

**CANADIAN INTERNET REGISTRATION AUTHORITY
DOMAIN NAME DISPUTE RESOLUTION POLICY**

DECISION

Domain Names: sheratta.ca; brarflour.ca; brarflourmilling.ca
Complainant: Brar Natural Flour Milling Inc.
Registrant: Brar Natural Flour Milling Inc.
Registrar: DomainsAtCost Corp.
Service Provider: ResolutionCanada Inc.

A. THE PARTIES

1. The Complainant is Brar Natural Flour Milling Inc. (the “Complainant”), a Manitoba corporation. The Complainant is represented by Aikins, MacAulay & Thorvaldson, LLP.
2. The Registrant is Brar Natural Flour Milling Inc. (the “Registrant”) and the address of record is Ottawa, Ontario.

B. DISPUTED DOMAIN NAME & REGISTRAR

3. The disputed domain names are sheratta.ca, brarflour.ca and brarflourmilling.ca (the “Domain Names”).

C. PROCEDURAL HISTORY

4. 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.
5. The Complainant filed its complaint (the “Complaint”) on August 17, 2011. The Date of Commencement of the proceeding was August 19, 2011.
6. The Registrant was provided 20 days to respond to the Complaint from the August 19, 2011 date. The Registrant did not file a response.
7. In light of the Registrant’s failure to file a response, the Complainant elected to convert the Panel from three members to a single member.
8. On September 13, 2011, the Panel was appointed. As prescribed by the Policy, the Panel has declared to the Provider that it can act impartially and independently in connection with this matter, and that there are no circumstances known to the Panel which would prevent it from so acting.

D. BASIS FOR DECIDING THE COMPLAINT

9. Since the Registrant has not submitted a response to the Complaint, the Panel shall decide the Proceeding on the basis of the Complaint. Notwithstanding the absence of a response, the proceedings shall be decided on the merits of the case.

E. CANADIAN PRESENCE REQUIREMENTS: ELIGIBILITY OF THE COMPLAINANT

10. The Complainant is a Manitoba corporation. The Panel is therefore satisfied that the Complainant is eligible to initiate these proceedings.

F. THE POSITIONS OF THE PARTIES

The Complainant's Position

11. The Complainant operates a flour milling business that produces and sells natural flour.
12. The term "sher" is a Hindi and Punjabi word for "lion", while the word "atta" is a Hindi and Punjabi word for "flour".
13. The Complainant is the owner of SHER, Registration No. TMA569435, which issued to registration in 2002, and SHER & Lion Design, Registration No. TMA577206, which issued to registration in 2003. The Complainant is also the owner of common law rights in the trade-marks BRAR NATURAL FLOUR MILLING and BRAR NATURAL FLOUR MILLING INC. & Lion Design. The Complainant also filed the trade-mark application BRAR NATURAL FLOUR MILLING INC. & Lion Design, Application No. 1524884 on April 26, 2011.
14. The Complainant has used the SHER & Lion Bag Design and SHER trade-marks in Canada since at least as early as November 27, 1998 in association with flour. The Complainant has used the BRAR NATURAL FLOUR MILLING INC. & Lion Design trade-mark in Canada since at least as early as December 2005 in association with flour.
15. The SHER and BRAR NATURAL FLOUR MILLING INC. trade-marks shall be collectively referred to as the "SHER Trade-marks".
16. The domain names were registered on the following dates: sheratta.ca – April 14, 2010; brarflour.ca – April 14, 2010; and brarflourmilling.ca – May 14, 2010. Contrary to the Complainant's assertion, Application No. 1524884 was not filed before the Domain Names were registered.
17. The Complainant did not authorize the registration of the Domain Names.
18. The Domain Names are confusingly similar with the SHER Trade-marks in which the Complainant had rights prior to the registration date of the Domain Names, and continues to have such rights.

19. The Registrant has no legitimate interest in the disputed domain names.
20. The Registrant registered the Domain Names in bad faith in that it registered the Domain Names primarily for the purpose of disrupting the business of the Complainant, a competitor. The Respondent has also engaged in a pattern of unauthorized domain name registrations by registering the Domain Names.
21. The Complainant has requested the transfer of the Domain Names.
22. The Registrant did not file a response. The identity of the Registrant is indicated as “Brar Natural Flour Milling Inc.”, which is the trade name of the Complainant. The administrative contact associated with the Domain Names is “Rob Hall”, who is the owner of the Registrar. This would suggest that the Registrant has availed itself of the Registrar’s privacy service with a view to concealing its identity.

G. DISCUSSION & REASONS

23. 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

24. 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 the Marks & Rights that Predate the Domain Name Registration Dates

25. The Complainant must establish trade-mark rights that precede the domain name registration date. Where the Complainant relies upon a trade-mark registered prior to the domain name registration date, the Policy does not require or permit a Panel

- to go behind the registration to determine whether the mark is valid or invalid based upon lack of distinctiveness or non-use. In cases where a trade-mark registration matured to registration after the domain name registration date, or the Complainant is relying on common law rights, it must establish rights that predate the domain name registration.
26. The Complainant's trade-mark registrations for SHER issued to registration prior to the 2010 registration dates of the Domain Names. Therefore, the Panel concludes that the Complainant has established rights in these marks.
 27. The Complainant's pending trade-mark application for BRAR NATURAL FLOUR MILLING INC. & Lion Design, Application No. 1524884 has not issued to registration. It is therefore not relevant to the analysis, as an application per se does not confer rights. In order to establish trade-mark rights in same, the Complainant must provide evidence of the use of the mark that predates the relevant domain name registration dates. The Complainant has provided sample packaging and invoices that it predate the domain name registration dates. On this basis, the Panel is satisfied that the Complainant has discharged its obligation of advancing the requisite trade-mark rights.
 28. The Panel notes that the Complainant also had the option of relying on its trade name rights as per paragraph 3.2(a) of the Policy. The evidence submitted would have been sufficient to establish these rights.
 29. As per paragraph 3.2 of the Policy, the Complainant has rights in the SHER Trade-marks.

