

IN THE SUPREME MOOT COURT FOR INTELLECTUAL PROPERTY APPEALS

BETWEEN:

KANGAROO INC.

Appellant

– and –

JANET DOUGH

Respondent

FACTUM OF THE RESPONDENT

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PART I: OVERVIEW

[1] This case is about a multi-million dollar corporation using an unjustifiably aggressive legal tactic against a much smaller business. The Appellant Kangaroo Inc. (“Kangaroo”) seeks to overturn the decision of the Court of Appeal vacating an Anton Piller Order (“APO”) against the Respondent, Janet Dough (“Janet”).

[2] This appeal should be dismissed. The APO should not have been granted in the first place because Kangaroo failed to meet the stringent requirements for the remedy. Given its extreme and highly-intrusive nature, the APO should be reserved for clear cases of fraud, counterfeiting, or other illegal activities where it would serve its purpose of preventing criminals from evading the law by destroying incriminating evidence.

[3] APOs should not be used in cases like Janet’s, where there is no strong *prima facie* case of trade-mark infringement, no evidence that Janet would cause significant damage to Kangaroo if not stopped in her tracks immediately, and no proof that Janet would likely destroy incriminating evidence. Kangaroo did not have to resort to an APO and could have obtained evidence using other, less intrusive means.

[4] Granting an APO in this case would encourage unfair competition. Large corporations like Kangaroo would rely on such orders to bully smaller businesses like Janet’s out of the market knowing that they rarely have the resources to challenge them in court. As a result, consumer choice in the marketplace would become more limited. The threshold for obtaining an APO must remain high to ensure the remedy is not abused. For this reason, the Court of Appeal's decision vacating the order was correct and should be upheld.

PART II: STATEMENT OF FACTS

Trade-marks at issue and associated wares

[5] Kangaroo is a successful Australian sportswear company. For the past eight years Kangaroo has been using the phrase “Just Roo It” as a slogan on its sportswear, including t-shirts. Worldwide sales of Just Roo It t-shirts have been in the millions of dollars. Kangaroo sells its products in its own specialty stores as well as at a variety of other locations including department stores, sports stores, and counters and stands set up in malls or near tourist sites. “Just Roo It” is a registered trade-mark in Canada.

Kangaroo v Janet Dough, 2014 FCIP 150 at para 2 [*Trial*].

[6] Janet is a student and a sole proprietor who, since July 2014, operated a small pop-up stand named “Janet’s Summertime Yogurt.” The stand was sometimes located near the ferry docks in Toronto, Ontario. As a very small business, Janet’s stand operated on a cash-only basis and was not registered for harmonized sales tax (HST). Janet employed one assistant. At her stand, Janet sold frozen yogurt and displayed t-shirts with artwork printed on them showing a cow, a frozen yogurt cone, and the words “Just Moo It.”

Trial at paras 7-9.

Kangaroo’s claim and service of the APO

[7] Kangaroo filed a statement of claim in August 2014 alleging that Janet’s Just Moo It t-shirts infringed its Just Roo It trade-mark pursuant to section 20 of the *Trade-marks Act* (“the Act”). Kangaroo also filed an *ex parte* motion for an APO. The APO was granted based on two affidavits provided by Kangaroo: one by its private investigator, Mr. Bunter, describing his observations of customers buying food and clothing at Janet’s stand, and the other by

Kangaroo's Vice President of Marketing, Mr. Crowe, discussing the impact of piracy and counterfeiting on Kangaroo's trade-mark rights.

Trial at paras 10-12.

