

CANADA / JUDGMENT

2572495 Ontario Inc. v. Terlin Construction Ltd.

2024 FC 1366

COURT

Federal Court

DECIDED

30 August 2024

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Court (s) Database

Federal Court Decisions

Date

2024-08-30

Neutral citation

2024 FC 1366

File numbers

T-976-20

Decision Content

Date: 20240830

Docket: T-976-20

Citation: 2024 FC 1366

Ottawa, Ontario, August 30, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

2572495 ONTARIO INC.

Plaintiff / Defendant by Counterclaim

and

TERLIN CONSTRUCTION LTD.

Defendant / Plaintiff by Counterclaim

ORDER AND REASONS

I. Overview [1] The Defendant moves for summary judgment in this action stemming from a collaboration between the parties in the early days of the Covid-19 pandemic in 2020. They entered into a business relationship involving a fifty-fifty profit-sharing arrangement, in connection with the manufacture and sale of see-through plexiglass shields for counters and vehicles. Their relationship was not memorialized in writing and broke down within months.

[2] The Plaintiff asserts ownership over copyright, industrial design, and trademark rights flowing from the collaboration. The Defendant disputes the Plaintiff's ownership and, through this motion, seeks declarations concerning ownership of the intellectual property rights and consequential remedies.

[3] For the reasons below, I find that the Defendant's motion will be granted in respect of the Plaintiff's asserted copyright registration and related claims in the action. The balance of the motion will be dismissed, however, because the Defendant has not met its onus of demonstrating that the remaining issues are apt for summary disposition.

II. Background [4] The Plaintiff, 2572495 Ontario Inc., carrying on business as Vacuum Parts Canada [VPC or Plaintiff], is a family-run retail business that includes an electronic commerce component operating through an Amazon "storefront" and a website. VPC's president is Allan Blue who works with his son Graham Blue, VPC's director of sales.

[5] The Defendant, Terlin Construction Ltd. [Terlin or Defendant] also is a family-run business but in construction, general contracting, and associated manufacturing, including design and millwork services. Terlin's president is Terry McLaughlin, who works with his son, Lindsey McLaughlin, production manager for Terlin's plastics division. Terlin has a computer numerical control [CNC] machine that can be used to apply designs and shapes to metal and plastic parts.

[6] At the beginning of the Covid-19 pandemic, Service Ontario contacted Terlin to design and manufacture protective plexiglass shields for use at customer service counters. Terlin began by designing hanging shields. At the request of Service Ontario, the shields quickly became free-standing counter shields by adding legs, for ease of installation and use. While Terlin hoped to sell these products online, it lacked e-commerce experience. This lack led to the brief business relationship with VPC, which has expertise in the online sale and distribution of products.

[7] On March 31 2020, Lindsey McLaughlin contacted Graham Blue, VPC's director of sales, to discuss a possible business relationship. Terlin and VPC share a family connection. Graham Blue's sister is married to Lindsey's brother, Brian McLaughlin.

- [8] On April 1, 2020, the parties met and agreed orally to a profit-sharing arrangement in which Terlin and VPC would split the profits equally on the sales of the plexiglass shield products. The parties worked collaboratively on the design and marketing of plexiglass shields under the name EZGARD. These included the EZGARD CounterShield and the EZGARD RideShield products. VPC sold the EZGARD products produced by Terlin from VPC's existing Amazon storefront, in addition to the newly created websites with the domain names EZGARD.com and EZ-GARD.ca.
- [9] During this time, applications were filed to obtain copyright, industrial design, and trademark registrations in VPC's name to take advantage of Amazon's intellectual property mechanisms and combat third-party infringements.
- [10] The oral profit-sharing arrangement continued smoothly for some time, until the parties attempted to put their agreement in writing. The parties dispute the original terms of the agreement, and specifically whether VPC is entitled to a portion of the offline sales of the EZGARD products to Terlin's customers.
- [11] In a related proceeding in the Ontario Superior Court of Justice bearing Court File No. CV-20-00084253-0000, VPC asserts breach of contract, interference with economic relations, and infringement of common law trademark rights, among other things. Terlin asserts breach, and inducement to breach, of contract by counterclaim.
- [12] In the Federal Court action that VPC launched in August 2020, each party claims and counterclaims, respectively, regarding infringing activities in which they say the other party has engaged resulting in damage, asserts their own intellectual property rights, and disputes the rights asserted by the other party.
- [13] VPC asserts the intellectual property rights captured in the following:
- Canadian copyright registration No. 1169407 entitled "EZGARD Packaging with EZGARD and Design Mark" [EZGARD Copyright Registration];
 - Canadian industrial design registration No. 194929 [ID 429] entitled VEHICLE SHIELD;
 - Canadian industrial design registration No. 194930 [ID 430] entitled COUNTER SHIELD;
 - Canadian Industrial Design Registration No. 195903 [ID 903] entitled COUNTER SHIELD [collectively with ID 429 and ID 930, EZGARD Industrial Design Registrations]; and
 - Common law rights in the word mark EZGARD and the design mark EZGARD Logo [collectively, EZGARD Marks]. The word mark EZGARD is the subject of pending trademark application No. 2023367 filed on April 20, 2020 and has been opposed by Terlin. The EZGARD Logo is reproduced below:
- [14] For its part, Terlin asserts rights in VPC's claimed intellectual properties described above, as well as the intellectual property rights captured in the following:

-Canadian copyright registration No. 1174139 in the VEHICLE SHIELD Works, comprising a series of photographs;

-Canadian copyright registration No. 1174141 in the PLEXISHIELD Works, comprising a series of photographs.

