



Feltmate Delibato Heagle LLP

L A W Y E R S

The Fine Print

This quarterly newsletter contains general information on developments in the law and other matters of interest to the clients of Feltmate Delibato Heagle LLP.

January 2004

Oakville Office Opens

*We are pleased to announce
the establishment of a second full-service office.*

*Our Oakville Office is conveniently located
just north of the Q.E.W. at Winston Churchill Blvd.*

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In This Issue:

Protecting Your Trade-Marks:	
Why and How?	2
The New Limitations Act	3
Has Your Claim In Real Estate	
Been Extinguished?	4
Office Direct Lines	4

“Has Your Claim in Real Estate Been Extinguished?”¹

By Fred Sheldon

Consider the following situation:

You have a deeded ten-foot right of way over your neighbour’s land. The purpose of the right of way is to give you access to your cottage. The right of way was created in 1945 in a deed to your predecessor in title. You bought your property in 1986. Your deed includes reference to the right of way. Your neighbour bought his property in 1995. His transfer/deed referred to your right of way. He sold his property in 2000. Your right of way is not referred to in that transfer/deed. The lands are registered under the Registry System.

Is it possible that your right of way (claim) has been extinguished by the passage of time and inaction on your part? The perhaps surprising answer is yes!

In order to appreciate this result, you must look at Part III, Investigation of Titles, of the *Registry Act*. That Part of the *Act* provides for the forty-year search rule. That’s the rule that says title to a property only has to be searched back forty years. Section 112 (3) of the *Act* provides that *a chain of title does not depend upon and is not affected by an instrument registered before the commencement of the title search period [forty years] except an instrument in respect of a claim for which a valid and subsisting notice of claim was registered during the title search period.* Section 113 (1) says *a claim that is still in existence on the last day of the notice period [forty years after the claim was created] expires at the end of that day unless a notice of claim has been registered.* Section 113 (2) of the *Act* provides for registering a notice of claim.

In the above example, the right of way was created in 1945. That claim expired in 1985. The claim had expired when you purchased your property in 1986. This is so even though your deed includes reference to the right of way. The reference alone is not sufficient to prevent expiry of your claim. A notice of claim must be registered to preserve it. The notice of claim can be registered any time within the forty year period following its creation or at any time before there is a conflicting claim. In the above example, the conflicting claim is the deed created in the year 2000 when the property was sold that makes no reference to the right of way. That conflicting claim precludes you from now registering a notice of claim to keep your claim alive.

All of the above only applies with respect to lands registered under the Land Registry System. It does not apply to lands registered under the Land Titles System. While most land in Ontario is being established in, or converted to, the Land Titles System, there are still areas of land that are registered under the Registry System. These include the Counties or Districts of Muskoka, Parry Sound, Haliburton, Algoma, Bruce, Dundas, Elgin, Haldimond, Haliburton and many others.

What can you do?

If your property is still registered under the Registry System and if you have a right of way that may have been created more than 40 years ago, you should arrange to have a search of title conducted against your property. Based upon the results of this search, it may be appropriate to register a notice of claim to preserve and protect your interest. Contact your legal counsel for further information and advice.

¹For the court’s analysis on this topic see the case of *Fire v Longtin* (1995) 128 DLR (4th) 767, 48 RPR (2nd) 1 aff’ing 17 OR (3rd) 418, 38 RPR (2nd) 1 (OCA).

We wish all of our clients and friends a Healthy and Happy New Year!

Feltmate Delibato Heagle Direct Phone Numbers

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Michelle Chartrand	905-287-2203	Paul G. Lewis	905-631-3650	Sondra Thackeray	905-631-3657
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Any inquiries or comments concerning The Fine Print should be directed to Debi M. Sutin (905) 639-8881 or dsutin@fdhlawyers.com.

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Protecting Your Trade-Marks: Why and How?

by Markus Cohen Q.C., LL.M.

A good name is rather to be chosen than great riches.

