

THE TORT OF CONVERSION IN THE ELECTRONIC AGE: A CASE STUDY

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A recent decision of the Supreme Court of British Columbia in *Canivate Growing Systems Ltd. v. Brazier* [*Canivate*],^[1] highlights the problems that can arise when a founder of a company registers the company's domain name personally, and subsequently refuses to transfer the registration to the company. More importantly, the decision in *Canivate* sets out what remedies are available to a company in that situation, including remedies for passing off and a modern day conception of conversion.

Background Facts

Mr. Brazier and two others agreed to develop their greenhouse technology for use in the cannabis industry. In 2017, Mr. Brazier registered the canivate.com domain name (the "**Domain Name**") in his own name, and shortly thereafter, a numbered company was incorporated. In February 2018, the numbered company's name was changed to Canivate Growing Systems Ltd. (the "**Company**"). Mr. Brazier, however, remained listed as the Registrant of the Domain Name.

The Company established a website at the Domain Name and company email addresses associated with the Domain Name. When the business relationship between the parties became strained in early 2018, Mr. Brazier took steps to interfere with the Company's use of the Domain Name, by disabling: (i) administrative access for the Company's employees; (ii) email addresses ending in @canivate.com; and (iii) the entire website. In late 2018, another dispute arose between the parties; Mr. Brazier later resigned as a director of the Company and commenced litigation against the Company. During this time, Mr. Brazier maintained administrative control over the Domain Name, and as a result the website and email addresses associated therewith. In mid-2019, the Company sought and was granted an interim injunction that ordered Mr. Brazier to restore the Domain Name's settings and to cease from interfering with the Domain Name (the "**Injunction Proceedings**").

The Canivate Decision

In January 2020, the Company brought an application for summary decision, seeking damages against Mr. Brazier for his interference with the Domain Name and seeking to have the Domain Name transferred into the Company's name.

The issues before the Court were: (1) whether Mr. Brazier's continued registration of and past interference with the Domain Name amounted to the tort of passing off; and (2) whether Mr. Brazier's interference with the Domain Name's settings as set out in the Injunction Proceedings amounted to the tort of conversion. Ultimately, the Court found that: (i) Mr. Brazier was liable for the tort of passing off; and (ii) Mr. Brazier was also liable for the tort of conversion. Notably, the Court found that a modern conception of conversion must include wrongful interference with intangible goods, such as electronic data, websites and email.

With respect to the Company's action for conversion, the Company needed to establish that Mr. Brazier had wrongfully interfered with the Company's goods in a manner that was inconsistent with the Company's rights of possession.^[2]

While "goods" are generally defined as physical goods, the Company sought to base its claim on Mr. Brazier's interference with the Company's use and possession of the Domain Name, the trademark "canivate" and the associated website and e-mail addresses. Mr. Brazier argued that a claim for conversion could not succeed, as he owned the Domain Name at the relevant time. While the Company did not own the Domain Name, it did own the website content, the "canivate" trademark and the email addresses and content associated with the Domain Name.

Therefore, the key question before the Court was whether electronic data in the form of a website or email address, or intellectual property in the form of a trademark, constituted goods that could be the subject of a conversion claim.

In finding that Mr. Brazier was liable for the tort of conversion with respect to the Company's website and email addresses, the court found that *"[i]n the electronic age in which we live, [...] it would be incongruous if conversion were limited to physical goods, or tangible chattels"* and that *"[...] a modern conception of conversion must include wrongful interference with intangible goods, such as electronic data, websites and email."*^[3] Because Mr. Brazier was found liable for the tort of passing off and conversion, the Court ordered him to transfer the Domain Name into the Company's name. General and special damages were also awarded.

Takeaway Points

The Court's willingness to acknowledge the value that intangible goods have to companies in today's society, and the harm that can be caused when such goods are wrongly interfered with, marks a significant step forward for the protection of intangible goods, including electronic data, websites and email, within the legal framework of the traditional common law tort of conversion. Below are some takeaways and reminders for businesses to consider:

- domain name possession is not synonymous with website possession or email address possession;

- common law torts are not stagnant and can be adapted to a changing business environment and to a modern world;
- intangible assets are potentially very valuable to a business, and protection thereof should not be overlooked.

by Lucy Williams and Pablo Tseng

[1] *Canivate Growing Systems Ltd. v. Brazier*, 2020 BCSC 232.

[2] *Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce*, [1996] 3 S.C.R. 727.

[3] *Supra* note 1, at para. 71.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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