[15] On this motion, Terlin seeks ownership declarations regarding the EZGARD Copyright Registration and the EZGARD Industrial Design Registrations, and an order varying them to identify Terlin as the owner of the underlying copyright and industrial designs. In the alternative, Terlin seeks an order expunging the registrations. Terlin also requests a declaration that VPC has no enforceable rights to support claims under paragraphs 7(a) to (d) of the Trademarks Act, RSC 1985, c T-13. Relevant legislative provisions are reproduced in Annex “A” below.

[16] In other words, as clarified in its written submissions, Terlin seeks adjudication on the ownership of VPC’s claimed ownership rights to provide appropriate context for the parties’ relationship. According to Terlin, other disputes raised in the action are outside the scope of this motion.

III. Issues and Evidence [17] With the above background in mind, I find that this motion raises the following questions that the Court must answer:

What are the applicable legal principles and test for summary judgment?

Is VPC the lawful owner of the copyright claimed in the EZGARD Copyright Registration?

Is VPC the lawful owner of the EZGARD Industrial Design Registrations?

Does VPC have enforceable rights to support claims under paragraphs 7(a) to (d) of the Trademarks Act?

[18] The evidence on Terlin’s motion consists of the affidavits of Terry McLaughlin, Lindsey McLaughlin, and Teresa Stirling (Terlin’s Director of Marketing and Communications), as well as Allan Blue, Graham Blue, and Alistair Forster (VPC’s intellectual property solicitor), in addition to excerpts from the transcripts of the cross-examinations on the affidavits.

IV. Analysis [19] Applying the applicable principles and test described below, I find that the EZGARD Copyright Registration is invalid and, therefore, it will be struck from the register. Consequently, corresponding portions of the Amended Statement of Claim also will be struck. Otherwise, I am not persuaded that remaining issues raised by Terlin are apt for summary judgment and, accordingly, the balance of the motion will be dismissed.

A. Applicable legal principles and test for summary judgment [20] Rules 213 to 215 of the Federal Courts Rules, SOR/98-106 [Rules] apply to a motion for summary judgment.

[21] In *Rallysport Direct LLC v 2424508 Ontario Ltd*, 2019 FC 1524 at para 42, I summarized the applicable legal principles along the following lines (citations omitted):

Summary judgment, if warranted, allows the Court to (i) dispense summarily with an action where there is no genuine issue for trial, (ii) conserve scarce judicial resources, and (iii) improve access to justice.

The Court must interpret summary judgment rules broadly, favouring proportionality and fair access to affordable, timely and just adjudication; a fair and just process is one that permits a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found.

The test that the moving party must meet is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; or, alternatively, whether there is no legal basis to the claim, having regard to the law or the evidence brought forward. It is not restricted to the clearest of cases.

Where the Court determines that the necessary facts cannot resolve the dispute fairly and justly, or where the Court determines that it would be unjust to make a finding on those facts alone, summary judgment should not be granted.

It would be unjust to make a finding on the facts alone where issues were not raised by one party because doing so would preclude them from knowing the case to meet.

The Court generally should not decide issues of credibility on a motion for summary judgment. Observing live testimony and cross-examination often places a judge in a better position to draw appropriate inferences, and to weigh evidence, as opposed to doing so based on affidavit evidence alone.

Not all conflicting evidence will raise credibility issues and preclude summary judgment. Courts should take a hard look at the merits of the case to determine if credibility issues need be resolved.

The effect of granting summary judgment will be to preclude a party from presenting any evidence at trial, effectively resulting in that party losing its day in court.

[22] These principles are derived largely from this Court's decision in *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [Milano Pizza] at paras 21-41 which were cited with approval by the Federal Court of Appeal in *ViiV Healthcare Company v Gilead Sciences Canada, Inc*, 2021 FCA 122 at para 39. More recently, they were followed by the Federal Court of Appeal in *Gemak Trust v Jempak Corporation*, 2022 FCA 141 at para 61 and *Saskatchewan (Attorney General) v Witchehan Lake First Nation*, 2023 FCA 105 at para 22 [Witchehan Lake].

[23] The Federal Court of Appeal has clarified that the bar for meeting the test for summary judgment is high: *Witchehan Lake*, above at para 23.

- [24] In addition, as mentioned in point 7 above, credibility issues will not defeat a motion for summary judgment if the Court does not need to resolve them to dispose of the motion; the motions judge also has the option of directing a summary trial on disputed facts or live credibility issues: *Witchekan Lake*, above at para 40.
- [25] There will be no genuine issue for trial if the summary judgment motion permits the judge to make necessary factual findings, apply the law to the facts, and reach a just result in a proportionate, more expeditious and less expensive manner: *Hryniak v Mauldin*, 2014 SCC 7 at para 49; *Techno-Pieux Inc v Techno Piles Inc*, 2022 FC 721 at para 38; *7294140 Canada Inc (Zoomtoner) v Connexlogix Inc*, 2023 FC 1010 at para 19.
- [26] Both parties must “put their best foot forward”; the moving party, however, bears the burden of establishing facts necessary to justify summary judgment, while the responding party, to resist the motion successfully, must provide specific facts and evidence to show there is a genuine issue for trial: *Garford Pty Ltd v Dywidag Systems International, Canada, Ltd*, 2010 FC 996 at para 6.
- [27] I consider next in succession the substantive intellectual property issues on this motion.
- B. VPC is not the owner of the copyright claimed in the EZGARD Copyright Registration [28] Terlin asks this Court to expunge or amend the EZGARD Copyright Registration pursuant to subsection 57(4) of the Copyright Act, RSC 1985, c C-42, and to strike the corresponding paragraphs in the Amended Statement of Claim. In my view, Terlin has met its burden of showing that it, not VPC, is the first owner of copyright in the artistic work underlying the EZGARD Copyright Registration, and that Terlin did not assign copyright in writing to VPC. As I explain, VPC is not the appropriate copyright owner, absent a written assignment.
- [29] The EZGARD Copyright Registration stands in the name of the Plaintiff and identifies Allan Blue and Graham Blue as the authors. It protects the artistic work entitled “EZGARD Packaging with EZGARD and Design Mark” [Work].
- [30] Alistair Forster filed the application to register copyright in the Work that resulted in the EZGARD Copyright Registration. He was questioned in examination for discovery about the subject matter of the registration because his affidavit states that it was uncertain when he prepared the underlying application to register copyright in the Work. Following his examination for discovery, and in answer to undertakings, Mr. Forster provided a representation of the Work in the form of a picture or photograph which was used for the subject matter of the EZGARD Copyright Registration. A representation of the photograph is reproduced below.
- [31] The photograph shows that the Work is applied to packaging for EZGARD CounterShield products and relates to the arrangement of printed matter on the packaging. In particular, and as implied by the title “EZGARD Packaging with EZGARD and Design Mark,” the Work consists of the words CounterShield by EZGARD (in stylized form), with the words ONE YEAR LIMITED WARRANTY underneath, in the centre of the box. In addition, the phrase

