

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

Domain Name: mckeehomes.ca
Complainant: McKee Homes Ltd.
Registrant: Gerlinde Honsek
Registrar: DomainPeople, Inc.
Panelists: Ms. Myra Tawfik; Mr. Jay Josefo; Mr. Eric Macramalla (Chair)
Provider: Resolution Canada Inc.

DECISION

A. THE PARTIES

1. The Complainant is McKee Homes Ltd. (the “Complainant”), an Alberta corporation having a place of business at 406-1st Ave. N.W., Airdrie, Alberta, T4B 3H1, Canada. The Complainant is represented by Ms. LuAnne Morrow of Borden Ladner Gervais LLP, located in Calgary, Alberta.
2. The Registrant is Gerlinde Honsek (the “Registrant”), who resides at 114-100 Cooper’s Common S.W., Airdrie, Alberta, T4B 3C7, Canada.

B. DISPUTED DOMAIN NAME & REGISTRAR

3. The disputed domain name is mckeehomes.ca (the “domain name”).
4. The Registrar is DomainPeople, Inc.

C. PROCEDURAL HISTORY

5. This is a dispute resolution proceeding initiated pursuant to the *CIRA Domain Name Dispute Resolution Policy* (the “Policy”) and the *CIRA Policies, Rules, and Procedures - CIRA Domain Name Dispute Resolution Rules* (the “Rules”). By registration of the domain name with the Registrar, the Registrant agreed to the resolution of this dispute pursuant to the Policy and the Rules.
6. The Complaint was filed on April 19, 2007. The Date of Commencement of the Proceedings was April 25, 2007. The Registrant’s response was dated May 9, 2007.
7. On May 16, 2007, the Panel was appointed. As prescribed by paragraph 7 of the Rules, the Panelists have declared to the Provider that they can act impartially and independently in connection with this matter, and that there are no circumstances known to the Panelists which would prevent them from so acting.

D. CANADIAN PRESENCE REQUIREMENTS: ELIGIBILITY OF THE COMPLAINANT

8. The Complainant has provided a copy of its corporate report. According to the report, the Complainant is an Alberta corporation. Pursuant to paragraph 1.4 of the Policy and paragraph 2.1(d) of the *CIRA Policies, Procedures and Guidelines: Canadian Presence Requirements For Registrants*, the Panel is satisfied the Complainant is eligible to initiate these proceedings.

E. THE POSITIONS OF THE PARTIES

The Complainant's Position

9. The Complainant is a residential construction company.
10. The Complainant built a home for the Registrant and her fiancé. The Complainant alleges that the Registrant made several complaints to the Complainant, which the Complainant “on numerous occasions attempted to resolve to the satisfaction of the Registrant”.
11. The Complainant is the owner of the common law trade-mark MCKEE HOMES, which has been in use in Canada since 1990 in association with “home design and construction services and residential home sales”. Evidence of the use of the mark was submitted in the form of the Statutory Declaration of Grace McKee-Howell (the “Declaration of McKee-Howell”), a co-owner of the Complainant.
12. The Complainant promotes its services through its website located at mckeehomes.com.
13. The disputed domain name mckeehomes.ca was registered on February 12, 2007 without the permission of the Complainant.
14. The disputed domain name resolves to a website comprised of a single page. The headline at the top of the web page reads “McKee Homes Customer Experience”. Below the headline is the disclaimer, “This site is not affiliated with the builder” followed by an under construction image. The remaining text appearing on the website is as follows:

This website is currently under construction.

It will detail the buying experience of a McKee Home from a customer point of view.

Only written and pictorial documentation will be posted.

www.KnowYourBuilder.ca

This new website will provide a forum where all Canadian consumers can detail their buying experience with their home builders.

This will serve strictly as a consumer-generated report page. The purpose of this site is to allow future customers to make a more informed buying decision.