[8] Kangaroo executed the APO on August 28, 2014. According to a second affidavit of Mr. Bunter filed two days later, Janet was cooperative, although she hesitated to give the solicitor her name when initially approached, saying it was "Paulette Poutine, ha!" She later acknowledged that her name was Janet Dough. As the solicitor serving the APO finished explaining the terms to her, Janet drew his attention to her assistant walking away from the stand with an armful of what appeared to the solicitor to be t-shirts. At that point Janet stated "Thanks for that, Mr. Roo, but the joke's on you. While you were talking, one of my business associates had a bit of an inventory clearance!" Nevertheless, according to the affidavit, Janet cooperated with the order and provided the solicitor with all six Just Moo It t-shirts that were found at the stand. Janet also provided paperwork relating to sale and purchase of "shirts." The paperwork did not provide further details as to what was shown on the shirts.

Trial at paras 13-14.

Trial court proceedings

[9] The Trial Court of Canada, Intellectual Property Division, allowed the APO to continue until trial. The Court found that Kangaroo's *prima facie* case was "exceedingly strong" and that the nature of Janet's business, along with her behaviour during the execution of the APO, was sufficient for the finding that she would likely destroy incriminating evidence.

Trial at paras 17-26.

Court of Appeal proceedings

[10] The Court of Appeal overturned the decision of the Trial Court and vacated the APO. The Court of Appeal held that Kangaroo had not made out a *prima facie* case of trade-mark infringement as confusion between the marks was unlikely. The court emphasized the “sophistication of today’s consumers,” who, in the Court’s view, would recognize that Janet’s t-shirts were “openly a parody” of the Just Roo It trade-mark and would therefore not be confused as to the source of the goods. In vacating the APO, the Court also found that Kangaroo had suffered no damage, and that the high threshold for finding probable destruction of evidence had not been met.

Janet Dough v Kangaroo, 2014 FCA 455 at paras 4-7 [*Appeal*].

PART III: POINT IN ISSUE

[11] The issue in this appeal is whether the Court of Appeal was correct in vacating the APO.

PART IV: ARGUMENTS IN BRIEF

[12] An APO is an extraordinary remedy, granted only in exceptional cases. It confers on the plaintiff search and seizure powers which run contrary to the principles of private property and trespass. In addition, it is granted on an *ex parte* basis without giving the other party a chance to defend itself. If not sparingly granted and closely controlled, it can cause great prejudice and irreparable loss to an unsuspecting and innocent defendant. For this reason, all requirements necessary for the granting of an APO must be fully satisfied.

Profekta International v Mai, [1996] FCJ No 1133, [1997] 1 FC 223.
British Columbia (Attorney General) v Malik, 2011 SCC 18 at para 5 [*Malik*].
United States of America v Yemec, [2009] OJ No 3546, 97 OR (3d) 409.

[13] The test for making an APO is found in *Celanese*:

- 1) The plaintiff must demonstrate a strong *prima facie* case;
- 2) The damage to the plaintiff of the defendant's alleged misconduct, potential or actual, must be very serious;
- 3) There must be convincing evidence that the defendant has in its possession incriminating documents or things; and
- 4) It must be shown that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.

Celanese Canada Inc v Murray Demolition Corp, 2006 SCC 36 at para 35, 2 SCR 189 [*Celanese*].

[14] Kangaroo has failed to satisfy each element of this test, as further set out below.

A. Kangaroo has not established a strong *prima facie* case

i. The prima facie standard is high

[15] The strong *prima facie* case is normally satisfied through proof of title to intellectual property rights and clear evidence of infringement. Although APO cases do not clearly articulate what is meant by the words “strong *prima facie* case,” the threshold to be met is discussed in greater detail in cases dealing with Mareva injunctions, a remedy very similar to the APO. To meet the strong *prima facie* standard, the plaintiff must establish that it is “clearly right” in its allegations against the responding party in the action, or that it is “almost certain to succeed at trial” in respect of those allegations. This is the correct standard for APOs because in the trademark context APOs are issued predominantly in straightforward cases of counterfeit goods, where the infringing product replicates the original product's features.