DESIGNED AND MANUFACTURED IN NORTH AMERICA is displayed at the bottom, and the word FRAGILE alongside an image of a broken glass in the top left corner.

- [32] Terlin argues that the above representation of the Work is nearly identical to the initial packaging mock-up created by its employee, Teresa Stirling, who also created the EZGARD Logo at the same time. VPC counters that in the process of creating design materials, Teresa Stirling worked with Allan Blue and Graham Blue to develop a design that has some of the same elements as the Work but there is no evidence she designed the actual Work.
- [33] I cannot accept VPC's arguments regarding the authorship and ownership of the Work because they fail to address whether the Work is a substantial copy of the initial packaging mock-up created by Teresa Stirling. I find that it is, and that this is a determinative answer to the authorship and ownership question regarding the Work.
- [34] Copyright subsists in original literary, dramatic, musical and artistic works, and means the sole right to produce or reproduce a work or any substantial part of it in any material form: Copyright Act, s 5(1) and s 3(1) (emphasis added).
- [35] In civil proceedings where a defendant puts the existence of copyright or a plaintiff's title in issue, copyright is presumed to subsist in a relevant work and the author/creator of the work is presumed to be the copyright owner, unless the contrary is proved: Copyright Act, s 34.1(1). (See also *Milliken & Co v Interface Flooring Systems (Canada) Inc* (TD), [1998] 3 FC 103 [Milliken] at para 17.) Further, where copyright in a work is registered, the registration is evidence that copyright subsists and the person registered is the owner: Copyright Act, s 53(2).
- [36] These are rebuttable presumptions, however. For example, a work created by an employee in the course of their employment gives rise to an exception to the litigation presumption, by reason of subsection 13(3) of the Copyright Act. Absent an agreement to the contrary, the employer is deemed (i.e. shall be) the first owner of copyright.
- [37] Here, Teresa Stirling's evidence is that she created the EZGARD Logo on April 14, 2020 (which, I note, is one day prior to the disputed publication date indicated in the EZGARD Copyright Registration). She recounts in her affidavit that she wanted design elements that were clean, simple, bold, and easy to read, so that the logo could go on stickers, boxes, packaging, and the like. She states that she decided to use a small raised letter "z" with three lines underneath it to enhance the distinctive nature of the logo and replace a hyphen between EZ and GARD. Below is a reproduction of the EZGARD Logo that resulted from Ms. Stirling's creative process (attached as an exhibit to her affidavit), and that she circulated the same day by email to Terry McLaughlin, Lindsey McLaughlin, Allan Blue, and Graham Blue, with the question "what do you think?"
- [38] Ms. Stirling also describes creating a sticker [EZGARD Sticker] that would permit them to get the EZGARD Logo on boxes immediately while they waited for boxes to be printed. The EZGARD Sticker, attached as an exhibit to Ms. Stirling's affidavit, is reproduced below.

- [39] During cross-examination on her affidavit, Ms. Stirling testified that “after discussions with the group, it was recommended that we put a warranty on it” (i.e. the EZGARD Sticker); hence the addition of the words “One Year Limited Warranty.” She also stated that the EZGARD Sticker was applied to standard, off-the-shelf boxes that could be branded easily while they waited for the printed packaging; a “Fragile” sticker also was added at the beginning.
- [40] Ms. Stirling further deposes that she designed the layout for EZGARD product packaging [EZGARD Packaging], and that she created product inserts as well. She also clarified, during cross-examination, that she designed and arranged the location of the graphics on the box. A photograph of the EZGARD Packaging for the CounterShield product is attached to her affidavit and is reproduced below. I note that the insert for the CounterShield product in evidence displays the same configuration shown in the centre of the EZGARD Packaging.
- [41] VPC takes issue with the addition of the Fragile and Made in Canada & Maple Leaf icons that Ms. Stirling admitted on cross-examination she herself did not create. Ms. Stirling also agreed that Allan Blue may have suggested changing “Made in Canada” to “Designed and Manufactured in North America.”
- [42] In posing the question, “And then you took those ideas and combined them into this drawing?” the counsel cross-examining Ms. Stirling understood, in my view, that others suggested ideas for the packaging but that Ms. Stirling reduced them into a graphic design that culminated in the Work for which the EZGARD Copyright Registration was obtained. I find the Work is a substantial copy of the initial mock-up. The configuration of “CounterSheild by EZGARD ONE YEAR LIMITED WARRANTY” is central to the EZGARD Packaging and maintained with the same prominence in the subsequent Work.
- [43] I also conclude that, on a balance of probabilities, Ms. Stirling was more than a scribe contrary to an implication of the above cross-examination question. In my view, she exercised skill and judgment in the placement and styling of the elements of the EZGARD Packaging, that is, in reducing the ideas into a fixed expression.
- [44] As this Court previously has observed, “the author is the one who clothes the work with form and not the one who has the idea without making it concrete”: *Tremblay v Orio Canada Inc*, 2013 FC 109 at para 34; appeal dismissed 2013 FCA 225 [Tremblay FCA]. See also *Milano Pizza*, above at para 144, citing *Kantel v Frank E Grant, Nisbet & Auld Ltd*, 1933 CanLII 584 (CA EXC).
- [45] I thus find the fact that Ms. Stirling did not create some of the individual elements is immaterial or, at the least, inconsequential, as between the parties. It is the overall design, comprising the arrangement of the elements (including their styling) by Ms. Stirling, in which copyright subsists, as (counter)claimed by Terlin.

