

**IN THE MATTER OF A COMPLAINT PURSUANT TO THE CANADIAN
INTERNET REGISTRATION AUTHORITY DOMAIN NAME DISPUTE
RESOLUTION POLICY**

Domain Name: kushtard.ca

Complainant: Alimentation Couche-Tard Inc.

Registrant: Kush Tard

Registrar: Tucows.com Co.

Panellist: Sharon Groom

Service Provider: Resolution Canada, Inc.

DECISION

A. The Parties

1. Alimentation Couche-Tard Inc. (the “**Complainant**”), is a corporation incorporated under the laws of Quebec located in Laval, Quebec.
2. The registrant for the domain name is Kush Tard (the “**Registrant**”), an individual located in Ottawa, Ontario.

B. The Domain Name and Registrar

3. The disputed domain name is kushtard.ca (the “**Domain Name**”). The registrar for this domain name is Tucows.com Co. (the “**Registrar**”). The disputed Domain Name was registered on September 20, 2022 by the Registrant.

C. Procedural History

4. This is a proceeding under the Canadian Internet Registration Authority (“**CIRA**”) *Domain Name Dispute Resolution Policy* (Version 1.3) (the “**Policy**”) and the CIRA *Domain Name Dispute Resolution Rules* (Version 1.6) (the “**Rules**”).
5. The history of the proceeding as provided by the dispute resolution service provider,

Resolution Canada, Inc. (“**Resolution Canada**”), is that the Complainant filed a complaint on October 11, 2023 against the Registrant with Resolution Canada requesting that the current registration of the Domain Name be transferred to the Complainant.

6. Resolution Canada served notice of the complaint on the Registrant as required by paragraph 4.3 of the Rules to the email address provided by CIRA on October 24, 2023 and the email came back as not received. Therefore the Registrant was re-served on November 22, 2023.
7. The Registrant was given 20 days to file a response and no response was filed. The panel was therefore appointed on January 9, 2024.

D. Panel Impartiality and Independence

8. As required by paragraph 7 of the Rules, the panel has submitted to Resolution Canada a declaration of impartiality and independence in relation to this dispute.

E. Canadian Presence Requirements

9. The Complainant is a provincial corporation incorporated in Quebec. Therefore, the Complainant satisfies the Canadian Presence Requirements under paragraph 2(d) of the *CIRA Canadian Presence Requirements for Registrants*, Version 1.3.

F. Factual Background

10. The Complainant is the operator of convenience stores offering a variety of goods and services in Canada and around the world under various marks including COUCHE-TARD. The Complainant has been operating this business since at least as early as 1980.
11. The trademark COUCHE-TARD is owned by the Complainant and the mark was registered with the Canadian Intellectual Property Office (“**CIPO**”) in 1987. The Complainant also owns other trademarks incorporating the term COUCHE-TARD, some of which are registered with CIPO, as well as the logo of an owl which has also been registered with CIPO.
12. The Domain Name was registered on September 20, 2022 and the Complainant has filed evidence indicating that the Domain Name was used in association with a website selling various recreational drugs. The homepage of the website in question featured an owl logo which looked almost identical to the Complainant’s owl logo, except this one was smoking something and had a bleary eye. It also featured the same red and blue branding that was used by the Complainant up until 2021-2022 when it updated its look.

13. The Complainant made some investigations to determine if the Registrant had obtained proper authorization to sell the substances offered on the website kushtard.ca and could not find any evidence that authorization had been obtained in Ontario, although the Complainant did not have all the details concerning the Registrant's name at the time, since this information had not yet been disclosed by CIRA. The Complainant has provided evidence indicating that in Quebec only the provincial government has the right to sell marijuana based products and so it does not appear that any sales of the recreational drugs that might have been made through kushtard.ca in Quebec would have been done legally.

