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A-70-18

2019 FCA 48

Cosmetic Warriors Limited (*Appellant*)

v.

Riches, McKenzie & Herbert LLP (*Respondent*)

INDEXED AS: COSMETIC WARRIORS LIMITED V. RICHES, MCKENZIE & HERBERT LLP

Federal Court of Appeal, Webb, Rennie and Laskin JJ.A.—Toronto, October 1, 2018; Ottawa, March 11, 2019.

Trade-marks — Expungement — Appeal from Federal Court decision allowing appeal from Trademarks Opposition Board hearing officer's decision to maintain registration of trademark in proceeding challenging registration for non-use under Trade-marks Act, s. 45 — Appellant owner of trademark "LUSH" — Lush Canada selling t-shirts bearing "LUSH" trademark to employees to wear as part of uniform, to give as gifts — Hearing officer finding trademark used in "normal course of trade" within meaning of Act, s. 4(1) — Finding LUSH-branded t-shirts objects of trade, not merely promotional — Federal Court finding that hearing officer unreasonably failing to consider certain evidence submitted by appellant — Finding conclusion that sales made in "normal course of trade" unreasonable — Concluding use of trademark in association with exported goods not established, therefore striking trademark from register — Whether test under Act, s. 4(1) having to include monetary profit for there to be transfer in "normal course of trade", whether hearing officer's decision unreasonable — Hearing officer correctly determining that s. 4(1) not requiring that profit result from transfer of trademarked goods to constitute "normal course of trade" — Otherwise, common business practices would never amount to use sufficient to maintain registration of trademark — This not Parliament's intent — Use of trademark not synonymous with commercial success of goods associated with trademark — Strict profit requirement rendering s. 4(1) insufficiently flexible to respond to different commercial contexts — Case law not requiring that trading profit be made — There continues to be authority for proposition that free distribution of goods can meet "normal course of trade" requirement — Hearing officer correct in declining to hold that owner needing to sell goods strictly for monetary profit for sales to be considered "in normal course of trade" — Actual profit not a prerequisite — Federal Court erring in finding hearing officer's application of Act, s. 4(1) unreasonable — Federal Court also erring in undertaking its own reassessment, reappraisal of the evidence — Appeal allowed.

Administrative Law — Judicial Review — Standard of Review — Federal Court allowing appeal from Trademarks Opposition Board hearing officer's decision to maintain registration of trademark in proceeding challenging registration for non-use under Trade-marks Act, s. 45 — Appellant owner of trademark "LUSH" — Lush Canada selling t-shirts bearing "LUSH" trademark to employees to wear as part of uniform, to give as gifts — Hearing officer finding trademark used in "normal course of trade" within meaning of Act, s. 4(1) — Finding LUSH-branded t-shirts objects of trade, not merely promotional — Federal Court finding that hearing officer unreasonably failing to consider certain evidence submitted by appellant — Finding conclusion that sales made in "normal course of trade" unreasonable — Concluding use of trademark in association with exported goods not established, therefore striking trademark from register — Whether hearing officer's decision unreasonable —

Federal Court erring in finding hearing officer's application of Act, s. 4(1) unreasonable, in undertaking its own reassessment, reappraisal of evidence — This amounting to applying correctness, not reasonableness, standard.

This was an appeal from a Federal Court decision allowing an appeal from a decision of a hearing officer of the Trademarks Opposition Board maintaining the registration of a trademark in a proceeding challenging the registration for non-use under section 45 of the *Trademarks Act*.