- [46] There is no dispute that Ms. Stirling was an employee of Terlin when she created the EZGARD Packaging and that she did so in the course of employment. By operation alone of subsection 13(3) of the Copyright Act, Terlin is deemed the first owner of copyright in the EZGARD Packaging.
- [47] For good measure, however, all employees of Terlin (and related companies of Terry McLaughlin), including Ms. Stirling, sign a standard Confidential Information, Intellectual Property and Non-Solicitation Agreement acknowledging that their creative efforts during the course of employment belong to Terlin (i.e. a company owned directly or indirectly by Terry McLaughlin). Terry McLaughlin deposes in his affidavit that he is the President of all companies related to Terlin and, as such, he has full control over each of their operations. Exhibit 1 to his affidavit is an example of the standard Confidential Information, Intellectual Property and Non-Solicitation Agreement with “Terlin Construction Ltd.” displayed in stylized form at the top of the first page, while a copy of the agreement signed by Ms. Stirling, with “Terlin Construction Ltd.” also displayed at the top of the first page, is Exhibit 2 to her affidavit.
- [48] There is no evidence of a written assignment of copyright from Terlin to VPC. Subsection 13(4) of the Copyright Act provides explicitly that an assignment of copyright is not valid unless it is in writing and signed by the owner.
- [49] VPC argues that Terlin acquiesced in the registration of the intellectual property rights in VPC’s name so that they could take advantage of enforcement mechanisms available through VPC’s Amazon storefront, thus giving rise to an implied assignment of copyright from Terlin to VPC. I do not agree.
- [50] I am unconvinced by VPC’s reliance on Tremblay FCA. There, the Federal Court of Appeal held that it was “excessively formalistic” to disregard an unsigned copyright assignment clause, where the transferor drafted the clause and recognized the assignment clause in court as governing the relationship: Tremblay FCA, at para 22. Here, the parties were unable to reduce their arrangement to writing; in attempting to do so, the relationship broke down. Considering the evidence before the Court, it cannot be said, in my view, that Terlin clearly provided informed consent to assign to VPC the copyright in the EZGARD Packaging created by Teresa Stirling. Because the Work is a substantial copy of the EZGARD Packaging, it also cannot be said, in my view, that VPC is the owner of copyright in the Work, nor, as a consequence, does VPC enjoy the rights enumerated in subsection 3(1) of the Copyright Act; instead, those belong to Terlin.
- [51] In the absence of a written assignment, signed or otherwise, the relevant question is whether the evidence raises a genuine issue regarding the identity of the original author. Based on my findings above, I conclude that it does not. Teresa Stirling, rather than Allan Blue and Graham Blue, was the original author. She was not, as argued by VPC, a co-author.

- [52] The EZGARD Copyright Registration, therefore, is invalid and will be expunged from the register of copyrights, while the following paragraphs of the Amended Statement of Claim will be struck: 1(a)(i), 1(c)(i), 1(d), 1(f), 26, and 27.
- [53] Although Terlin requested that a much longer list of paragraphs (including 1(e)(i), 1(e)(v), 1(e)(vii), 1(i), 1(j), 4(b), 7, 9, 10, 11, 12, 13, 14, 19, 21, 22, 25, 38, 39, 40, 41, 42, and 43) be struck from the Amended Statement of Claim, I am not convinced that they should be removed because they are not confined necessarily to the EZGARD Copyright Registration and the underlying Work (i.e. the EZGARD Packaging). In many cases, they are more general and refer, as an example, to “VPC’s intellectual property.” In some cases, they are more specific and refer to the industrial designs or the trademarks.
- C. Is VPC the lawful owner of the EZGARD Industrial Design Registrations? [54] In my view, the issue of ownership of the EZGARD Industrial Design Registrations is not apt for summary disposition on this motion and must be left to the trial of the action and the counterclaim.
- [55] Terlin asks the Court to vary the EZGARD Industrial Design Registrations to change the name of the owner to Terlin or expunge them, pursuant to paragraph 15.2(b) and subsection 22(1) of the Industrial Design Act, RSC 1985, c I-9. Terlin also requests the Court to strike the related paragraphs of the Amended Statement of Claim.
- [56] The EZGARD Industrial Design Registrations cover the specifications and design of the CounterShield product, a standing sheet of plexiglass supported by plastic legs inserted at the bottom of the sheet, as well as the Vehicle Shield (or RideShield) product, a sheet of plexiglass used as a barrier between the front and back seats of an automobile. The proprietor, both at registration and currently, is listed as 2572495 Ontario Inc. (i.e. the Plaintiff).
- [57] I note that the drawings for ID 430 and ID 903 for COUNTER SHIELD, depict the article resting on “feet.” In ID 903, they are outlined with stippled or dotted lines and the registration contains the following sentence in the Statement describing the features of the design: “The portions of the article shown in stippled lines are for illustrative purposes only and do not form part of the design.” In ID 430, however, the feet are shown in solid lines and the above sentence is not present in the Statement.
- [58] Terlin argues that, having regard to section 64 of the Copyright Act and the linkage between copyright and industrial designs, that it owns the industrial designs because it owns the copyright in the CAD drawings created by two of its employees, Lindsey McLaughlin and Nathan McCagg, that were used as the drawings for the EZGARD Industrial Design Registrations. Further, Terlin asserts there was no written assignment of the designs to VPC.