Questions? E-mail contact@knowyourbilder.ca

15. The Declaration of Mckee-Howell included a copy of the Registrant's website, which the Panel attaches as **Schedule "A"** to this decision.
16. The intention behind the mckeehomes.ca website "appears to be to draw potential or existing customers of the Complainant to their website, to criticize the Complainant's company, defame the Complainant and harm its reputation".
17. The choice of domain name by the Registrant "can only be interpreted as a calculated, bad faith gesture to infringe the Complainant's trade-mark and damage its goodwill.
18. The domain name is confusingly similar with the MCKEE HOMES trade-mark.
19. The Registrant has no rights or legitimate interest in the disputed domain name, and the original intention behind the registration was to mislead consumers to the Registrant's website in order to damage the goodwill attaching to the MCKEE HOMES trade-mark.
20. The Registrant registered the domain name primarily for the purpose of disrupting the business of the Complainant, a competitor of the Registrant. Bad faith is established where the use of a domain name creates a likelihood of confusion among end users as to affiliation or sponsorship and includes trade-mark infringement and passing off.
21. The Registrant has been, and continues to be, unjustly enriched by her improper and unlawful activities.
22. The Registrant registered the domain name "in order to force the Complainant to take legal action at great expense, and in order to cause the Complainant aggravation, in retribution for issues the Registrant has with the Complainant, regardless of the numerous other forums the Registrant has available" to her to resolve the issues.
23. The Complainant seeks the transfer of the domain name.

The Registrant's Position

24. The Registrant and her fiancé bought a new home from the Complainant and took possession on October 23, 2006. Subsequent to the purchase of the home, problems began to surface, including issues with the drywall, carpet, toilets, sinks, tiles and front stairs. The Complainant was largely unresponsive to the Registrant's multiple requests that the deficiencies be addressed.

25. The mckeehomes.ca domain name was chosen because it most directly related to the subject matter of the Registrant's website, namely a customer's buying experience of a McKee Home.
26. A reasonable person would not be confused into believing that the Registrant's website is somehow connected with the Complainant. The website includes a disclaimer to that effect. Further, the link title and description associated with the Registrant's website when it is retrieved through the Google and Yahoo! search engines "clearly indicate that the site presents the buying experience from a customer point of view". In this regard, the link title reads, "McKee Homes customer experience", while the link description is as follows:

"McKee Homes buying experience from a customer point of view...It will detail the buying experience of a McKee Home from a customer point of view".
27. The Registrant has never intended to post untruthful statements or "defame the Complainant and harm their reputation", and only plans to post "factual" content on the site.
28. The domain name has been used in good faith in association with non-commercial activity, namely, a consumer review website. The use of the domain name in connection with a non-commercial website devoted to critical commentary represents legitimate use of the domain name and is protected by the Registrant's right to freedom of expression.
29. The domain name was not registered with the intent of selling, renting, licensing, or otherwise transferring it to the Complainant. The Registrant neither approached the Complainant, or any other party, with an offer to sell the domain name.
30. The domain name was not registered to disrupt the business of the Complainant. The Registrant is not a competitor of the Complainant, and the website does not sell advertising space to competitors of the Complainant, nor does it provide links to competitors.
31. In an attempt to maintain a "cordial relationship" with the Complainant, the website has remained inactive pending the outcome of these proceedings.

F. DISCUSSION & REASONS

32. In accordance with paragraph 4.1 of the Policy, to succeed in this proceeding, the Complainant must prove, on a balance of probabilities, that:
 - (a) the Registrant's 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; and
 - (b) the Registrant has registered the domain name in bad faith as

described in paragraph 3.7 of the Policy;

and the Complainant must provide some evidence that:

- (c) the Registrant has no legitimate interest in the domain name as described in paragraph 3.6 of the Policy.

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 paragraph 3.6.

CONFUSINGLY SIMILAR - PARAGRAPH 3.4

- 33. In order to satisfy this branch of the test, the Complainant must demonstrate (i) that it has rights in a mark, (ii) that the rights in its mark predate the registration date of the domain name, and (iii) that the domain name is confusingly similar with the disputed domain name.

Rights in a Mark

- 34. The Policy contemplates protection for unregistered or common law trade-marks (paragraph 3.2(a), the Policy; *Canadian Broadcasting Corporation/Société Radio-Canada v. William Quon*, BCICAC Case No. 00006; *Browne & Co. v. Bluebird Industries*, Resolution Canada Case No. 00002).
- 35. The Complainant alleges that it is the owner of the common law trade-mark MCKEE HOMES and has provided samples of promotional materials featuring the mark. Based upon the evidence submitted, the Panel is satisfied that the Complainant is the owner of the common law trade-mark MCKEE HOMES.
- 36. As per Paragraph 3.2(a) of the Policy, it was open to the Complainant to also rely on its rights in its trade name. However, the Complainant did not do so, and accordingly, the Panel has focused its analysis exclusively on the Complainant's common law trade-mark rights in MCKEE HOMES.

Prior Rights

- 37. The domain name was registered on February 12, 2007.
- 38. The MCKEE HOMES trade-mark was in use well before the domain name registration date. The Panel therefore concludes that the Complainant's rights in its mark predate the registration date of the domain name.

