion when they encounter the trademarks that is relevant.

Later research, which may later remedy confusion does not mean that no confusion ever existed or that it will not continue to exist in the minds of consumers who did not carry out that research. Before source confusion is remedied it may lead a consumer to seek, consider or purchase goods or services from a source they had had no awareness of or interest in. Such diversion diminishes the value of the goodwill associated with the trademark and business a consumer initially thought he or she was encountering on seeing the trademark.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.