- [59] VPC takes issue with what it describes as Terlin's conflation of copyright and industrial design to allege ownership in the industrial designs in question. Further, VPC argues these are issues not raised in the pleading. On the latter point, I note that paragraph 27(a) in the Amended Statement of Defence and Counterclaim at the least alludes to Terlin's claim in this regard and relies specifically on section 64 of the Copyright Act.
- [60] VPC further argues that the EZGARD Industrial Design Registrations were explicitly authorized to be obtained in its name. While a prototype was created by Terlin's employees before VPC's involvement, Allan Blue and Graham Blue were involved in the design of the products protected by the EZGARD Industrial Design Registrations, including the addition of the feet to the free standing CounterShield product, for example. VPC submits that an assignment need not be written, and Terlin assigned the rights through its conduct.
- [61] Having taken a hard look at the parties' evidence and the merits of their respective positions, I find that the answer to the question of whether VPC is the lawful owner of the EZGARD Industrial Design Registrations ultimately will turn on the resolution of credibility issues that, as Milano Pizza guides, generally should not be decided on a motion for summary judgment. This is one of those instances.
- [62] I do not disagree with Terlin that there is a connection between copyright and industrial design. Milliken suggests (at para 24) that a design is created when an artistic work is created and must be created first before it can be applied to an article (i.e. with reference to "in a finished article" in the definition of "design or industrial design" in the Industrial Design Act).
- [63] That said, subsection 64(2) of the Copyright Act provides that copyright is unenforceable if the useful article to which the design is applied is reproduced in a quantity of more than 50 (subsection 64(3) is not applicable here), or by reason of subsection 64.1(1) where, for example, the features applied to the useful article "are dictated solely by a utilitarian function of the article" (see paragraph 64.1(1)(a) of the Copyright Act). The sales information in evidence on this motion is inconclusive, in my view, about the quantities of EZGARD shield products (i.e. involving the EZGARD Industrial Design Registrations) that may have been sold.
- [64] More to the point, I disagree with Terlin that, in the context of industrial design rights, the transfer of a design must be in writing. Before the Industrial Design Act was amended in 2018, subsection 13(1) stated explicitly that a design, registered or unregistered, could be assigned (in whole or in part) only "by an instrument in writing, which shall be recorded in the office of the Commissioner of Patents." Subsection 13(1) was amended in 2018, however, and now simply states that "[e]very design, whether registered or unregistered, is transferable in whole or in part," and removes any reference to an instrument in writing.
- [65] Subsections 13(2) and 13(3) of the current Industrial Design Act stipulate that the Minister must record a transfer, of an application or a registration respectively, at the request of a transferee "on receipt of evidence satisfactory to the Minister of the transfer." The Canadian

Intellectual Property Office's Industrial Design Office Practice Manual states that "[t]he Industrial Design Office will assess all evidence on a case-by-case basis and will contact the requestor if additional documentation or clarification is required." In other words, the evidence may or may not take the form of a written assignment, and whether the evidence is acceptable to record the assignment, will depend on the circumstances.

- [66] Given this overt departure from "an instrument in writing" in the previous iteration of subsection 13(1) of the Industrial Design Act, I find that the legislative intention was to remove the requirement for assignments in writing.
- [67] In my view, the question that thus comes into focus, in the absence of a written assignment, is whether there was a valid assignment of the underlying design, either orally or by conduct. The parties' accounts of events in the early days of the relationship spotlight serious disagreements about VPC's involvement in the designs (particularly in respect of the development of the RideShield or Vehicle Shield product) and regarding what transpired at a meeting on April 14, 2020 among Allan and Graham Blue, Terry McLaughlin, Teresa Stirling, and Alistair Forster. In that meeting, the parties agree that they discussed filing for trademark, copyright, and industrial design protection to prevent further intellectual property infringement.
- [68] They conflict, however, about whether Terlin orally authorized an assignment of its intellectual property rights by allowing the registrations to be obtained in the name of VPC. There also is a significant question about Mr. Forster's role as counsel. Terlin believes that there was a joint retainer and Mr. Forster had a fiduciary duty to both corporations (or to a "NewCo" they intended to incorporate to hold the intellectual property rights for their new venture), while VPC states that Mr. Forster was its counsel solely. This would affect Terlin's conduct. Terlin also questions the degree of due diligence exercised by Mr. Forster in ascertaining ownership of the intellectual property rights before proceeding with the filings.
- [69] VPC points to manufacturing and licensing agreements executed by Terlin with third parties that identify VPC as the owner of trademark and industrial design applications in the schedules to the agreements. The content of the agreements is inconclusive, in my view, about whether Terlin had the rights, as owner or licensee, to license or sublicense another in turn. These agreements are not determinative, however, given that they were reviewed by Alistair Forster, and then adapted in a subsequent agreement by Terlin.
- [70] I am not satisfied that these competing accounts should be resolved based on the evidence before the Court on this motion for summary judgment. In other words, VPC has shown that there is a genuine issue for trial.

D. Does VPC have enforceable rights to support claims under paragraphs 7(a) to (d) of the Trademarks Act? [71] I similarly find that the issue of ownership of the EZGARD Marks is not apt for summary disposition on this motion and must be left to the trial of the action and the counterclaim. As with the EZGARD Industrial Design Registrations, a hard look at the parties' evidence discloses seriously conflicted positions about who first used the EZGARD Marks in association with the goods that ultimately will turn on credibility.