Adobe Systems Inc v KLJ Computer Solutions Inc, [1999] 3 FC 621 at para 36, 1 CPR (4th) 177 [*Adobe*].
SLM Soft.com v Rampart Securities (Bankruptcy), [2004] OJ No 3290, 4 CBR (5th) 105 at para 14.
Ronald E Dimock, *Dimock: Intellectual Property Disputes: Resolution and Remedies*, loose-leaf (consulted on January 4 2015) (Canada: Carswell, 2003) , ch 16.5.

[16] This is not a straightforward case of counterfeiting, because Janet's Just Moo It t-shirts are not a copy of Kangaroo's Just Roo It t-shirts. Therefore, Kangaroo must establish that it will

almost certainly succeed at trial on the merits of its confusion claim under section 20 of the Act. For the reasons set out below, confusion between the two marks is unlikely.

Appellant's factum at paras 36 - 37.

ii. Confusion between Kangaroo's and Janet's marks is unlikely

Confusion is measured from the perspective of an ordinary consumer

[17] In order to make out a strong *prima facie* case of confusion under section 20 of the Act, Kangaroo must establish likelihood that a consumer would be unable to discern which company stands behind Janet's t-shirts and could mistakenly infer that the t-shirts are manufactured by Kangaroo.

Masterpiece Inc v Alavida Lifestyles Inc, 2011 SCC 27 at para 1, 2 SCR 387 [*Masterpiece*].

[18] The likelihood of confusion is measured from the perspective of an ordinary casual consumer somewhat in a hurry who, at the time the new trade-mark catches their eye, will have only a general and not very precise recollection of the earlier trade-mark. It is neither an expert, nor a "casual fitness enthusiast," as submitted by Kangaroo, nor a "moron in a hurry." In *Mattel* the Supreme Court stated that courts owe the consumer a certain amount of credit for their intelligence or knowledge.

Veuve Cliquot Ponsardin v Boutiques Cliquot Ltée, 2006 SCC 23 at para 58, 1 SCR 824 [*Veuve Clicquot*].
Appellant's factum at para 18.
Mattel, Inc v 3894207 Canada Inc, 2006 SCC 22 at para 57, 1 SCR 772 [*Mattel*].

The test for confusion

[19] The confusion analysis is guided by subsection 6(5) of the Act, which provides a non-exhaustive list of factors that must be considered in determining whether there is inference of a common trade source. All surrounding circumstances shall be considered, including: (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have

become known; (b) the length of time the trade-marks or trade-names have been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

Trade-marks Act, RSC 1985, c T-13, s 6(5).
Mattel, *supra* para 18 at para 89.

S. 6(5)(a). Both marks are inherently distinct

[20] It is not disputed that Kangaroo’s “Just Roo It” slogan is widely known. However, it is not a distinctive expression *per se*. The words “just,” “it” and “roo” were not invented by Kangaroo. The word “roo” is a well-known short form of the word kangaroo in Australia. As such, these words should receive less protection than in the case of “an invented or unique or non-descriptive word[s]”.

General Motors v Bellows, [1949] SCR 678 at 691, 10 CPR 101.

[21] Even if this Court finds that Kangaroo’s trade-mark has become significantly famous and therefore distinctive, distinctiveness alone is not a deciding factor in infringement cases. There have been a number of cases where courts found no confusion despite the trade-mark being famous.

Veuve Clicquot, *supra* para 18 at paras 26-37.
Mattel, *supra* para 18.

[22] In addition, Janet’s Just Moo It t-shirts are distinctive in themselves. They display a cow with a cone of frozen yogurt, which implies that Janet’s mark is associated with frozen yogurt rather than Kangaroo’s brand. These prominent design elements make Janet’s t-shirts even more distinct from Kangaroo’s t-shirts and reduce the likelihood of confusion.

S.6(5)(b). The length of time Kangaroo used its mark should not preclude Janet from market entry

[23] The fact that Kangaroo's trade-mark has been in use for eight years, while Janet commenced use of her mark in the summer of 2014, is not determinative. In assessing the policy behind the confusion analysis, the importance of fair competition should be a guiding consideration. As a result, the length of time Just Roo It has been in use cannot by itself preclude Janet from market entry.