The appellant is the owner of the trademark "LUSH" and operates through licensees worldwide. One such licensee, Lush Canada, operates LUSH stores. Lush Canada sold t-shirts bearing the "LUSH" trademark to LUSH employees to wear as part of their uniform, and sometimes to give as gifts to family and friends. The hearing officer found that the trademark had been used in the "normal course of trade" within the meaning of subsection 4(1) of the Act, and that there was no need to consider whether use was established in relation to exported goods under subsection 4(3). The hearing officer found that even though the evidence suggested that the clothing was sold to employees at cost, and even though the trademark owner's primary business was personal care products and cosmetics, the LUSH-branded t-shirts were "themselves objects of trade" and "not merely promotional", since they had been sold to employees, invoices had been issued, and taxes had been collected on the sales. The Federal Court found that the hearing officer had unreasonably failed to consider evidence submitted by the appellant indicating that the t-shirts were identified as "swag" by their supplier, and were sold by Lush Canada to employees at prices approximating their acquisition cost. The Federal Court found the conclusion that the sales were in the "normal course of trade" to be unreasonable based on the absence of profit, the limited extent of the sales and their promotional nature, and the fact that the appellant is not normally in the business of selling clothing. The Federal Court also concluded that use of the trademark in association with exported goods had not been established. It therefore struck the trademark from the register. The appellant asked that the LUSH trademark be maintained on the register. The appellant argued, *inter alia*, that the Federal Court applied the wrong tests for trademark use within the meaning of subsections 4(1) and (3) of the Act.

At issue was whether the test under subsection 4(1) must include a monetary profit for there to be a transfer in the "normal course of trade", and whether the hearing officer's decision was unreasonable.

Held, the appeal should be allowed.

The hearing officer correctly determined that subsection 4(1) does not require that a transfer of trademarked goods be for actual profit to constitute a transfer in the "normal course of trade". A conclusion that actual profit is required would mean that such common business practices as selling last year's trademarked merchandise at a discount would never amount to use sufficient to maintain registration of a trademark. That could not have been the intention of Parliament. It would also be inconsistent with the principle that "[u]se of a trademark is not ... synonymous with commercial success of the [goods] associated with the trade-mark". A strict profit requirement could render subsection 4(1) insufficiently flexible to respond to the many different commercial contexts in which it may need to be applied. The case law does not go so far as to require that a trading profit be made. There continues to be authority for the proposition that even the free distribution of goods can, depending on the circumstances, meet the "normal course of trade" requirement. The hearing officer in this case was correct in declining to hold that "a registered owner needs to sell its goods strictly for monetary profit for such sales to be considered "in the normal course of trade"". Whether or not the transfer yielded a profit can be a relevant circumstance. But actual profit is not a prerequisite.

The Federal Court erred in finding the hearing officer's application of subsection 4(1) to be unreasonable, and in undertaking its own reassessment and reappraisal of the evidence. A judge

reviewing a decision of the hearing officer for reasonableness should not reassess the evidence and substitute his or her own appreciation of the evidence for that of the hearing officer. That would amount to applying the correctness and not the reasonableness standard. While the hearing officer erred in declining to draw an inference adverse to the appellant from the documentation showing purchases and sales of the t-shirts on the basis that the appellant was not required to file it, this error did not render unreasonable the hearing officer's decision as a whole.

STATUTES AND REGULATIONS CITED

Copyright Act, R.S.C., 1985, c. C-42.

Trade-marks Act, R.S.C., 1985, c. T-13, ss. 2 "trademark", "use", 4(1),(3), 45, 56.

CASES CITED

APPLIED:

Agraira v. Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 S.C.R. 559; *One Group LLC v. Gouverneur Inc.*, 2016 FCA 109, 483 N.R. 1; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *JC Penney Co. Inc. v. Gaberdine Clothing Co. Inc.*, 2001 FCT 1333, 213 F.T.R. 189; *CBM Kabushiki Kaisha v. Lin Trading Co. Ltd.* (1985), 5 C.P.R. (3d) 27, [1985] T.M.O.B. No. 71 (QL), affd [1987] 2 F.C. 352, (1987), 14 C.P.R. (3d) 32 (T.D.), affd [1989] 1 F.C. 620, (1989), 21 C.P.R. 93d) 417 (C.A.).

CONSIDERED:

Mattel, Inc. v. 3894207 Canada Inc., 2006 SCC 22, [2006] 1 S.C.R. 772; *Diamant Elinor Inc. v. 88766 Canada Inc.*, 2010 FC 1184, 90 C.P.R. (4th) 428; *John Labatt Ltd. v. Rainier Brewing Co.* (1984), 80 C.P.R. (2d) 228, 54 N.R. 296 (F.C.A.); *Plough (Canada) Limited v. Aerosol Fillers Inc.*, [1981] 1 F.C. 679, (1980), 53 C.P.R. (2d) 62 (C.A.); *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.