- [72] VPC asserts common law rights in the EZGARD Marks and claims against Terlin under paragraphs 7(a) to (d) inclusive of the Trademarks Act. Terlin asks the Court to strike the paragraphs related to trademark rights from the Amended Statement of Claim on the basis that VPC has no enforceable trademark rights to ground these section 7 claims.
- [73] Terlin challenges VPC's alleged common law rights, asserting that Terlin was the first user of the EZGARD Marks, in accordance with section 4 of the Trademarks Act, by etching them on the shields with its CNC machine, displaying them on packaging as part of the EZGARD Packaging created by Teresa Stirling, and transferring them to VPC in the normal course of trade under the profit-sharing arrangement.
- [74] Further, Terlin insists that it controlled, at all times, the quality and nature of the goods, and that no control was ceded to VPC, despite collaboration, nor did VPC ever actually exercise control over the finished goods, lacking as it did, expertise in the design and manufacture of the goods. Consistent with its position regarding copyright and industrial design rights, Terlin submits that it did not assign trademark rights to VPC, nor was VPC entitled in the circumstances to register the EZGARD Marks in its own name.
- [75] VPC submits that Allan Blue, having come up with the name EZGARD, was the first user when he registered the domain names ez-gard.ca and ezgard.com, followed by commercial use when it was placed on VPC's Amazon seller account. Control, VPC argues, is of limited relevance because it relates to the defence of dilution, which is not at play here. VPC nonetheless argues that it controlled aspects of the goods, including defective products. VPC further submits that there is no evidence of a licensing or agency agreement from Terlin that would disentitle it to register the EZGARD Marks.
- [76] In my view, a similar question arises with the EZGARD Marks about whether Terlin orally or by its conduct assigned the EZGARD Marks to VPC. Notwithstanding Terlin's stance about ownership, the manufacturing and licensing agreements executed by Terlin with third parties described above suggest otherwise.
- [77] In addition, Terlin admits that it stopped using the EZGARD Marks in July 2020, after the conflict arose, but claims ownership of the EZGARD Marks prior to the dispute. VPC, however, points to a live issue regarding abandonment of trademark and whether Terlin continues to claim ownership. For example, VPC claims that that Terlin continued to use the EZGARD Marks after VPC revoked its consent to Terlin's use at the end of June 2020. Terlin's Counterclaim alleges that VPC has blocked Terlin from selling its products under the EZGARD Marks on Amazon and, thus, Terlin seeks a permanent injunction restraining VPC

from selling shields in association with the EZGARD Marks.

[78] All of which is to say, I similarly am satisfied VPC has demonstrated that there is a genuine issue for trial insofar as the EZGARD Marks are concerned.

V. Conclusion [79] For the above reasons, Terlin's motion for summary judgment will be granted in respect of the EZGARD Copyright Registration which is invalid and, thus, will be expunged from the register of copyrights, while the following paragraphs will be struck from the Amended Statement of Claim: 1(a)(i), 1(c)(i), 1(d), 1(f), 26, 27. Otherwise, having found that there are genuine issues for trial, the remainder of the motion, involving issues of ownership of the EZGARD Industrial Design Registrations and the EZGARD Marks, will be dismissed.

VI. Place of Trial [80] Terlin submits that Ottawa would be appropriate for the conduct of the trial, rather than Vancouver where VPC's counsel is located, because both parties are Ottawa-based and VPC has commenced a related action in the Ontario Superior Court of Justice in Ottawa. While VPC concedes that Ottawa likely will be the more appropriate place, I agree with VPC that this issue is premature. In my view, it should be addressed either in case management or trial management, as the action progresses toward trial.

VII. Costs [81] At the outset of the hearing on this motion, the parties informed the Court that they had come to an agreement with respect to costs. Given that Terlin only partially succeeded on its motion, however, and exercising my discretion, I determine that costs of this motion will be in the cause.

ORDER in T-976-20

THIS COURT ORDERS that:

The Defendant's motion is granted in part. Canadian copyright registration No. 1169407 entitled "EZGARD Packaging with EZGARD and Design Mark" is invalid and will be struck from the register of copyrights, pursuant to paragraph 57(4)(b) of the Copyright Act, RSC 1985, c C-42. The following paragraphs will be struck from the Amended Statement of Claim: 1(a)(i), 1(c)(i), 1(d), 1(f), 26, 27. The remainder of the motion is dismissed. The costs of this motion will be in the cause.

"Janet M. Fuhrer"

Judge

Annex "A": Relevant Provisions

Copyright Act, RSC 1985, c C-42

Loi sur le droit d'auteur, LRC 1985, ch C-42

Copyright in works

Droit d'auteur sur l'oeuvre

3 (1) For the purposes of this Act, copyright, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

3 (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif :

Conditions for subsistence of copyright

Conditions d'obtention du droit d'auteur

5 (1) Subject to this Act, copyright shall subsist in Canada, for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work if any one of the following conditions is met:

5 (1) Sous réserve des autres dispositions de la présente loi, le droit d'auteur existe au Canada, pendant la durée mentionnée ci-après, sur toute oeuvre littéraire, dramatique, musicale ou artistique originale si l'une des conditions suivantes est réalisée :

Work made in the course of employment

Oeuvre exécutée dans l'exercice d'un emploi

13 (3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

13 (3) Lorsque l'auteur est employé par une autre personne en vertu d'un contrat de louage de service ou d'apprentissage, et que l'oeuvre est exécutée dans l'exercice de cet emploi, l'employeur est, à moins de stipulation contraire, le premier titulaire du droit d'auteur; mais lorsque l'oeuvre est un article ou une autre contribution, à un journal, à une revue ou à un périodique du même genre, l'auteur, en l'absence de convention contraire, est réputé posséder le droit d'interdire la publication de cette oeuvre ailleurs que dans un journal, une revue ou un périodique semblable.

