

Federal Court



Cour fédérale

**Date: 20141106**

**Docket: T-939-14**

**Ottawa, Ontario, November 6, 2014**

**PRESENT: The Honourable Madam Justice Heneghan**

**BETWEEN:**

**DECOMMODIFICATION LLC, BURNING  
MAN PROJECT AND BLACK ROCK CITY,  
LLC, DOING BUSINESS AS BURNING MAN**

**Plaintiffs**

**and**

**BURN BC ARTS COOPERATIVE, JACKSON  
SMITH, TANYA EVANS, BHAK JOLICOEUR  
AND BRIAN CORKUM, SOMETIMES  
OPERATING INDIVIDUALLY OR  
COLLECTIVELY AS BURN BC,  
BURNBC.ORG AND/OR BURN BC ARTS  
COOPERATIVE**

**Defendants**

**ORDER**

By Notice of Motion dated, September 24, 2014, and filed on October 6, 2014, Burn BC Arts Cooperative (“Burn BC”) sought leave to be represented by an individual, that is, Mr. Bhak Jolicoeur, an individual and a director of Burn BC. The motion was brought pursuant to the *Federal Courts Rules*, SOR/98-106 (the “Rules”), specifically Rule 120.

By Notice of Motion dated September 24, 2014, and filed September 24, 2014, the Defendants requested that the action be dismissed pursuant to Rule 382.4. In the alternative, the Defendants requested that the proceedings be case managed pursuant to Rule 383; that a mediator be assigned pursuant to Rule 387; that the location of the proceedings be moved from Toronto, Ontario to Vancouver, British Columbia; and that the Defendants be granted additional time to prepare and serve a defence, pursuant to Rule 8 of the Rules.

At the hearing on October 6, 2014, it was agreed by the parties that they would only address the motion by Burn BC that Mr. Jolicoeur be allowed to represent Burn BC instead of a solicitor.

In support of its Notice of Motion, Burn BC filed the affidavit of Mr. Jolicoeur, a director of that association. In the written representations filed on behalf of Burn BC, Mr. Jolicoeur said that Burn BC “is an organisation [sic] of little means.”

At the hearing of this motion, Mr. Jolicoeur repeated that assertion as part of his argument.

Decommodification LLC, Burning Man Project and Black Rock City, LLC, doing business as Burning Man (the “Plaintiffs”), oppose the motion by Burn BC that it be represented by an individual, that is, Mr. Jolicoeur. The Plaintiffs argued that the exercise of discretion pursuant to Rule 120 of the Rules requires proof of “special circumstances” for a corporation to be represented by an officer, partner or member. The Plaintiffs referred to the decision in *Alpha Marathon Technologies Inc. v. Dual Sprial Systems Inc.*(2005), 46 C.P.R. (4th) 32 to argue that

there is a high onus upon a corporate defendant to show the existence of “special circumstances” to justify departure from the normal rule that a corporation be represented by a solicitor.

The Plaintiffs also referred to the decision in *Kobetek Systems Ltd. v. R*, [1998] 1 C.T.C. 308 at paragraph 6 where the Court set out four factors that are to be considered in establishing “special circumstances”, as follows:

1. Whether a corporation can pay for a lawyer;
2. Whether the proposed representative will be required to appear both as advocate and witness;
3. The complexity of the legal issues in play and whether the representative is capable of addressing the legal issues; and
4. Whether the action can proceed in an expeditious manner.

The Plaintiffs submit that Burn BC has failed to adduce sufficient evidence to show that it cannot pay for a lawyer; the bare assertion that it is unable to pay for a lawyer is insufficient.

The Plaintiffs further note that Mr. Jolicoeur has already indicated that he would be appearing as a witness in if the Plaintiffs’ action goes to trial.

Further, the Plaintiffs argue that there are complex issues of law involved in this proceeding. As an example of the legal complexity, the Plaintiffs refer to submissions made by Burn BC and Mr. Jolicoeur, in various documents submitted to the Court, to opposition proceedings before the Canadian Intellectual Property Office (“CIPO”). The Plaintiffs argue that

the manner in which Burn BC and Mr. Jolicoeur have dealt with the opposition proceedings shows a lack of understanding of the legal issues at play in this action.

Finally, the Plaintiffs submit that representation of Burn BC by Mr. Jolicoeur or any other individual will not contribute to the expeditious determination of the legal issues involved in this action.

I agree with the arguments of the Plaintiffs that, having regard to the factors identified in *Kobetek Systems, supra* the special circumstances required by Rule 120 to justify appointing Mr. Jolicoeur to represent the Defendant, are not present in the circumstances of this case. I also agree with the submissions of the Plaintiffs in this motion, that the Defendant Burn BC has not produced sufficient evidence to show that it is incapable of retaining a lawyer.

The fact that the proposed representative, Mr. Jolicoeur, would be involved both as a witness and as an advocate for Burn BC weighs against granting the motion. The participation of a lay person, as advocate, will not contribute to an expeditious resolution of this action.

The Statement of Claim in this matter raises issues of trade-mark infringement pursuant to subsection 7(b) of the *Trade-marks Act*, R.S.C. 1985, c. T-13, which codifies the common law tort of passing off. Specifically, the Plaintiffs claim that the Defendants have used the Plaintiffs' trade-marks without authorization, in a way likely to cause confusion in Canada. These are complex legal issues and in my opinion, Mr. Jolicoeur will not be able to deal with them.

Considering the evidence submitted on behalf of Burn BC and the factors addressed in *Kobetek Systems, supra*. I am satisfied that the motion by Burn BC should be dismissed because

it has failed to meet the legal test required under Rule 120 of the Rules to justify the exercise of discretion allowing it to be represented by a non-lawyer in this action.

In the result, Burn BC shall appoint a lawyer to act on its behalf within 30 days. That lawyer is to file a defence within that 30 day period, failing which the Plaintiffs can move on an *ex parte* basis, that is, without notice to Burn BC, for the entry of default judgment.

Although the Plaintiffs seek costs in the amount of \$2000.00 in respect of this motion, and Mr. Jolicoeur agreed to that amount, I am not satisfied that Mr. Jolicoeur understood that he was agreeing to pay \$2000.00 in costs.

In the exercise of my discretion, pursuant to Rule 400 of the Rules, I direct that the costs on this motion be costs in the cause.

**THIS COURT ORDERS that** this motion is dismissed, costs in the cause.

“E. Heneghan”

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Judge