REFERRED TO:

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16, [2015] 2 S.C.R. 3; *Domaines Pinnacle Inc. v. Constellation Brands Inc.*, 2016 FCA 302, leave to appeal to S.C.C. refused [2017] 4 S.C.R. viii; *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145, (2000), 5 C.P.R. (4th) 180 (C.A.); *Iwasaki Electric Co. Ltd. v. Hortilux Schreder B.V.*, 2012 FCA 321, 442 N.R. 310; *John Labatt Ltd. v. Molson Cos. Ltd.* (1987), 19 C.P.R. (3d) 211, [1987] T.M.O.B. No. 326 (QL), revd (1988), 22 C.P.R. (3d) 311, 22 F.T.R. 270 (F.C.T.D.); *Cast Iron Soil Pipe Institute v. Concourse International Trading Inc.* (1988), 19 C.P.R. (3d) 393, [1988] T.M.O.B. No. 43 (QL); *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, 119 C.P.R. (4th) 1; *Conagra Foods Inc. v. Fetherstonhaugh & Co.*, 2002 FCT 1257, 23 C.P.R. (4th) 49; *Cathay Pacific Airways Limited v. Air Miles International Trading B.V.*, 2015 FCA 253, 133 C.P.R. (4th) 333; *Jean Pierre v. Canada (Immigration and Refugee Board)*, 2018 FCA 97.

AUTHORS CITED

Pretnar, Bojan. "Use and Non-Use in Trade Mark Law" in Jeremy Phillips and Ilana Simon, eds., *Trade Mark Use*, Oxford: Oxford University Press, 2005.

APPEAL from a Federal Court decision (2018 FC 63, 156 C.P.R. (4th) 425) allowing an appeal from a decision of a hearing officer of the Trademarks Opposition Board

(2017 TMOB 36) maintaining the registration of a trademark in a proceeding challenging the registration for non-use under section 45 of the *Trade-marks Act*. Appeal allowed.

APPEARANCES

Mark Robbins and Tamara Céline Winegust for appellant.

Peter W. Choe and Scott Jolliffe for respondent.

SOLICITORS OF RECORD

Bereskin & Parr LLP, Toronto, for appellant.

Gowling WLG (Canada) LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

LASKIN J.A.:

I. Overview

[1] Cosmetic Warriors Limited appeals from a judgment of the Federal Court (Manson J., 2018 FC 63, 156 C.P.R. (4th) 425), allowing an appeal from a decision of the Registrar of Trademarks (2017 TMOB 36), made through her delegate, a hearing officer of the Trademarks Opposition Board. The hearing officer maintained the registration of a trademark in a proceeding challenging the registration for non-use under section 45 of the *Trade-marks Act*, R.S.C., 1985, c. T-13 [the Act]. He found that the trademark had been used in the “normal course of trade” within the meaning of subsection 4(1) of the Act, and that given that finding, there was no need to consider whether use was established in relation to exported goods under subsection 4(3).

[2] In issue is the trademark “LUSH”, as registered (No. TMA649810) for use in association with “[c]lothing, namely, t-shirts”. The owner of the trademark, Cosmetic Warriors, is a cosmetics company that operates through licensees worldwide. These include the company referred to as Lush Canada, which operates LUSH stores in this country. T-shirts and tank tops bearing the LUSH trademark are sold by Lush Canada in limited quantities to LUSH store employees in both Canada and the United States to wear as part of their uniform, and sometimes to give as gifts to family and friends. Cosmetic Warriors also creates limited edition t-shirts bearing the LUSH mark to promote its public awareness and lobbying campaigns, which address social and environmental issues of importance to the cosmetics industry. The proceeds from these items go to direct action and charitable groups.

[3] On appeal, the Federal Court Judge found that the hearing officer had unreasonably failed to consider evidence submitted by Cosmetic Warriors indicating, among other things, that the t-shirts and tank tops were identified as “swag” by their supplier, and were sold by Lush Canada to employees at prices approximating their acquisition cost. On a review of all of the evidence, the Judge found the hearing officer’s

conclusion that the sales were in the “normal course of trade” to be unreasonable. The judge based this view on the absence of evidence of profit, the limited extent of the sales and their promotional nature, and the fact that Cosmetic Warriors is not normally in the business of selling clothing. He also concluded that use of the trademark in association with exported goods had not been established. He therefore struck the trademark from the register.