Assignments and licences

Cession et licences

- (4) The owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations relating to territory, medium or sector of the market or other limitations relating to the scope of the assignment, and either for the whole term of the copyright or for any other part thereof, and may grant any interest in the right by licence, but no assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by the owner's duly authorized agent.
- (4) Le titulaire du droit d'auteur sur une oeuvre peut céder ce droit, en totalité ou en partie, d'une façon générale ou avec des restrictions relatives au territoire, au support matériel, au secteur du marché ou à la portée de la cession, pour la durée complète ou partielle de la protection; il peut également concéder, par une licence, un intérêt quelconque dans ce droit; mais la cession ou la concession n'est valable que si elle est rédigée par écrit et signée par le titulaire du droit qui en fait l'objet, ou par son agent dûment autorisé.

Presumptions respecting copyright and ownership

Présomption de propriété

34.1 (1) In any civil proceedings taken under this Act in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it,

34.1 (1) Dans toute procédure civile engagée en vertu de la présente loi où le défendeur conteste l'existence du droit d'auteur ou la qualité du demandeur :

- (a) copyright shall be presumed, unless the contrary is proved, to subsist in the work, performer's performance, sound recording or communication signal, as the case may be; and
- a) l'oeuvre, la prestation, l'enregistrement sonore ou le signal de communication, selon le cas, est, jusqu'à preuve contraire, présumé être protégé par le droit d'auteur;
- (b) the author, performer, maker or broadcaster, as the case may be, shall, unless the contrary is proved, be presumed to be the owner of the copyright.
- b) l'auteur, l'artiste-interprète, le producteur ou le radiodiffuseur, selon le cas, est, jusqu'à preuve contraire, réputé être titulaire de ce droit d'auteur.

Owner of copyright

Titulaire du droit d'auteur

53 (2) A certificate of registration of copyright is evidence that the copyright subsists and that the person registered is the owner of the copyright.

53 (2) Le certificat d'enregistrement du droit d'auteur constitue la preuve de l'existence du droit d'auteur et du fait que la personne figurant à l'enregistrement en est le titulaire.

Rectification of Register by the Court

Rectification des registres par la Cour

57 (4) The Federal Court may, on application of the Registrar of Copyrights or of any interested person, order the rectification of the Register of Copyrights by

57 (4) La Cour fédérale peut, sur demande du registraire des droits d'auteur ou de toute personne intéressée, ordonner la rectification d'un enregistrement de droit d'auteur effectué en vertu de la présente loi :

- (a) the making of any entry wrongly omitted to be made in the Register,
 - a) soit en y faisant une inscription qui a été omise du registre par erreur;
- (b) the expunging of any entry wrongly made in or remaining on the Register, or
 - b) soit en radiant une inscription qui a été faite par erreur ou est restée dans le registre par erreur;
- (c) the correction of any error or defect in the Register,
 - c) soit en corrigeant une erreur ou un défaut dans le registre.

and any rectification of the Register under this subsection shall be retroactive from such date as the Court may order.

Pareille rectification du registre a effet rétroactif à compter de la date que peut déterminer la Cour.

Non-infringement re certain designs

Non-violation : cas de certains dessins

64 (2) Where copyright subsists in a design applied to a useful article or in an artistic work from which the design is derived and, by or under the authority of any person who owns the copyright in Canada or who owns the copyright elsewhere,

64 (2) Ne constitue pas une violation du droit d'auteur ou des droits moraux sur un dessin appliqué à un objet utilitaire, ou sur une oeuvre artistique dont le dessin est tiré, ni le fait de reproduire ce dessin, ou un dessin qui n'en diffère pas sensiblement, en réalisant l'objet ou toute reproduction graphique ou matérielle de celui-ci, ni le fait d'accomplir avec un objet ainsi réalisé, ou sa reproduction, un acte réservé exclusivement au titulaire du droit, pourvu que l'objet, de par l'autorisation du titulaire — au Canada ou à l'étranger — remplisse l'une des conditions suivantes :

- (a) the article is reproduced in a quantity of more than fifty, or

- a) être reproduit à plus de cinquante exemplaires;
- (b) where the article is a plate, engraving or cast, the article is used for producing more than fifty useful articles,
- b) s'agissant d'une planche, d'une gravure ou d'un moule, servir à la production de plus de cinquante objets utilitaires.

it shall not thereafter be an infringement of the copyright or the moral rights for anyone

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- (c) to reproduce the design of the article or a design not differing substantially from the design of the article by

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- (i) making the article, or

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- (ii) making a drawing or other reproduction in any material form of the article, or

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- (d) to do with an article, drawing or reproduction that is made as described in paragraph (c) anything that the owner of the copyright has the sole right to do with the design or artistic work in which the copyright subsists.

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Non-infringement re useful article features

Non-violation : caractéristiques d'objets utilitaires

64.1 (1) The following acts do not constitute an infringement of the copyright or moral rights in a work:

64.1 (1) Ne constitue pas une violation du droit d'auteur ou des droits moraux sur une oeuvre le fait :

- (a) applying to a useful article features that are dictated solely by a utilitarian function of the article;
- a) de conférer à un objet utilitaire des caractéristiques de celui-ci résultant uniquement de sa fonction utilitaire;
- (b) by reference solely to a useful article, making a drawing or other reproduction in any material form of any features of the article that are dictated solely by a utilitarian function of the article;

- b) de faire, à partir seulement d'un objet utilitaire, une reproduction graphique ou matérielle des caractéristiques de celui-ci qui résultent uniquement de sa fonction utilitaire;
- c) doing with a useful article having only features described in paragraph (a), or with a drawing or reproduction made as described in paragraph (b), anything that the owner of the copyright has the sole right to do with the work; and
- c) d'accomplir, avec un objet visé à l'alinéa a) ou avec une reproduction visée à l'alinéa b), un acte réservé exclusivement au titulaire du droit;
- (d) using any method or principle of manufacture or construction.
- d) d'utiliser tout principe ou toute méthode de réalisation de l'oeuvre.