Mattel, supra para 18 at paras 21-22.

S.6(5)(c). Janet's mark is associated with similar wares but is used for a different purpose

[24] Janet acknowledges that both the Just Roo It and Just Moo It trade-marks are associated with t-shirts. Nevertheless, the shirts have different purposes. Janet's shirts are souvenirs promoting frozen yogurt. Kangaroo's shirts are sports apparel. The possibility of confusion is unlikely, because no reasonable consumer would expect to find gym clothes at a yogurt stand.

S.6(5)(d). The nature of Janet's trade is different from Kangaroo's

[25] There is less risk of confusion where the wares or services are distributed in different types of stores.

Pink Panther Beauty Corp v United Artists Corp, [1998] 3 FC 534, 80 CPR (3d) 247 at para 30.

[26] In this case, Janet and Kangaroo use different modes of distribution with no possibility of overlap. Although Kangaroo's sports apparel may be found in counters and stands set up in malls or near tourist sites, it would be fundamentally incompatible with their brand image to sell their clothing at a food stand like Janet's.

[27] Even assuming that Janet's business could expand at some point, her t-shirts are closely associated with her primary business of selling frozen yogurt. If she were to grow her business

large enough to open a store, it would be a frozen yogurt store, not a clothing store. It is unlikely that Kangaroo t-shirts would ever be sold there. With no possibility of overlap in the channels of trade, there is no likelihood that a consumer would buy a “Just Moo It” t-shirt at a popup yogurt stand thinking it was produced by Kangaroo.

[28] Moreover, as pointed out in the American case of *Nike, Inc v Just Did It Enterprises*, the two business attract two different kinds of consumers, reducing the possibility of confusion even further:

[O]ne group of purchasers might seek out the [brand] name to ensure top quality and to display to others their good taste for such quality. On the other hand, some purchasers might resent paying a premium to be a walking billboard and would relish the opportunity to mock trendy folks who wear labels on their sleeves.

Nike, Inc v Just Did It Enterprises, [1993] 6 F 3d 1225 at para 25 (7th Cir).

S.6(5)(e). There is a low degree of resemblance between the marks

[29] As the Supreme Court stated in *Masterpiece*, “the degree of resemblance is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion.”

Masterpiece, supra para 17 at para 49.

[30] Although previously courts considered the first words the most important for the purpose of distinctiveness, in *Masterpiece* the court said that the preferable approach is to consider whether there is an aspect of a trade-mark that is particularly striking or unique. In this case, the most striking and unique features of the marks are the whimsical verbs “roo” and “moo” that stand out because of the repeated letter “o.” These verbs give meaning to the slogans and evoke very different associations.

Masterpiece, supra para 17 at para 63.

[31] The word “Roo” evokes an association with Kangaroo, as the idea behind the company name and the animal, the kangaroo, representing the company’s home—Australia. The word “Moo” evokes an association with cows and dairy. Read as a whole, the slogan “Just Roo It” calls for being active and exercising in Kangaroo’s sports apparel, while “Just Moo It” calls for eating dairy. The addition of a prominent design element—the images of a cow and a yogurt cone—make the likelihood of confusion even lower.

Masterpiece, supra para 17 at para 64.

[32] Furthermore, when the question of infringement is decided upon the principle of *idem sonas* (i.e. that the marks in question are similar in sound), the matter is one of first impression. Kangaroo has not established, through survey evidence or by any other means, that as a matter of first impression the use of two marks would result in consumer confusion.

Battle Pharmaceuticals v British Drug Houses Ltd, [1944] Ex CR 239, 4 DLR 577.
Veuve Clicquot, supra para 18 at para 6.