[4] Cosmetic Warriors asks that the Federal Court’s judgment be set aside and that the LUSH trademark be maintained on the register in accordance with the hearing officer’s decision. It argues that the Federal Court Judge applied the wrong tests for trademark use within the meaning of subsections 4(1) and (3), and that he was insufficiently deferential to the hearing officer’s findings.

[5] For the reasons set out below, I would allow the appeal.

II. Statutory context

[6] As the Supreme Court has famously stated, “[u]nlike other forms of intellectual property, the gravamen of trade-mark entitlement is actual use.... in trade-marks the watchword is ‘use it or lose it’”: *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 S.C.R. 772, at paragraph 5. This is reflected in the Act’s definition of “trademark” in section 2:

Definitions

2 ...

...

***trademark* ...**

(a) a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others,

[7] Section 45 of the Act provides a summary procedure for removing from the register trademarks that have fallen into disuse. Subsection 45(1) authorizes the Registrar, either at her own initiative at any time or on a request made after three years from the date a trademark was registered, to require the owner of the trademark to provide evidence showing that it was in use in Canada during the preceding three-year period. By subsections 45(3) and (5), if the owner fails to show use in Canada within that period, or a good reason for non-use, the registration will be expunged.

[8] As also provided in section 2, the definition of “use” in relation to a trademark in association with goods is set out in subsection 4(1). It reads as follows:

When deemed to be used

4 (1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is

marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred. [Emphasis added.]

[9] Subsection 4(3) provides in the following terms for the deemed use in Canada of a trademark used in association with exported goods:

4 (1) ...

Use by export

(3) A trademark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[10] Proceedings under section 45 are heard by the Registrar, who may delegate this function to a hearing officer. Subsection 45(2) limits the evidence that may be adduced to the affidavit or statutory declaration provided by the trademark owner. No cross-examination on that evidence is permitted, and no counter-evidence may be submitted, though both the trademark owner and the person at whose request the notice was given may make representations. The Federal Court has described the burden of proof on the trademark owner in a section 45 proceeding as “very light”—the evidence filed by the trademark owner “must only supply facts from which a conclusion of use may follow as a logical inference”: see, for example, *Diamant Elinor Inc. v. 88766 Canada Inc.*, 2010 FC 1184, 90 C.P.R. (4th) 428, at paragraph 9. The evidence must nonetheless be sufficient to “inform the Registrar in detail of the situation prevailing with respect to the use of the trade-mark so that [the Registrar], and the Court on appeal, can form an opinion and apply the substantive rule set out in [subsection 45(3)]”: *John Labatt Ltd. v. Rainier Brewing Co.* (1984), 80 C.P.R. (2d) 228, 54 N.R. 296 (F.C.A.), at pages 235–236 [of C.P.R.], excerpting from *Plough (Canada) Limited v. Aerosol Fillers Inc.*, [1981] 1 F.C. 679, (1980), 53 C.P.R. (2d) 62 (C.A.), at page 684.

[11] By subsection 56(1), an appeal lies to the Federal Court from the decision in a section 45 proceeding. Subsection 56(5) authorizes the filing of additional evidence in the Federal Court, and provides that, on appeal, the Court “may exercise any discretion vested in the Registrar.”

III. Standard of review

[12] The standard of review in appeals from decisions on judicial review of administrative decisions also applies in statutory appeals like this one: *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at paragraph 38; *Domaines Pinnacle Inc. v. Constellation Brands Inc.*, 2016 FCA 302, at paragraph 8, leave to appeal to S.C.C. refused [[2017] 4 S.C.R. viii], 2017 CanLII 23865.

[13] Accordingly, as set out in *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559, at paragraphs 45–47, this Court’s task on appeal is to determine whether the Federal Court, in reviewing the decision of the Registrar, correctly identified the administrative law standard of review that it should

apply—either reasonableness or correctness—and properly applied that standard. This means as a practical matter that this Court “step[s] into the shoes” of the Federal Court and focuses on the Registrar’s decision: *Agraira*, at paragraph 46; *One Group LLC v. Gouverneur Inc.*, 2016 FCA 109, 483 N.R. 1, at paragraph 12.