Federal Courts Rules, SOR/98-106

Règles des Cours fédérales, DOR/98-106

Motion by a party

Requête d'une partie

213 (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.

213 (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

Facts and evidence required

Faits et éléments de preuve nécessaires

214 A response to a motion for summary judgment shall not rely on what might be adduced as evidence at a later stage in the proceedings. It must set out specific facts and adduce the evidence showing that there is a genuine issue for trial.

214 La réponse à une requête en jugement sommaire ne peut être fondée sur un élément qui pourrait être produit ultérieurement en preuve dans l'instance. Elle doit énoncer les faits précis et produire les éléments de preuve démontrant l'existence d'une véritable question litigieuse.

If no genuine issue for trial

Absence de véritable question litigieuse

215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

[...]

[...]

Powers of Court

Pouvoirs de la Cour

- (3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may
- (3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :
 - (a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or
 - a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
 - (b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.
 - b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

Industrial Design Act, RSC 1985, c I-9

Loi sur les dessins industriels, LRC 1985, ch I-9

Design transferable

Dessins transférables

13 (1) Every design, whether registered or unregistered, is transferable in whole or in part.

13 (1) Tout dessin, qu'il soit enregistré ou non, est transférable en tout ou en partie.

Recording of transfer of application

Inscription du transfert — demande d'enregistrement

- (2) The Minister shall, subject to the regulations, record the transfer of an application for the registration of a design on the request of the applicant or, on receipt of evidence satisfactory to the Minister of the transfer, on the request of a transferee of the application.

- (2) Sous réserve des règlements, le ministre inscrit le transfert de toute demande d'enregistrement d'un dessin sur demande du demandeur ou, à la réception d'une preuve du transfert qu'il juge satisfaisante, d'un cessionnaire de la demande.

Registration of transfer of design

Inscription du transfert — dessin

- (3) The Minister shall, subject to the regulations, register the transfer of any registered design on the request of the registered proprietor or, on receipt of evidence satisfactory to the Minister of the transfer, on the request of a transferee of the design.
- (3) Sous réserve des règlements, le ministre inscrit le transfert de tout dessin enregistré sur demande du propriétaire inscrit du dessin ou, à la réception d'une preuve du transfert qu'il juge satisfaisante, d'un cessionnaire du dessin.

Concurrent jurisdiction

Compétence concurrente

15.2 The Federal Court has concurrent jurisdiction to hear and determine

15.2 La Cour fédérale a compétence concurrente pour juger toute question en matière de propriété d'un dessin ou de droits sur un dessin ainsi que toute action en violation d'un droit exclusif.

- (a) any action for the infringement of an exclusive right; and

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- (b) any question relating to the proprietorship of a design or any right in a design.

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Federal Court may rectify entries

Correction des inscriptions par la Cour fédérale

22 (1) The Federal Court may, on the information of the Attorney General or at the suit of any person aggrieved by any omission without sufficient cause to make any entry in the Register of Industrial Designs, or by any entry made without sufficient cause in the Register, make such order for making, expunging or varying any entry in the Register as the Court thinks fit, or the Court may refuse the application.

22 (1) La Cour fédérale peut, sur l'information du procureur général, ou à l'instance de toute personne lésée, soit par l'omission, sans cause suffisante, d'une inscription sur le registre des dessins industriels, soit par quelque inscription faite sans cause suffisante sur ce registre, ordonner que l'inscription soit faite, rayée ou modifiée, ainsi qu'elle le juge à propos ou peut rejeter la demande.

Trademarks Act, RSC 1985, c T-13

Loi sur les marques de commerce, LRC 1985, ch T-13

When deemed to be used

Quand une marque de commerce est réputée employée

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.

4 (1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

Prohibitions

Interdictions

7 No person shall

7 Nul ne peut :

- (a) make a false or misleading statement tending to discredit the business, goods or services of a competitor;
- a) faire une déclaration fausse ou trompeuse tendant à discréditer l'entreprise, les produits ou les services d'un concurrent;
- (b) direct public attention to his goods, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his goods, services or business and the goods, services or business of another;
- b) appeler l'attention du public sur ses produits, ses services ou son entreprise de manière à causer ou à vraisemblablement causer de la confusion au Canada, lorsqu'il a commencé à y appeler ainsi l'attention, entre ses produits, ses services ou son entreprise et ceux d'un autre;
- (c) pass off other goods or services as and for those ordered or requested; or
- c) faire passer d'autres produits ou services pour ceux qui sont commandés ou demandés;
- (d) make use, in association with goods or services, of any description that is false in a material respect and likely to mislead the public as to

- d) employer, en liaison avec des produits ou services, une désignation qui est fausse sous un rapport essentiel et de nature à tromper le public en ce qui regarde :
- (i) the character, quality, quantity or composition,
- (i) soit leurs caractéristiques, leur qualité, quantité ou composition,
- (ii) the geographical origin, or
- (ii) soit leur origine géographique,
- (iii) the mode of the manufacture, production or performance
- (iii) soit leur mode de fabrication, de production ou d'exécution.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:

T-976-20

STYLE OF CAUSE:

2572495 ONTARIO INC. v TERLIN CONSTRUCTION LTD.

PLACE OF HEARING:

Ottawa, Ontario

DATE OF HEARING:

January 24 & 25, 2024

JUDGMENT AND REASONS:

FUHRER J.

DATED:

August 30, 2024

APPEARANCES:

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Plaintiff by Counterclaim

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Prepared on 30 October 2026 · Esheria