Other surrounding circumstances make confusion less likely

Parody makes confusion less likely

[33] The fact that Janet’s mark can be considered to be a parody of Kangaroo’s trade-mark does not compound the confusion, as stated by Kangaroo, but rather makes it less likely. A parody reduces the likelihood of confusion because its intent is to emphasize the distinction between the original and the parody itself.

Appellant factum at para 28.
Jason ST Kotler, “Trade-Mark Parody, Judicial Confusion and the Unlikelihood of Fair Use” (1999-2000) 14 IPJ 219.

[34] The logo on Janet’s t-shirts makes fun of health buffs and individuals who follow trends and purchase Kangaroo’s clothing. The association of Janet’s mark with a dessert makes it

satirical because it suggests an idea diametrically opposed to that promoted by Kangaroo: instead of exercise and healthy eating, it suggests indulgence.

Lack of evidence of actual confusion reduces the likelihood of confusion

[35] While the relevant issue in the confusion analysis is the “likelihood of confusion” and not “actual confusion,” the lack of actual confusion is a factor that courts have found to be significant when determining the likelihood of confusion. A court may draw an adverse inference when there is evidence of concurrent use of the two trade-marks, yet no evidence of confusion.

Christian Dior SA v Dion Neckwear Ltd, [2002] 3 FC 405, 2002 FCA 29 at para 19.

[36] Janet’s products co-existed with Kangaroo’s products for at least a month, yet Kangaroo was unable to produce any evidence of actual confusion that occurred during that time. Lack of evidence of confusion suggests that the marks were able to co-exist in the marketplace without confusing consumers.

B. Kangaroo has not demonstrated that Janet’s alleged misconduct, potential or actual, would result in very serious damage

i. Defining the “very serious damage” standard and the test to be met

[37] The very serious damage requirement is proportional to the extraordinary nature of the APO. The Federal Court has explained the proposition as follows:

The Plaintiff wants an order for a pre-trial remedy in the context of disputed facts, where the remedy has the capacity for a total disruption of the Defendant’s affairs. It is the nature of this extraordinary remedy that mandates the requirement of “very serious damage”, not just “some damage.”

WIC Premium Television v Levin, [1999] FCJ No 652 at para 21, 1999 CarswellNat 4983 [*WIC*].

[38] The requirement of “very serious damage” flowing from Janet’s alleged misconduct must be shown in at least one of two ways:

- (1) Adverse financial impact; that is, very serious damage in monetary terms; or
- (2) Very serious damage to the case itself; that is, an inability on the part of Kangaroo to prove its case, either as to liability or to damages, should the alleged infringing articles or other vital evidence not be available.

Aldrich v Struk, [1985] BCWLD 2922 at para 14, 33 SCWS (2d) 391.

[39] Kangaroo has not met the onus of demonstrating with sufficient evidence that it suffered “very serious damage,” either in financial terms or in terms of its ability to prove its case, due to Janet’s alleged misconduct.

ii. Janet’s conduct did not cause Kangaroo financial damage

a. Lack of connection between Janet’s conduct and Kangaroo’s sales downturn

[40] To establish that Janet caused Kangaroo very serious financial damage, Kangaroo must provide evidence of a causal link between the downturn in its sales and Janet’s operations. Courts have refused to grant an APO where there was no evidence of a causal link. For example, in *WIC Premium Television v Levin*, the Court found that the plaintiff failed to present any evidence of market share loss or even an estimate of size of the defendant’s business and that, therefore, the evidence was insufficient to support the claim of “very serious damage.” Likewise, in *M.M. International Business Directories*, the Federal Court (Trial Division) refused to find serious damage in the absence of direct evidence showing that the defendant’s revenues were at least equal to the losses suffered by the plaintiff or an indication as to whether the losses were a large or a small percentage of the plaintiff’s sales.

WIC, *supra* para 37 at para 23.