Confusingly Similar

39. As per paragraph 3.4 of the Policy, a domain name will be found to be confusingly similar with a mark if the domain name so nearly resembles the mark in appearance, sound or in the ideas suggested by the mark so as to be likely to be mistaken for the mark.
40. Pursuant to paragraph 1.2 of the Policy, a domain name is defined as the second level domain, which is the part of a domain name that immediately precedes the dot-ca suffix.
41. The test to be applied when considering “confusingly similar” is one of first impression and imperfect recollection. The Complainant must prove, on a balance of probabilities, that a person, as a matter of first impression, knowing the Complainant’s corresponding mark only, and having an imperfect recollection of the mark, would likely confuse the domain name for the Complainant’s mark based upon the appearance, sound or the ideas suggested by the mark (*Government of Canada, on behalf of Her Majesty the Queen in Right of Canada v. David Bedford*, BCICAC Case No. 00011).
42. It should be noted that the test for confusion under the Policy is not the same test for confusion set out under the Canadian *Trade-marks Act*. Under the Section 6(5) of the *Trade-mark Act*, when assessing the likelihood of confusion between marks, the factors to consider are as follows: (a) the inherent distinctiveness of the marks and the extent to which they have become known; (b) the length of time the marks have been in use; (c) the nature of the wares, services, or businesses; (d) the nature of the trade; (e) the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them; and (f) the surrounding circumstances.
43. In contrast, the Policy provides that confusion is established if a domain name so nearly resembles a mark in appearance, sound or in the ideas suggested. This is similar to the test set out under Section 6(5)(e) of the *Trade-marks Act*. However, the remaining factors as set out under the *Trade-marks Act* do not apply to the assessment of confusion under the Policy. The Policy’s summary proceedings are ill-suited for the in-depth and traditional confusion analysis contemplated by the *Trade-marks Act*.
44. The domain name mckeehomes.ca is comprised exclusively of the MCKEE HOMES trade-mark. Under the circumstances, the Panel finds that the domain name is confusingly similar with the MCKEE HOMES trade-mark, given that mckeehomes.ca so nearly resembles the MCKEE HOMES trade-mark in appearance, sound and in the ideas suggested so as to be likely to be mistaken for the mark.
45. Under the circumstances, the Panel finds that the domain name is confusingly similar with the MCKEE HOMES trade-mark in which the Complainant had rights prior to the registration date of mckeehomes.ca, and continues to have such rights.

BAD FAITH REGISTRATION - PARAGRAPH 3.7(C)

46. The Complainant has alleged that the domain name was registered in bad faith pursuant to paragraph 3.7(c) of the Policy, which provides as follows:

the Registrant registered the domain name or acquired the Registration primarily for the purpose of disrupting the business of the Complainant, or the Complainant's licensor or licensee of the Mark, who is a competitor of the Registrant.
47. The Registrant's website is intended to be a non-commercial gripe or protest website dedicated to legitimate critical commentary. This case pits the brand owner's rights against the individual's right to legitimate expression.
48. Bad faith as per paragraph 3.7(c) exists in cases where the use of a domain name is likely to cause confusion among Internet users as to affiliation or sponsorship. There is no requirement that a domain name be active to satisfy the requirements under paragraph 3.7(c). It is sufficient that the registration of a domain name, if ever put to use, would be likely to cause confusion (*Bell Canada v. Archer Entreprises*, BCICAC Case No. 00038; *Glaxo Group Limited v. Defining Presence Marketing Group Inc. (Manitoba)*, BCICAC Case No. 00020; (*Pacific Industries Inc. v. Dhalla*, BCICAC No. 00009).
49. The Panel recognizes the Registrant's right to express herself and conduct her campaign by way of the Internet.
50. However, the mckeehomes.ca domain name is identical to the MCKEE HOMES trade-mark. Under the circumstances, the use of the domain name is likely to mislead or confuse Internet users into believing that the Registrant is somehow affiliated with, or endorsed by, the Complainant. As a result, Internet traffic properly destined for the Complainant may be misdirected to the Registrant's website. This would cause a disruption to the Complainant and its commercial interests.
51. As well, by adopting a domain name identical to the Complainant's trade-mark, the Registrant is competing with the Complainant for Internet traffic by capitalizing on consumer confusion. This competition for Internet traffic makes the Registrant a competitor of the Complainant for the purposes of these proceedings.
52. Under the circumstances, the Panel finds that mckeehomes.ca was registered in bad faith as per paragraph 3.7(c).
53. The Panel's finding of bad faith should not be seen as an indictment of the Registrant personally. "Bad faith" is indeed a term of art. The Panel has found the Registrant's submissions to be genuine and sincere. The Complainant's allegation that the Registrant intended to "defame" the Complainant is unsupported by the facts, and therefore

unwarranted.