Confusingly Similar

30. 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.
31. Pursuant to paragraph 1.2 of the Policy, a domain name is defined as the second level domain (the portion that immediately precedes the dot-ca suffix).
32. 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 marks only, and having an imperfect recollection of the marks, would likely confuse the Domain Name for the Complainant's marks based upon the appearance, sound or the ideas suggested by the mark.
33. 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.
34. 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*.
 35. The domain name sheratta.ca incorporates the SHER trade-mark together with the word "atta", which is a Hindi word for "flour". The Complainant of course operates in the field of flour. Under the circumstances, it is reasonable to conclude that the domain name is confusingly similar with the Complainant's SHER trade-marks as outlined above.
 36. The domain names brarflour.ca and brarflourmilling.ca incorporate the formative element of the Complainant's BRAR NATURAL FLOUR MILLING INC. trade-marks, namely, BRAR. Further, the domain name brarflourmilling.ca also includes the term "milling", which is also part of the Complainant's mark. Finally, both domain names incorporate the term "flour", which is a reference to the Complainant's business and which also appears in the marks.
 37. It is argued that the domain name registrations constitute trade-mark infringement, depreciation of goodwill and passing off contrary to Sections 20, 22 and 7 of the Canadian *Trade-marks Act*. The Policy requires that a complainant establish that a disputed domain name was registered in bad faith. The term "bad faith" is a term of art and is defined by the Policy. The Policy, however, does not provide for the far broader consideration of the statutory causes of action of trade-mark infringement, depreciation of goodwill and passing off. That would require an in-depth analysis of the matter that is not well-suited for these summary proceedings. In any event, the Panel notes that the Domain Names are inactive. Under these circumstances, trade-mark "use" has not occurred as per Section 4(1) and (2) of the Act, thereby rendering Section 20 and 22 inapplicable.
 38. There can be no doubt in the opinion of the Panel that the Registrant targeted the Complainant with the domain name registrations. The Domain Names are references to the Complainant.
 39. The Panel concludes that the Domain Names are confusingly similar with the Complainant's SHER Trade-marks, given that the Domain Names so nearly resemble the SHER Trade-marks in appearance, sound and in the ideas suggested so as to be likely to be mistaken for these marks.

Conclusion - Confusion

40. The Panel finds that the Domain Names are confusingly similar with the SHER Trade-marks in which the Complainant had rights prior to the registration date of the Domain Names, and continues to have such rights.

BAD FAITH REGISTRATION

Paragraph 3.7(b) - Pattern of Unauthorized Registrations

41. As per paragraph 3.7(b) of the Policy, the Complainant must establish the following:

the Registrant registered the domain name or acquired the Registration in order to prevent the Complainant, or the Complainant's licensor or licensee of the Mark, from registering the Mark as a domain name, provided that the Registrant, alone or in concert with one or more additional persons has engaged in a pattern of registering domain names in order to prevent persons who have Rights in Marks from registering the Marks as domain names.

42. The Policy does not define the term "pattern". As few as two domain name registrations, including the disputed domain name, in the view of the Panel, is sufficient to establish that the Registrant has engaged in a "pattern" of unauthorized registrations. In this case, the Complainant has established that the Registrant's registrations constitute a pattern given that it has registered 3 domain names to which it does not appear entitled.
43. Further, given that the Domain Names are confusing with the SHER trade-marks, the Panel finds that the Complainant was prevented from registering the Domain Names.
44. Accordingly, the Panel is satisfied that the Complainant has met the test prescribed by paragraph 3.7(b) of the Policy.
45. Given that the Complainant has established bad faith, the Panel shall not consider 3.7(c).

LEGITIMATE INTEREST

46. 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 Names.
47. 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".

48. 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 Names pursuant to paragraph 3.6.
49. The Panel finds that the Complainant has provided sufficient evidence that the Registrant does not have a legitimate interest in the disputed domain names as prescribed by paragraph 3.6 of the Policy. The Complainant did not authorize the registrations – which are clearly references to the Complainant.
50. As the Registrant has not replied to the Complaint, it has not established, on a balance of probabilities, that it has a legitimate interest in the Domain Names.
51. Accordingly, the Panel finds that the Registrant does not have a legitimate interest in the Domain Names.

DECISION & ORDER

52. For the reasons set out herein, the Panel decides this dispute in favour of the Complainant.
53. Pursuant to paragraph 4.3 of the Policy, the Panel orders the transfer of the domain names sheratta.ca, brarflour.ca and brarflourmilling.ca from the Registrant to the Complainant.

Dated at Ottawa, Ontario, Canada, this 4th day of October, 2011.



Eric Macramalla
Sole Panelist