MM International Business Directories v International Business Index, [2000] FCJ No 1338 at para 8, 8 CPR (4th) 515 [*M.M. International Business Directories*].

[41] Kangaroo points only to what they call “an unexpected downturn in Just Roo It t-shirt sales” at a Kangaroo store located one block away from Janet’s yogurt stand. The downturn in

sales could have been caused by any number of factors, including changing consumer tastes, increased competition from other sports apparel stores, poor management of the store in question, amongst any number of other alternative reasons. Even if this Court were to accept that this downturn was anomalous—and, to that end, no evidence was led by Kangaroo to rule out a chain-wide or region-wide downturn in sales across all Kangaroo stores—the inference that the decrease in Kangaroo sales was *caused* by Janet’s yogurt stand requires a leap of faith that is inadequate absent any evidence to support the connection. The size of Janet’s operation is so small that she could not realistically cause very serious damage to an organization of Kangaroo’s proportions. Therefore, this Court cannot ascertain whether the alleged damage caused by Janet to Kangaroo exists at all.

Appellant’s factum at para 39.

Vinod Chopra Films Private Ltd v Jane Doe, 2010 FC 387 at paras 29-33, 83 CPR (4th) 245 [*Vinod Chopra*].

b. If there was financial damage, it was too small to be considered “very serious”

[42] In any event, any financial impact that Janet’s yogurt stand may have had on Kangaroo’s sales (which is denied) does not meet the “very serious” threshold. In *Nintendo*, the Federal Court awarded an APO where the defendants “threatened [the plaintiff’s] entire operation” by “flooding the market” with counterfeit goods. Conversely, in this case, Janet’s business is minuscule and cannot possibly threaten the multinational operations of Kangaroo. As a result, there is no possibility of “very serious” financial damage.

Nintendo of America v Coinex Video Games, [1983] 2 FC 189 at para 11, 69 CPR (2d) 122 [*Nintendo*].

[43] Kangaroo argues that the refusal of an APO in this case would effectively open the door for a flood of small-scale infringers that, collectively, could cause significant damage to Kangaroo’s brand. The *raison d’etre* of an APO is to prevent the destruction of evidence in a

particular proceeding. An APO is not an appropriate tool to deal with hypothetical infringers who could exist sometime in the future and could cause a company “death by thousand cuts.”

This type of “slippery slope” argument should be reserved for the main section 20 claim.

Catalyst Partners v Meridian Packaging, 2007 ABCA 201 at para 7, 160 ACWS (3d) 539.
Appellant Factum at para 42.

iii. Janet’s conduct did not damage Kangaroo’s ability to prove its case

[44] If Kangaroo is unsuccessful in establishing that it suffered very serious financial damage due to Janet’s operations, it must show that, absent the APO, sufficient damage would be caused to its ability to prove its case. The Alberta Court of Appeal in *Peters & Co Limited* recently endorsed the “serious harm” approach to procedural impact, whereby the question “is not whether the Plaintiff could improve its case with the discovery of further evidence via the Anton Piller Order, but whether that evidence was so crucial that the plaintiff could not make out its case without the evidence seized” [Emphasis added].

CCS Corp v Secure Energy Services, 2009 ABQB 275, at para 46, 76 CPC (6th) 91.
Peters & Co Limited v Ward, [2015] AJ No 10, 2015 ABCA 6 at paras 21-22.

[45] The “serious harm” requirement is not met where alternatives to seizure are available. For example, the Federal Court has refused to grant an APO where an investigator retained by a plaintiff was able to purchase a representative item of the wares in question.

Fila Canada v Jane Doe, [1996] 3 FC 493 at para 10, 68 CPR (3d) 1.

[46] In this case, Kangaroo’s investigators could have easily purchased one of Janet’s t-shirts as a representative item without executing a private search order and without potentially destroying her business by seizing her inventory.