Proverbs, XXII, I

WHY PROTECT?

A memorable trade-mark is the cornerstone of an effective branding and marketing program. Arguably, it is the single most important element in the formula for continued success in a difficult commercial environment - including "B2C" (business to consumer) and "B2B" (business to business) transactions. Instant awareness and name recognition unleash a profusion of emotional and physiological reactions in the average consumer. These are powerful forces which, when properly managed and buttressed - for example, in the food-service industry - by the virtuous quartet of "quality, value, service and cleanliness", bring customers in - and, once they firmly associate "the name" with a satisfying experience - keep them coming back.

It is essential that a trade-mark portfolio be carefully assembled, maintained and legally protected from the free-riders who would prefer to "piggy-back" on a savvy entrepreneur's success rather than invest "sweat equity" in original thought. Protection from so-called "piggy-back" competitors is vital.

HOW PROTECT?

Selection

The first step is to select one or more possible trade-marks for your business which are both (1) distinctive and (2) original. The first will help you stand out in a crowd and avoid confusion in the minds of consumers, the second will keep competitors from successfully suing you for "infringing" upon *their* trade-marks.

You are well advised to retain a knowledgeable retail marketing expert and graphic designer to assist you in devising and selecting your trade-marks. These experts will generally have a well-developed sense of what's original and what "sells" and will likely keep you from making mistakes that might later require your entire corporate identity to be changed, often at monumental expense. A proposed mark consisting of words, designs, symbols or combinations of the above, along with one or two alternates, will then be ready to test for legal acceptability.

Search

As original and distinctive as your initial selection may appear to be, there is a chance that someone else has been the first to arrive at the same or confusingly similar notion. In order to avoid additional wasted time and money, it is prudent to have appropriate searches undertaken to ensure, so far as is possible, that your chosen mark, and any alternates, meet the legal tests of distinctiveness and registrability.

Searches normally undertaken run from the preliminary and cursory -

telephone directories, trade journals and basic on-line searches through databases set up for the purpose - to the intense and full-blown, necessitating in-depth, rigorous computer searches of many databases - not only those maintained by the Canadian Trade-marks Office ("TMO") but many common law sources as well.

Application

If the threshold legal requirements are met, experienced trade-mark counsel should be instructed to prepare and file an application for registration in accordance with the *Trade-Marks Act* (Canada). The completed application is filed with the Trade-marks Office ("TMO") - usually electronically to save both time and expense - together with the requisite filing fee. The application may be based on **actual use** of the trade-mark in association with a business that you are already operating or on the basis of **proposed use** of that trade-mark.

Registration

When the TMO has completed its examination of your application and is satisfied that everything is in order, upon payment of the applicable registration fee, a certificate of registration will issue. A registration is currently good for 15 years and may be renewed perpetually upon payment of the requisite fee. The essence of continuous trade-mark protection, however, lies in its continued "**use**" - in a technical trade-mark sense - by or on behalf of the owner and in a proper commercial context. Care must be taken to actually keep using the trade-mark to avoid allegations of **abandonment**, and - for the same reason - to actually use, portray and advertise the trade-mark in the precise form in which it was first registered. It is in this sphere of trade-mark law that the expression "Use it ... or lose it!" has critical meaning.

Why? Because abandonment of a trade-mark can lead to **expungement** of its registration.

Continued registration is critical because it gives the registered owner cross-Canada rights to exclusive use of the mark even if the owner's business is not yet represented across the country. If I am a registered owner in Toronto, I can stop an infringer in Vancouver even if I do not yet operate anywhere west of Ontario. Non-registration, on the other hand, allows the trade-mark owner to stop only those competitors who "pass off" their goods or services for those of the owner in the particular market area where the owner already operates. This can be an impenetrable barrier to rapid regional or national expansion of a successful business that is bursting at the seams of its local market.

Licensing

Your trade-mark is too important and valuable to risk being lost by default. Because consumers associate your trade-mark with a particular

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