

Andrew Moeser
416-649-1815
amoeser@litigate.com



Martin Brandsma
416-238-7397
mbrandsma@litigate.com

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Beyond Nominal: Recouping Damages from Evasive Trademark Infringers

For brand owners, trademark enforcement is critical to protect goodwill and prevent market confusion. Yet the prospect of litigation can feel futile precisely when infringement is most blatant: the defendant ignores demand letters, refuses to participate in the proceeding, withholds financial information, and leaves the plaintiff to prove loss through an evidentiary fog of the defendant's own making. Without reliable evidence of sales, customers, profits, or duration of use, even a strong infringement case risks collapsing into a modest "nominal" damages award.

A recent Federal Court decision, *Martinizing International, LLC v C&D Makridis Holdings Ltd*, provides some practical relief. The Court awarded $185,473.86 in damages against a non-participating respondent that used the MARTINIZING mark for dry-cleaning services without authorization. Importantly, the Court did not allow the respondent's silence to force the applicant into "nominal" recovery and instead accepted a damages theory anchored in the franchise and licensing economics that would have governed lawful use of the mark.

The decision is not a licence to speculate. The applicant still had to prove its case on a complete record. But the case is a useful reminder that for evasive trademark infringers, the Court may be more prepared to accept the evidence before it – and may be reluctant to let an infringer profit from the uncertainty it helped create.

Blatant Infringement

The applicant owned the MARTINIZING brand, used in association with an international dry-cleaning and laundry franchise. The respondent operated a dry-cleaning business in Halifax, Nova Scotia, and used the MARTINIZING mark on:

- Interior and exterior signage
- The respondent's website and social media
- Printed materials, including receipts

The respondent was not, and had never been, a franchisee, licensee, or authorized user of the mark.

The application proceeded undefended and was heard *ex parte*. Given the coined nature of the MARTINIZING mark and the respondent's use of the identical mark for identical services, liability was unsurprising. The Court accepted all claims made under the *Trademarks Act*:

- Infringement under sections 19 and 20
- Passing off under section 7(b)
- Depreciation of goodwill under section 22

Damages From Evasive Infringers

The more complicated question was damages. In a contested proceeding, a plaintiff may obtain through discovery evidence of the defendant's financial benefit from use of the mark, such as sales records, customer information, revenue data, and profits associated with the infringing use. In an *ex parte* application against a silent respondent, that evidence is generally unavailable.

This matters because trademark damages are often difficult to prove. Lost sales require a plaintiff to establish not only infringement and confusion but a causal connection between the infringing conduct and measurable economic loss. Depreciation of goodwill is no easier to quantify.

That evidentiary asymmetry often pushes plaintiffs toward nominal or conventional damages: awards that acknowledge compensable harm but do not attempt a full reconstruction of the commercial injury. While appropriate in some cases, such awards can make enforcement uneconomic, particularly where the defendant's own refusal to engage has prevented a more precise calculation.

Martinizing is important because the Court did not treat the absence of defendant evidence as an automatic path to a nominal award. The applicant still had to adduce the best evidence available. But once it did, the Court was prepared to assess damages using a commercially grounded proxy.

The decision is also a reminder that an unopposed application is not an invitation to under-prove the case. The applicant put forward evidence of its own Canadian use and goodwill, including revenue figures, Canadian website traffic, and customer review evidence associated with Canadian franchise locations. That evidence helped establish that the mark had meaningful goodwill in Canada and that the respondent's unauthorized use was not merely trivial.

Damages as the Price of Lawful Participation in the Franchise Business

The applicant framed damages by reference to the franchise and licensing fees the respondent would have paid had it operated lawfully as an authorized MARTINIZING franchisee. The Court accepted that approach in substance, awarding $185,473.86.

Although the applicant had not proven that it lost a specific prospective franchisee or that a particular customer or franchise opportunity had been diverted, the Court accepted the use of franchise economics as a reasonable proxy for loss.

Key Elements of the Damages Calculation

- **Royalty Component**: The Court accepted the applicant's standard franchise agreement royalty of 6% of gross revenues.
- **Revenue Estimate**: Without the respondent's financials, the applicant estimated the respondent's revenues using its own average Canadian store revenue.
- **Court's Acceptance**: The Court acknowledged the estimate was imperfect but accepted it as a reasonable basis for assessment in the circumstances. This determination is important. While the burden of proof remains with the plaintiff, where the plaintiff's evidence of its own licensing model is credible and the defendant elects not to participate, the Court may be willing to proceed on an imperfect but principled basis. Perfection is not the standard where the missing evidence lies in the hands of the infringer.

Costs: Silence Can Be Expensive

The costs award reinforces the same theme. The Court awarded lump-sum costs at 50%, above the range often seen in Federal Court intellectual property matters. The Court supported the elevated award based on the respondent's conduct:

- Using the mark for identical services
- Continuing to use the mark after receiving notice
- Failing to participate in the proceeding

The award gives brand owners another reason not to assume enforcement against an evasive defendant is futile.

Key Takeaways

Martinizing does not eliminate the challenges of proving trademark damages in Canada, nor does it convert every infringement claim into a reasonable royalty or franchise-fee case. The damages theory worked in this instance because:

- The applicant's business model involved licensing and franchising the mark.
- The respondent used the mark for the same services.
- The applicant supplied evidence that made the proxy commercially intelligible.

The broader lesson is about evidence. Plaintiffs facing evasive defendants should think early about substitute measures of value:

- Licence fees, royalty rates, and franchise fees
- Historical Canadian revenues
- Comparable store performance
- Web traffic
- Customer reviews
- Demand correspondence
- Any evidence showing that lawful use of the mark would have required payment

The goal is to give the Court a principled path through a complete record.

For defendants, the message is equally sharp. Silence is not a damages strategy. If the plaintiff can put forward a credible commercial proxy, a non-responsive defendant may find that the Court is prepared to calculate the price of infringement without the infringer's help – and then increase costs for having made that exercise more challenging.