[47] Kangaroo does not require the paperwork seized from Janet in order to prove its case because the paperwork does not reflect the sales of the particular t-shirts at issue. In addition, this

is the type of evidence that is normally obtained through documentary discovery, and an APO should not be used as an alternative to discovery unless there is a serious risk of destruction.

C. Kangaroo has not established that Janet was in possession of incriminating evidence

[48] In order to obtain an APO the moving party must provide clear evidence that the defendant was in possession of incriminating items prior to the issuance of the APO. Although Kangaroo obtained six Just Moo It t-shirts and paperwork related to the purchase and sale of “shirts” after the APO was executed, it had not provided clear evidence of Janet’s possession of incriminating t-shirts prior to the issuance of the APO. The only evidence provided by Kangaroo at that time was the affidavit of its private investigator, Mr. Bunter, who stated that he observed customers buying food and clothing from Janet’s stand. These observations do not establish that Janet was in possession of incriminating evidence.

Trial at para 11.

WIC, supra para 37 at para 26.

[49] Courts have previously indicated that opinions of private investigators can be unreliable, particularly when investigators are looking for results to confirm the moving party’s conclusions about defendants’ dishonesty. In *Adobe*, the court set out a positive duty on plaintiffs to investigate beyond the surface indicia to present a full characterization of the defendant’s business.

WIC, supra para 37 at para 33.

Adobe, supra para 15 at paras 195-7.

[50] In this case, Kangaroo view of Janet’s operation was based solely on the statements provided by a private investigator. However, the investigator, looking to confirm his employer’s opinion, could be mistaken in interpreting what he observed. For example, he could have mistakenly inferred that t-shirts were being sold when in fact they were being given away for

free as promotional items for Janet’s yogurt business. Displaying marks on promotional items is not always considered trade-mark “use” under section 4(1) of the Act. Mr. Bunter’s affidavit does not establish with certainty that t-shirts were being sold at Janet’s stand.

Trial at para 11.

Trade-marks Act, RSC 1985, c T-13, s 4(1).

Renaud Cointreau & Cie v Cordon Bleu International, [1993] TMOB No 117, 52 CPR (3d) 284 at para 11.

[51] The paperwork obtained from Janet during the execution of the APO also cannot reliably establish whether Janet was in possession of incriminating evidence prior to the execution of the APO. The “shirts” mentioned in the paperwork could be any shirts, not only the ones with “Just Moo It” logo. Mr. Bunter’s affidavit does not state that he observed Janet’s stand since it began its operation. It should not be assumed that Janet always sold the same t-shirts for the entire existence of her business, because there is no evidence supporting this assumption.

D. Kangaroo has not established that there was a real possibility that Janet would destroy incriminating evidence

i. The surrounding circumstances do not establish a real possibility of destruction

[52] Kangaroo has pointed to a line of cases including *Capitanescu* and *Malik*, in which the Court inferred probable destruction of evidence based on the surrounding circumstances. These authorities are distinguishable from the present case because probable destruction of the evidence was inferred on the basis of prior dishonest or improper conduct of the defendant. In *Malik*, the impugned party had “a history of refusal to provide proper disclosure of financial information despite [a court order] to do so.” In *Netbored*, the impugned party had previously failed to disclose the existence of relevant evidence, including his computer and hard drive. In *Capitanescu*, there was evidence that prior to the APO the defendant used confidential information stolen from the plaintiff.

Malik, supra para 12 at para 60,
Netbored Inc v Avery Holdings Inc, 2005 FC 1405 at para 61, 48 CPR (4th) 241 [*Netbored*].
Capitanescu et al v Universal Weld Overlays Inc et al, [1996] AJ No 1038, 71 CPR (3d) 37 at para 12
[*Capitanescu*].

[53] In the present case, Kangaroo has led no evidence to suggest that Janet acted dishonestly or improperly prior to the serving of the APO. Rather, Kangaroo would have this Court infer dishonesty on the basis of a general set of characteristics that are perfectly normal for a student-run sole proprietorship.