G. *CIRA Domain Name Dispute Resolution Policy*

14. Paragraph 4.1 of the Policy requires that the Complainant establish that:
 - a) the Registrant's dot ca domain name is Confusingly Similar to a Mark in which the Complainant had Rights prior to the date of registration of the domain name and continues to have such Rights;
 - b) the Registrant has registered the domain name in bad faith as described in section 3.5; and
 - c) the Registrant has no legitimate interest in the domain name as described in section 3.4.
15. The Complainant must prove points (a) and (b) above on the balance of probabilities and for point (c) it must provide some evidence that the Registrant has no legitimate interest in the domain name. Even if the Complainant proves (a) and (b) and provides some evidence of (c), the Registrant will succeed in the proceeding if the Registrant proves, on a balance of probabilities, that the Registrant has a legitimate interest in the domain name as described in section 3.4 of the Policy.

H. *Analysis*

Rights to a Mark

16. Under paragraph 4.1(a) of the Policy, the Complainant has to show, on the balance of probabilities, that it had rights (and continues to have rights) in a mark that was confusingly similar to the domain name, prior to the date of registration of the disputed domain name.
17. The Domain Name was registered on September 20, 2022, therefore this is the earliest possible relevant date for this analysis.
18. A "Mark" is defined in paragraphs 3.2(a) and (c) of the Policy as:

(a) a trade-mark, including the word elements of a design mark...that has been used in Canada by a person...for the purpose of distinguishing the wares, services or business of that person... from the wares, services or business of another person;

(c) a trade-mark, including the word elements of a design mark, that is registered in CIPO;

19. The Complainant has submitted evidence of its registration of the trademark COUCHE-TARD that was obtained in Canada in 1987. The Complainant has also provided evidence of current use of the COUCHE-TARD trademark on its website couche-tard.com and on its various social media accounts. The panel finds that the Complainant has established that it had rights in the mark COUCHE-TARD prior to the date of registration of the Domain Name, and continues to have these rights.
20. The Domain Name (apart from the .ca component) consists of the term KUSHTARD which is the phonetic equivalent of the Complainant's trademark COUCHE-TARD. In defining "Confusingly Similar" in paragraph 3.3 of the Policy, it states:

"In determining whether a domain name is "**Confusingly Similar**" to a Mark, the Panel shall only consider whether the domain name so nearly resembles the Mark in appearance, sound or the ideas suggested by the Mark as to be likely to be mistaken for the Mark."

In this case the Domain Name so nearly resembles the mark COUCHE-TARD in sound that it is likely to be mistaken for the mark.

21. Therefore, pursuant to paragraph 3.3 of the Policy, the panel finds that the Domain Name is confusingly similar to the mark COUCHE-TARD as it so nearly resembles the trademark in sound as to be likely to be mistaken for the trademark.

Bad Faith

22. The Complainant also has to prove, on the balance of probabilities, that the Domain Name was registered in bad faith. Paragraph 3.5 of the Policy deals with the grounds which constitute bad faith and these are not exhaustive; it is open to the panel to find other grounds which lead to a conclusion of bad faith conduct.
23. The Complainant argues that the Registrant's conduct constitutes bad faith pursuant to paragraph 3.5(d) of the Policy which states:
- (d) the Registrant has intentionally attempted to attract, for commercial gain, Internet users to the Registrant's website or other on-line location, by creating a likelihood of confusion with the Complainant's Mark as to the source, sponsorship, affiliation, or

endorsement of the Registrant's website or location or of a product or service on the Registrant's website or location.

24. With regard to paragraph 3.5(d) of the Policy, the Complainant asserts that the Registrant has intentionally registered a domain name that is confusingly similar to the Complainant's mark COUCHE-TARD in order to attract users to its website. In addition the use of the Complainant's branding attributes, including the owl logo, enhances the impression that the Complainant might be affiliated with the Registrant's website, or might have sponsored or endorsed it. The Complainant therefore asserts that this is evidence that the Domain Name was registered in bad faith.
25. The panel agrees that the use of the Domain Name, which sounds exactly like the Complainant's trademark, along with the use of an owl logo that is very close to the Complainant's owl logo, and the Complainant's blue and red colours, makes it clear that the Registrant was aware of the Complainant's trademarks and was using the Complainant's intellectual property to promote its business, without authorization, which falls within the definition of bad faith in paragraph 3.5(d).
26. Therefore, the panel finds that the Complainant has proven, on the balance of probabilities, that the registration of the Domain Name was done in bad faith, as set out in paragraph 3.5(d) of the Policy.