[14] In section 56 appeals from decisions of the Registrar, the answer to the first *Agraira* question—whether the Federal Court correctly identified the standard that it should apply—ordinarily depends on whether new material evidence was adduced on appeal: see *Molson Breweries v. John Labatt Ltd.*, [2000] 3 F.C. 145, (2000), 5 C.P.R. (4th) 180 (C.A.), at paragraph 51; *Iwasaki Electric Co. Ltd. v. Hortilux Schreder B.V.*, 2012 FCA 321, 442 N.R. 310, at paragraphs 2–3. If, as in this case, no new material evidence was adduced on appeal, decisions of the Registrar within the Registrar’s area of expertise, whether of fact, law or discretion, are ordinarily to be reviewed on the reasonableness standard.

[15] The applicability of the reasonableness standard is subject to an exception. Where the Act gives concurrent jurisdiction to the Registrar and the Federal Court to decide a question of statutory interpretation at first instance, the rationale set out in *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, calls for application of the correctness standard to the Registrar’s decision on that question.

[16] In *Rogers*, the Supreme Court held, in the context of proceedings under the *Copyright Act*, R.S.C., 1985 c. C-42, that “[i]t would be inconsistent for the court to review a legal question on judicial review of a decision of the [Copyright] Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance” (at paragraph 14). The Court added that the conferral of concurrent jurisdiction on the Copyright Board and the court required the inference “that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions” (at paragraph 15).

[17] The *Trademarks Act* assigns jurisdiction at first instance to the Court in relation to “use” in a variety of contexts, including in infringement and invalidity proceedings. In my view, therefore, the same inconsistency referred to in *Rogers* arises, and the same inference as in *Rogers* is required, with respect to the Registrar’s decisions on the meaning of “use” within the meaning of the Act. These decisions are accordingly subject to review on the correctness standard.

IV. Did the hearing officer err in finding trademark use under subsection 4(1)?

A. *The test under subsection 4(1)—Is actual profit required?*

[18] In determining that the “normal course of trade” requirement was met, the hearing officer found [at paragraphs 23 and 25] that even though the evidence suggested that the t-shirts were sold to employees at cost, and even though the trademark owner’s primary business was personal care products and cosmetics, the LUSH-branded t-shirts were “themselves objects of trade” and “not *merely* promotional”

(emphasis in original), since they had been sold to employees, invoices had been issued, and taxes had been collected on the sales. The hearing officer added (at paragraph 25) that he did

... not consider it appropriate to expand the ... jurisprudence to suggest that a registered owner needs to sell its goods strictly for monetary profit for such sales to be considered “in the normal course of trade” within the meaning of section 4(1) of the Act.

[19] On appeal, the Federal Court Judge stated (at paragraph 10) that the first issue before him was whether “the ‘normal course of trade’ requirement” required “transfer of the marked goods for profit”. He then referred to Cosmetic Warriors’ lack of actual profit from the sales several times in his reasons. As a result, Cosmetic Warriors submits that the Federal Court Judge in effect overruled the hearing officer on this issue and imposed a requirement that, for there to be a transfer in the “normal course of trade”, the goods be sold strictly for actual monetary profit. In doing so, Cosmetic Warriors submits, the judge applied the wrong test for use under subsection 4(1).

[20] I disagree that the Federal Court Judge decided this issue. Although he no doubt posed the question whether actual profit is a required element of a transfer in the “normal course of trade”, a review of his analysis makes it clear that he did not decide this legal question, and did not consider his finding to turn on its answer. Instead, he proceeded (at paragraph 12) on the basis that, in the circumstances before him, “what constitutes ‘use in the normal course of trade’ ... involves a mixed or intertwined question of fact and law, that cannot be readily separated, such that the legal question is not neatly extricable from its factual context”. He thus did not see himself as deciding any extricable legal question, such as whether, as a matter of law, actual profit is required. He also noted (at paragraph 18) that in certain circumstances the free distribution of goods could constitute use in the “normal course of trade”. In light of that statement he could not have come to the conclusion that a transfer must itself generate profit to meet the requirements of subsection 4(1).

