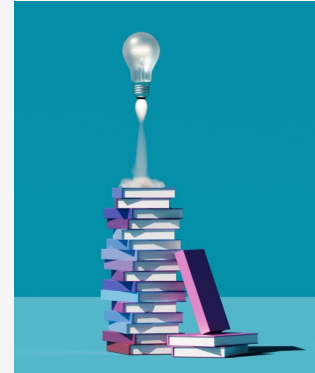


Pre-trial trademark injunctions: hard to get but worth the squeeze?

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Key Takeaways

- Trademark owners often seek pre-trial injunctions to halt infringement during litigation, which are highly valuable but challenging to obtain.
- The evidentiary bar, which is already high, may be raised further if the plaintiff's trademark has not been registered.
- Understanding the requirements and preparing adequate evidence can significantly enhance the chances of obtaining a pre-trial injunction.

In almost every trademark dispute, the most important goal for the brand owner is to halt the infringement. While permanent injunctions are a common remedy accompanying a final decision, lawsuits often take years.

A shorter-term solution is to obtain an injunction pending the resolution of the case. These interim^[1] or interlocutory^[2] injunctions are highly desirable for trademark owners, but notoriously difficult to obtain. In this Update, we explore the keys to obtaining this special remedy so that trademark owners can best position themselves for success, and avoid disappointment when the facts are not supportive.

Anatomy of a pre-trial injunction: key requirements

Obtaining a pre-trial injunction requires a high evidentiary burden that meets a three-part test. The test was set down by the Supreme Court of Canada in *RJR-MacDonald*, and is universally applied in Canadian law.

The burden is on the party seeking relief to demonstrate each of the following elements:^[3]

1. Serious issue to be tried: The claims must have a real prospect of success, based on the law and evidence presented on the injunction motion.^[4]

Plaintiffs should also be aware that "mandatory injunctions", which would require the defendant to take a positive course of action, carry a higher burden of proof at the first step

in the analysis and require the requesting party to demonstrate a strong prima facie case, or a strong likelihood of success at trial.^[5]

Classifying an injunction as prohibitive or mandatory is challenging. It is the practical effects of the order, not strictly the language or form, that governs.^[6] An order against further trademark infringement that appears prohibitive on its face may be characterized as mandatory if it requires the defendant to take steps, like removing allegedly infringing materials from the internet.^[7]

2. Irreparable harm: The harm suffered must be irreparable, in that it cannot be compensated by a monetary award. Irreparable harm cannot be inferred from confusion and must be supported by clear evidence.^[8]

The analysis of irreparable harm is highly fact dependent and, in a trademark case, will often focus on assessing if the mark will lose its distinctiveness, resulting in damage to goodwill that is impossible to calculate in monetary terms.^[9] The high evidentiary threshold means this is typically where most injunction motions will fail.

3. Balance of convenience: The equities must favour granting the injunction. There is no set list of factors to consider, although it may be relevant to take into account the length of time that each party has been in the market, which party altered the status quo, and the likelihood that any award of damages will be paid.

Recent Federal Court guidance on the threshold for a ‘serious issue to be tried’

The recent Federal Court decision in *Schlegel Health Care Inc. v. Edgewood Health Network Inc.* serves as a reminder that the “serious issue” can be a barrier, particularly where the brand owner does not have a trademark registration.^[10]

Schlegel sought a pre-trial injunction to stop Edgewood’s use of EHN GUARDIANS in association with mental health and addictions services for first responders, military personnel, veterans and their families.

Schlegel provided similar services and claimed to have begun using the trademark GUARDIANS since 2017. Edgewood claimed it had used the EHN GUARDIANS trademark since applying for its registration in April 2024. Schlegel only later applied to register GUARDIANS in June 2024.

Because Schlegel lacked a registration, the basis for the injunction was “passing off” under section 7(b) of the *Trademarks Act*. Passing off protects unregistered trademarks and prohibits individuals from directing public attention to their goods, services, or business in such a way that would cause or be likely to cause confusion in Canada.

Passing off, in turn, requires the plaintiff to demonstrate it owns a valid trademark. This requirement is automatically met by registered trademarks. However, without a registration, trademark rights must be proven through evidence of use of the trademark in the marketplace.

Schlegel argued that its evidence, consisting of licensing agreements with third parties and the display of GUARDIANS with other words (e.g., “Guardians Program”), demonstrated use

and therefore ownership. The Court disagreed, concluding Schlegel's evidence did not demonstrate use as a trademark.

Schlegel also disagreed with the Court on the nature of the injunction. It claimed it was requesting a prohibitive injunction, seeking only that Edgewood cease use of the EHN GUARDIANS trademark.

The Court disagreed, noting that the order would return the parties not to the status quo, but to the situation that existed from 2017 to 2024, before Edgewood began using EHN GUARDIANS. It would obligate Edgewood to cease marketing and advertising, remove or disable its website and social media accounts, and take down signage at facilities.

This, the Court said, was a mandatory injunction. As such, Schlegel was obligated to show there was a "strong likelihood of success", which the Court concluded it had not met.

Key takeaways for trademark owners

Schlegel serves as an important reminder that pre-trial injunctions are difficult to obtain, especially where rights are asserted in unregistered trademarks. In the Federal Court, injunction motions will virtually always require evidence of use, whether as a requirement for establishing jurisdiction or as an element of an underlying cause of action.

Trademark owners can take the following steps to maximize their chances of success:

1. Regularly review your trademark portfolio with a view to registering core marks early. As Schlegel demonstrates, registered trademarks carry a presumption of validity, which will make meeting the "serious issue" element much simpler.
2. Do not unnecessarily delay litigation once other measures of enforcement have been exhausted. The longer the defendant operates, the more likely the court will conclude the status quo has changed, and you will face the higher burden of a strong prima facie case.
3. Be prepared to prove use when enforcing unregistered trademark rights. Businesses should consider conducting regular reviews of marketing materials and business records to ensure trademarks are displayed in a way that constitutes use under the *Trademarks Act*, and that important trademarks are registered or their use is well-documented. For a detailed discussion of additional "use hygiene" protocols, please refer to our prior Osler Update: ['Use' it or lose it: demystifying trademark usage and its impact on your rights](#) on the concept of use in Canadian law.

For assistance acquiring, enforcing and maintaining trademark rights in Canada, please contact a member of Osler's Intellectual Property group.

[1] An urgent injunctive remedy sought pending a more formal motion for an interlocutory injunction.

[2] A slightly less urgent remedy covering the period up to the final determination of the merits of the trademark case.

[3] RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 SCR 311 at 334.

[4] American Cyanamid Co. v. Ethicon Ltd., [1975] 1 All E.R. 504 (U.K. H.L.) at 510.

[5] R. v. Canadian Broadcasting Corp., 2018 SCC 5 [CBC] at paras 15, 17.

[6] CBC at para 16.

[7] For example, see Dhillon v. Bernier, 2019 FC 573 at para 32 and 2572495 Ontario Inc. v. Vacuum Specialists (1985) Ltd., 2023 FC 345 at para 31.

[8] Centre Ice Ltd. v. National Hockey League (1994), 53 CPR (3d) 34 (FCA) at 54.

[9] Reckitt Benckiser LLC v. Jamieson Laboratories Ltd, 2015 FC 215 at para 55 (var'd on other grounds in 2015 FCA 104); Sleep Country Canada Inc. v. Sears Canada Inc. 2017 FC 148 at para 116.

[10] 2025 FC 1639.