Legitimate Interest

27. In order to succeed the Complainant has to provide some evidence that the Registrant does not have a legitimate interest in the Domain Name. Paragraph 3.4 of the Policy lists six possible ways in which a Registrant may have a legitimate interest in a domain name which are as follows:
 - (a) the domain name was a Mark, the Registrant used the Mark in good faith and the Registrant had Rights in the Mark;
 - (b) the Registrant registered the domain name in Canada in good faith in association with any wares, services or business and the domain name was clearly descriptive in Canada in the English or French language of: (i) the character or quality of the wares, services or business; (ii) the conditions of, or the persons employed in, production of the wares, performance of the services or operation of the business; or (iii) the place of origin of the wares, services or business;
 - (c) the Registrant registered the domain name in Canada in good faith in association with any wares, services or business and the domain name was understood in Canada to be the generic name thereof in any language;

- (d) the Registrant used the domain name in Canada in good faith in association with a non-commercial activity including, without limitation, criticism, review or news reporting;
- (e) the domain name comprised the legal name of the Registrant or was a name, surname or other reference by which the Registrant was commonly identified; or
- (f) the domain name was the geographical name of the location of the Registrant's non-commercial activity or place of business.

This list is not exhaustive as it is said to be "without limitation". Therefore neither party is bound by only those criteria.

28. The Complainant's searches did not disclose any marks filed or registered with CIPO that were made up of the word component "kushtard". Even if the Registrant had demonstrated on the balance of probabilities that "kushtard" was a common law mark, the Registrant has not shown that it was used in good faith or that the Registrant had any rights in the mark. Therefore there is some evidence that there is no legitimate interest under subsection (a), which the Registrant has not rebutted.
29. With regard to subsection (b), the Complainant points out that while the word "kush" is slang for cannabis, the term KUSHTARD has no meaning. Therefore there is some evidence that the term is not clearly descriptive as referred to in subsection (b). The Complainant similarly asserts that the term is not a generic term, therefore subsection (c) does not apply. None of this has been refuted by the Registrant.
30. The Complainant found no evidence that the Registrant has used the term "kushtard" in good faith for a non-commercial activity including, criticism, review or news reporting, and none was provided by the Registrant, so subsection (d) does not appear to be applicable.
31. With regard to subsection (e), the records of CIRA list both the name of the Registrant, and the name of the Organization associated with the Domain Name, as "Kush Tard". However the Registrant has not provided any evidence showing that this is the legal name of the Registrant, or that it is a name by which the Registrant is commonly identified. In the absence of any such evidence that the words "Kush Tard" are the proper legal name of the Registrant, or a name by which the Registrant is commonly identified, the panel does not find that the mere listing of "Kush Tard" in the registration information for the Domain Name is sufficient to establish, on the balance of probabilities, that the criteria in subsection (e) have been established.
32. The Complainant also asserts that the term "Kushtard" is not the name of a geographic place, nor has the Registrant filed anything to demonstrate that this is the case, therefore subsection (f) does not apply either.

33. The onus is on the Complainant to show “some evidence” that there is no legitimate interest. In this case, the panel finds that the Complainant has provided some evidence that the Registrant does not have a legitimate interest in the Domain Name.
34. The Registrant has not rebutted the Complainant’s evidence with any evidence of its own, therefore it has not proven, on the balance of probabilities, that it has a legitimate interest in the Domain Name.

I. Conclusion and Decision

35. In conclusion, the panel finds that the Complainant has rights in the mark COUCHE-TARD which predate the registration of the Domain Name. The panel also finds that the Domain Name is Confusingly Similar to the Complainant’s trademark, that the Domain Name was registered in bad faith and that the Registrant has no legitimate interest in the Domain Name.
36. The panel therefore orders, pursuant to paragraph 4.3 of the Policy, that the registration of the Domain Name kushtard.ca be transferred to the Complainant.

Dated: January 24, 2024

A handwritten signature in black ink, appearing to read "Sharon Groom", is written over a solid horizontal line.

By: Sharon Groom (Sole Panellist)