[21] But the fact that the Federal Court Judge did not decide this question does not relieve this Court from addressing it. As discussed above, *Agraira* requires this Court to focus on the decision subject to review by the Federal Court, and the hearing officer [at paragraph 25] plainly decided that there is no requirement “that a registered owner needs to sell its goods strictly for monetary profit for such sales to be considered ‘in the normal course of trade’” The respondent submits that the hearing officer’s decision on this point raises an extricable question of law which, applying the rationale in *Rogers*, attracts the correctness standard of review. I agree. The respondent asserts that the hearing officer incorrectly decided this question, and puts forward this asserted error as a ground on which the judgment on appeal should be upheld.

[22] In my view, the hearing officer correctly determined that subsection 4(1) does not require that a transfer of trademarked goods be for actual profit to constitute a transfer in the “normal course of trade”. A conclusion that actual profit is required would mean that such common business practices as selling last year’s trade-marked merchandise at a discount would never amount to use sufficient to maintain registration of a trade-

mark. That could not have been the intention of Parliament. It would also be inconsistent with the principle that “[u]se of a trade-mark is not ... synonymous with commercial success of the [goods] associated with the trade-mark”: *JC Penney Co. Inc. v. Gaberdine Clothing Co. Inc.*, 2001 FCT 1333, 213 F.T.R. 189, at paragraph 91. In addition, to require the trademark owner to establish that particular sales did or would necessarily generate profit—something that can be a complex evidentiary task—would, as Cosmetic Warriors submits, put at risk the summary nature of section 45 proceedings.

[23] Further, a strict profit requirement could render subsection 4(1) insufficiently flexible to respond to the many different commercial contexts in which it may need to be applied. One knowledgeable commentator has suggested that a precise and exhaustive definition of trademark use is not only impossible but also “not necessarily desirable as it may easily become too rigid and/or obsolete in a rapidly changing world where every day new ways of sales, marketing and commerce are developed and applied”: Bojan Pretnar, “Use and Non-Use in Trade Mark Law” in Jeremy Phillips and Ilana Simon, eds., *Trade Mark Use* (Oxford: Oxford University Press, 2005) 11, at page 27.

[24] The respondent submits that the hearing officer ignored “the clear jurisprudence which requires a trading profit be made” (respondent’s memorandum, paragraph 36). I do not agree that the jurisprudence goes that far.

[25] It appears that the relationship between profit and the “normal course of trade” requirement in subsection 4(1) was first expressly considered by a hearing officer in *CBM Kabushiki Kaisha v. Lin Trading Co. Ltd.* (1985), 5 C.P.R. (3d) 27, [1985] T.M.O.B. No. 71 (QL), affirmed without comment on the point, [1987] 2 F.C. 352, (1987), 14 C.P.R. (3d) 32 (T.D.), affirmed, [1989] 1 F.C. 620, (1989), 21 C.P.R. (3d) 417 (C.A.). In that case it was argued that a sale of a small volume of marked goods to a distributor to be used as samples in soliciting orders from retailers was not in the normal course of trade.

[26] The hearing officer in *Lin Trading* did not accept this submission. He stated (at page 32 [of (1985), 5 C.P.R. (3d) 27, paragraph 12 of QL]) that “the term ‘in the normal course of trade’ should be interpreted as requiring that the transfer be a part of a dealing in the wares for the *purpose* of acquiring goodwill and profits from the marked goods” (emphasis added). In support of this interpretation he invoked a decision of the English Court of Appeal interpreting a somewhat different expression—“a bona fide course of trading”—in the English trade marks statute of the day:

... A similar approach was taken by Shaw L.J., in *Imperial Group Ltd. v. Philip Morris & Co. Ltd.* [1982] F.S.R. 72 to the meaning of the term “a bona fide course of trading”. At p. 83, Shaw L.J. states:

In my judgment “a bona fide course of trading” involves a trading activity pursued with the primary intention of deriving from it a trading profit coupled with a trading goodwill, these being the ultimate and legitimate objectives of trade.