54. The Complainant has also taken the position that the Registrant “has been, and continues to be, unjustly enriched by its improper and unlawful activities”. It is unclear to the Panel how the Registrant has reaped, and continues to reap, a commercial benefit from its use of mckeehomes.ca. The domain name resolves to a website that is “under construction”. The website does not include any banner advertisements, sponsored links, or any other type of content that would suggest, let alone demonstrate, that the Registrant has ever reaped any type of commercial advantage in association with the domain name.
55. The Complainant has further alleged that the Registrant registered the domain name “in order to force the Complainant to take legal action at great expense” and to “cause the Complainant aggravation, in retribution for issues the Registrant” had with the Complainant. Based upon the evidence submitted, the Panel disagrees with the Complainant, and accepts that the Registrant intended to associate the disputed domain name with a legitimate criticism website. It does not appear that the Registrant was motivated by retribution.

LEGITIMATE INTEREST - PARAGRAPH 3.6

56. The final element of the test set out in the Policy is to determine whether or not the Registrant has a legitimate interest in the domain name.
57. As per paragraph 4.1 of the Policy, the Complainant must provide “some evidence that the Registrant has no legitimate interest in the domain name as described in paragraph 3.6”.
58. Once this onus has been discharged by the Complainant, the Registrant may still succeed if it can show, on a balance of probabilities, that it has a legitimate interest in the domain name pursuant to paragraph 3.6, which provides 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 used 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 used 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.
59. The focus of the Panel is quite plainly on paragraph 3.6(d). The issue is whether the use of the domain name by the Registrant in association with a non-commercial website devoted to legitimate critical commentary serves to legitimize the domain name registration.
60. The Panel accepts that the Registrant genuinely believes that she has a grievance with the Complainant. The Panel further accepts that the Registrant's right to free speech entitles her to express her views on the matter. The Panel is also greatly concerned over preserving and protecting the rights of the public to freely communicate, be it on the Internet, or through other mediums.
61. However, in the view of the Panel, none of this entitles the Registrant to represent herself as the Complainant, or represent that she is somehow connected to the Complainant. There is a difference between having a right to express criticism and a right in respect of a domain name. The two are quite different.
62. A right to freedom of expression does not confer upon a registrant the right to register a domain name that is identical to a third party trade-mark or trade name, or that, on its face, suggests an affiliation with, or endorsement by, a trade-mark or trade name owner. Such a domain name is likely to confuse or mislead the public into believing that the parties are somehow connected, when in fact, they are not.
63. In this case, the mckeehomes.ca domain name is identical to the Complainant's trade-mark. The domain name creates a false impression that some type of relationship exists between the parties.
64. The fact that the nature of the website is apparent as soon as one arrives to it does not legitimize the registration. The damage has already been done as the user has been exposed to the misrepresentation inherent in the dispute domain name.
65. The disclaimer that appears on the mckeehomes.ca website does not assist the Registrant's position. The disclaimer not only demonstrates that the Registrant was aware of the Complainant's mark, but also that Internet users might be attracted to the website under the mistaken impression that the site is associated with the Complainant.

66. The Registrant can achieve her objective of criticism by adopting a domain name that is not identical to Complainant's mark, or that does not otherwise suggest some type of connection with the Complainant. Depriving the Registrant of the use of the domain name does not in any way deprive the Registrant of her right to exercise her right to freedom of speech.
67. The proper approach in such circumstances is to adopt a domain name that, on its face, does not suggest a connection with the Complainant. For example, the Registrant's other domain name, namely, knowyourbuilder.com, which appears on the Registrant's mckeehomes.ca website, would be an appropriate domain name to use in connection with the Registrant's campaign.
68. Accordingly, in balancing the rights of the Complainant in its mark and the rights of the Registrant to express herself freely, the Panel finds that the Registrant does not have a legitimate interest in mckeehomes.ca.

Decision & Order

69. For the reasons set out herein, the Panel decides this dispute in favour of the Complainant.
70. Pursuant to paragraph 4.3 of the Policy, the Panel orders the domain name mckeehomes.ca transferred from the Registrant to the Complainant.

Myra Tawfik, Jay Josefo, Eric Macramalla (Chair)



Eric Macramalla
Chair

Date: June 25, 2007

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