Appellant's factum at para 45.

[54] Janet did not operate her yogurt stand contrary to normal business practices given the relevant circumstances. The lack of sophistication of her business—including the fact that it operated on a cash-only and temporary basis, for instance—is not necessarily atypical for a student and sole proprietor with limited business knowledge and insufficient capital to invest in a storefront and credit- and debit- accepting capabilities. The U.S. Small Business Administration notes that many small businesses continue to accept only cash due to limited risk of fraud, simplicity of accounting practices, and the fact that third-party transaction fees do not need to be paid, among other reasons.

US Small Business Administration, “Managing Business Finances & Accounting: Accepting Cash Only,” online: US Small Business Administration <www.sba.gov>.

[55] This stands in stark contrast to large-scale counterfeiting operations—often the subject of APOs—where transience and cash-only dealings are attempts to “fly under the radar” of law enforcement and the corporations these illegitimate organizations seek to defraud. Indeed, this point was made in *Adobe*, where it was noted that Courts may be willing to infer probable destruction of evidence in cases concerning flea markets, street stalls or concerts, not *because* these businesses are temporary, but because these types of businesses are likely to be knowingly

selling counterfeit goods. It is incorrect to conclude that simply because Janet may share certain business practices with untrustworthy people that she herself is untrustworthy and may destroy evidence.

Adobe, supra para 15.

ii. Post-APO conduct cannot justify the probable destruction requirement after the fact

[56] The basic requirement for an APO is that the moving party must provide sufficient evidence of its allegations prior to the order being issued. Were it otherwise, a party could convince a court to grant an APO first, and then rely on after-the-fact conduct to support its initial assertions. Considering the potential dire consequences of an APO for the defendant's business, such process could lead to abuse. In this case, Kangaroo had no proof of the risk of evidence of destruction by Janet prior to the serving of the APO.

[57] Contrary to Kangaroo's position, the conduct of a defendant during the execution of the APO does not by itself establish that the possible disappearance of the evidence was "all but a certainty." This point was discussed by Huges J in *Vinod Chopra*:

Evidence as to the general conduct of a Defendant whose premises are being searched should be used with extreme caution when attempting to use such "post Order" evidence to support the "pre Order" assertion that the materials sought would likely be destroyed. There must be sufficient proof at the beginning of the process to support an allegation of likely destruction, not a simple allegation to be supported later by conduct of a party during execution of the Order... [Emphasis added].

Appellant's factum at para 37.

Vinod Chopra, supra para 41 at para 20.

[58] Kangaroo would have this court find that an in-the-moment reaction of a student who was suddenly confronted by unknown individuals requiring her to turn in her inventory and documentation can form the basis for a finding that destruction of evidence was probable prior to the issuance of the APO. To characterize Janet in this way would be to ignore any alternative

explanation for her behaviour, especially given that the terms of the APO were later complied with in full and the evidence was in fact not destroyed.

E. Unwarranted APOs lacking an evidentiary basis are harmful for trade in general

[59] This unwarranted APO has the potential to destroy or at least significantly interfere with Janet’s business by seizing her inventory and business records. However, the biggest harm of this order is in its precedential value. Restoring this APO would encourage unfair competition. Small businesses like Janet’s rarely have the means to fight APOs. Large corporations like Kangaroo would take advantage of them by improperly obtaining such orders and using them to destroy the businesses of their smaller competitors with the view to unduly monopolize the market. It is the court’s responsibility to prevent such abuse and to ensure that APOs are issued only in cases where the high bar to obtaining one has been met.

Vinod Chopra, supra para 41 at para 14.

PART V – ORDER REQUESTED

[60] The Respondent respectfully requests the Court of Appeal’s decision is upheld and the APO is vacated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Signed this 27th day of January, 2015.

Team No. 6R

Counsel for the Respondent

PART VI – TABLE OF AUTHORITIES

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