[27] The hearing officer accepted (at pages 32–33 [of (1985), 5 C.P.R. (3d) 27, paragraphs 13–14 of QL]) that transfers made for no consideration could meet the requirement of “normal course of trade” as he had expressed it, depending on the circumstances. He went on (at page 33 [of (1985), 5 C.P.R. (3d) 27, paragraph 14 of QL]) to describe the shipment in issue as “clearly part of an over-all activity carried on ... for the purpose of making a profit and developing goodwill in the trade mark”. On this basis he concluded that the transfer was in the “normal course of trade”.

[28] The language in *Lin Trading* was repeated by a senior hearing officer in *John Labatt Ltd. v. Molson Cos. Ltd.* (1987), 19 C.P.R. (3d) 211, [1987] T.M.O.B. No. 326 (QL), reversed on other grounds (1988), 22 C.P.R. (3d) 311, 22 F.T.R. 270 (F.C.T.D.), and in *Cast Iron Soil Pipe Institute v. Concourse International Trading Inc.* (1988), 19 C.P.R. (3d) 393, [1988] T.M.O.B. No. 43 (QL), on which the respondent here relies. It has since been accepted and applied by the Registrar in a long series of decisions, as well as by the Federal Court: see *Distrimed Inc. v. Dispill Inc.*, 2013 FC 1043, 119 C.P.R. (4th) 1, at paragraph 302.

[29] But none of this authority appears to go so far as to interpret “normal course of trade” to require the actual making of a profit, as opposed to the pursuit of an ultimate profit-making purpose, through the transfer of the marked goods. And there also continues to be authority for the proposition, accepted in *Lin Trading* and (at paragraph 18) by the Federal Court Judge here, that even the free distribution of goods can, depending on the circumstances, meet the “normal course of trade” requirement: see, for example, *Conagra Foods Inc. v. Fetherstonhaugh & Co.*, 2002 FCT 1257, 23 C.P.R. (4th) 49, at paragraph 16.

[30] In my view, therefore, the hearing officer [at paragraph 7] in this case was correct in declining to hold that “a registered owner needs to sell its goods strictly for monetary profit for such sales to be considered ‘in the normal course of trade’”. Whether or not the transfer yielded a profit can be a relevant circumstance. But actual profit is not a prerequisite.

B. *Application of subsection 4(1)—Was the hearing officer’s decision unreasonable?*

[31] Cosmetic Warriors submits that the Federal Court Judge failed to correctly apply the reasonableness standard by improperly substituting his own findings of fact and mixed fact and law for those of the hearing officer in concluding that Cosmetic Warriors’ clothing sales were for the purpose of promoting its cosmetics business, and not in the “normal course of trade”. It also relies among other things on the judge’s statement (at paragraph 13) that the hearing officer’s decision “is entitled to *some* deference” (emphasis added) as an indication that the judge did not give the decision the full measure of deference that reasonableness review requires.

[32] I agree with Cosmetic Warriors that a judge reviewing a decision of the hearing officer for reasonableness should not reassess the evidence and substitute his or her own appreciation of the evidence for that of the hearing officer: *One Group LLC v.*

Gouverneur Inc., at paragraphs 10, 14. That would amount to applying the correctness and not the reasonableness standard: *Cathay Pacific Airways Limited v. Air Miles International Trading B.V.*, 2015 FCA 253, 133 C.P.R. (4th) 333, at paragraph 20. Rather, the question for the Federal Court was, and the question for this Court, “stepping into its shoes”, now is, whether the hearing officer’s decision, taken as a whole in the context of the record, was unreasonable: *Agraira*, at paragraph 53.

[33] The respondent submits that the hearing officer’s decision was unreasonable because he ignored two pieces of relevant evidence included in Cosmetic Warriors’ affidavit, and that this failure entitled the judge to undertake a fresh review of the evidence as a whole.

[34] The first piece of evidence that the respondent submits the hearing officer ignored consisted of two invoices from the supplier of the t-shirts describing them, together with other goods, as “assorted swag”. The hearing officer stated (at paragraph 27) that he was not prepared to draw negative inferences from the supplier’s use of the word “swag”, because it was a vague term and the invoices had originated not from Cosmetic Warriors but from the supplier.

[35] I do not see the hearing officer as having failed to consider the two supplier invoices. In my view the hearing officer did consider this evidence, but decided to give it no weight because of its terminology and source. It was open to the hearing officer to assess this evidence as he did.

[36] The second piece of evidence to which the respondent refers comprised documentation showing purchases of t-shirts and tank tops from the supplier and sales to employees at prices approximating the amount which Lush Canada paid for them. (I note that some appear to have been sold for prices slightly higher than those paid by Lush Canada. For example, the documentation records that 46 t-shirts purchased by Lush Canada at \$12 were sold to employees at \$13.) The hearing officer discussed this evidence as part of his treatment of what he described as the “at cost” issue. The hearing officer stated that Cosmetic Warriors was not required to furnish evidence of its purchases from its supplier. He went on to state (at paragraph 24) that he was “not prepared to draw a negative inference against [it] for ... having done so”.

[37] I agree with the Federal Court Judge that the hearing officer erred in declining to draw an inference adverse to Cosmetic Warriors from the documentation showing purchases and sales of the t-shirts on the basis that Cosmetic Warriors was not required to file it. The hearing officer did not suggest that this evidence was not relevant to the “at cost” issue. Once the evidence was before him, he was bound to consider it—his task was to “determine whether the facts stated show use”: *Plough (Canada) Limited v. Aerosol Fillers Inc.*, at page 686. This task included drawing appropriate inferences from the evidence where inferences were called for, whether or not the evidence was required to be filed.

[38] But the question remains whether this error rendered unreasonable the hearing officer’s decision as a whole. In my view it did not.

[39] It is axiomatic that reasonableness is a genuinely deferential standard. It is “based on the idea that there might be multiple valid ... answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported”: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 41. A decision is not unreasonable because the evidence would support another conclusion: *Cathay Pacific Airways Limited*, at paragraph 21. The tribunal is entitled to deference with respect to both findings of fact and inferences of fact: *Jean Pierre v. Canada (Immigration and Refugee Board)*, 2018 FCA 97, at paragraph 53.

[40] In coming to his decision, the hearing officer reviewed the case law setting out the evidentiary standard that must be met to maintain a registration in a section 45 proceeding, and then the evidence filed by Cosmetic Warriors. This included a spreadsheet summarizing hundreds of sales of t-shirts and tank tops to employees over an 18-month period. He referred to the case law under subsection 4(1) bearing on the distinction between the use of goods for purely promotional purposes, and their use as objects of trade in themselves. He also noted the case law holding that a single sale may be sufficient to establish the transfer of goods in the “normal course of trade”, and that sales to employees may also qualify. He proceeded, correctly, on the footing that actual profit was not required. He found, as noted above, that the t-shirts were not “merely promotional” (at paragraph 25; emphasis in original), and that their sales “[appeared] to form a pattern of genuine commercial transactions in the normal course of trade” (at paragraph 26).

[41] In my view, these conclusions were rationally open to the hearing officer on the record before him. Indeed, had he been prepared to draw inferences from the purchase and sale documentation, it might well have reinforced his conclusion since, as noted above, it indicates that some t-shirts were sold not merely at cost but, on one definition of the term, at a modest profit.

[42] I therefore agree with Cosmetic Warriors that the Federal Court Judge erred in finding the hearing officer’s application of subsection 4(1) to be unreasonable, and in undertaking his own reassessment and reappraisal of the evidence.

V. Did the Federal Court err in finding no trademark use under subsection 4(3)?

[43] As set out above, the hearing officer found it unnecessary to decide whether Cosmetic Warriors’ sales to U.S. employees met the subsection 4(3) test, given his conclusion that use had been demonstrated under subsection 4(1). In light of my proposed disposition of the subsection 4(1) issues, it is similarly unnecessary for this Court to address the subsection 4(3) issues in this appeal.

VI. Proposed disposition

[44] I would therefore allow the appeal, with costs to Cosmetic Warriors in the agreed-upon amount of \$5 000 all-inclusive, and set aside the judgment of the Federal Court. Giving the judgment that the Federal Court should have given, I would dismiss, with

costs, the respondent's appeal to the Federal Court from the hearing officer's decision to maintain the registration of trademark Registration No. TMA649810.

WEBB J.A.: I agree.

RENNIE J.A.: I agree.