

**IN THE MATTER OF AN OPPOSITION
by J. Mavor Moore to application Nos.
1,089,196 and 1,089,197 for the trade-
marks BLUE LIGHT SPRINGTHAW and
SPRINGTHAW filed by Labatt Brewing
Company Limited/La Brasserie Labatt
Limitée**

On January 16, 2001, Labatt Brewing Company Limited/La Brasserie Labatt Limitée (the “Applicant”) filed applications to register the trade-marks BLUE LIGHT SPRINGTHAW and SPRINGTHAW, Nos. 1,089,196 and 1,089,197 respectively. Both applications are based on proposed use of the mark in Canada in association with:

Wares:

(1) Alcoholic brewery beverages; wearing apparel for men and women namely shorts, vests, jackets, coats, sweaters, shirts, sweatshirts, T-shirts, pants, warm-up suits, shoes, socks, suspenders, belts, scarves, aprons, shoe laces, neckties, wrist bands, jerseys, raincoats, rain slickers, umbrellas, rain shoes, rain ponchos, swim suits, gloves, buttons for clothing, slippers, boots, sandals, dickies, overalls, nightshirts, belt buckles, ear muffs; robes, pyjamas, handkerchiefs, coats, jumpsuits, mitts, muffs, neckwarmers, pants, sports bags; ski wear namely ski hats, ski caps, visors, neckwarmers, ski socks, ski jackets, jerseys, ski pants, ski sweaters, jumpsuits, toques, ski mitts, muffs; glassware namely glasses and cups; bottle openers; head wear namely hats, caps, rain hats, ear muffs, toques, head bands and visors; mirrors, coasters, clocks, lighters, posters and umbrellas.

Services:

(1) Entertainment services, namely organizing, conducting and sponsoring social events, sporting events, promotions, contests (not including stage performances, television performances, or radio performances) for the benefit of others, and for the purposes of advertising, marketing, and promoting alcoholic brewery beverages.

Application No. 1,089,197 was advertised for opposition purposes in the Trade-marks Journal of May 14, 2003. J. Mavor Moore (the “Opponent”) filed a statement of opposition against this application on July 14, 2003.

Application No. 1,089,196 was advertised for opposition purposes in the Trade-marks Journal of June 25, 2003. The Opponent filed a statement of opposition against this application on November 24, 2003.

The Applicant requested an interlocutory ruling on the sufficiency of certain pleadings in the statements of opposition. Paragraphs 14 and 15 of both statements of opposition were struck pursuant to orders of the Chair of the Trade-marks Opposition Board (dated July 20, 2004 re application No. 1, 089, 196 and August 26, 2004 re application No. 1,089,197).

The Applicant filed and served counter statements.

The Opponent's evidence consists of the affidavit of J. Mavor Moore.

The Applicant elected to not file any evidence.

Neither party filed a written argument and an oral hearing was not requested.

Onus

The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the "Act"). There is however an initial burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. [See *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.).]

Section 12(1)(b) Grounds of Opposition

The Opponent has pleaded that the Applicant's marks are not registrable pursuant to s. 12(1)(b) of the Act because the marks are clearly descriptive or deceptively misdescriptive of the character or quality of the wares or services in that "the words 'spring thaw' conjure up images of natural renewal well-being."

The issue as to whether a mark is clearly descriptive must be considered from the point of view of the average purchaser of those wares. Furthermore, the mark must not be dissected into its component elements and carefully analyzed but must be considered in its entirety as a matter of

immediate impression. [see *Wool Bureau of Canada Ltd. v. Registrar of Trade Marks*, 40 C.P.R. (2d) 25 at 27-8; *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183 at 186]

Quite clearly, BLUE LIGHT SPRINGTHAW is not contrary to s. 12(1)(b) as the Applicant has not raised any argument that BLUE LIGHT is descriptive.

I also find that SPRINGTHAW is not clearly descriptive or misdescriptive of the Applicant's wares or services. Character means a feature, trait or characteristic of the wares and "clearly" means "easy to understand, self-evident or plain" [*Drackett Co. of Canada Ltd. v. American Home Products Corp.* (1968), 55 C.P.R. 29 at 34]. The idea of "natural renewal, well-being" does not clearly describe any character or quality of the applied for wares and services.

I therefore dismiss the s. 12(1)(b) grounds.

Section 12(1)(d) Grounds of Opposition

The Opponent has pleaded that the Applicant's marks are not registrable pursuant to s. 12(1)(d) of the Act because the marks are confusing with the trade-mark SPRING THAW registered by the Opponent under No. 123,310.

The material date with respect to this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)] and the Opponent's registration must be in good standing as of today's date in order for its initial burden to be satisfied.

Registration No. 123,130 was expunged pursuant to s. 45 on May 16, 2006. Accordingly, the s. 12(1)(d) grounds are dismissed.

Section 30(a) Grounds of Opposition

The Opponent has pleaded that the Applicant has failed to define its wares and services in ordinary commercial terms, contrary to s. 30(a). However, having reviewed the statements of wares and services, I find that this is not the case. I therefore dismiss the s. 30(a) grounds.

Section 30(i) Grounds of Opposition

The Opponent has pleaded that the applications do not comply with s. 30(i) because the Applicant could not have been fairly satisfied that it is entitled to use the marks having regard to the use thereof by others.

These grounds fail because they have not been sufficiently pleaded. The identity of the “others” is not clear. In addition, the Opponent has not claimed that the Applicant was aware of the alleged use by others. Even if the Applicant had been aware as of the relevant date, such a fact is not inconsistent with the statement that the Applicant was satisfied that it was entitled to use the marks applied for on the basis that its marks were not confusing with such others’ marks.

If I were to assume that “the use thereof by others” is meant to refer to the Opponent’s use of SPRING THAW, the grounds would still fail for the foregoing reasons. In addition, they would fail because no evidence has been presented that would enable me to conclude that the Opponent ever used SPRING THAW as a trade-mark as per s. 4 of the Act.

I will also add that where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant. [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]

Section 2 Grounds of Opposition

The Opponent has pleaded that the Applicant’s marks are not distinctive in that they neither distinguish nor are adapted to distinguish the Applicant’s wares and services for two reasons:

- 1) SPRINGTHAW and BLUE LIGHT SPRINGTHAW are incapable of distinguishing the Applicant’s wares and services from the Opponent’s previously used and registered trade-mark SPRING THAW;
- 2) SPRINGTHAW and BLUE LIGHT SPRINGTHAW are incapable of distinguishing the Applicant’s wares and services from those of others because they are clearly descriptive or deceptively misdescriptive.

In order to meet its evidential burden with respect to the first arm of this ground, the Opponent must show that as of the filing of the opposition its trade-mark had become known sufficiently to negate the distinctiveness of the Applicant's marks [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 at 58 (F.C.T.D.)]. The registration of a mark is insufficient to satisfy an opponent's initial burden with respect to distinctiveness.

I reproduce below some of Mr. Moore's evidence concerning his mark that predates the filing of these oppositions:

- “The SPRING THAW trade-mark originated with the stage revue of that title, musical and stage productions, as well as related activities and wares, that commenced in 1948 and ran in annual editions for twenty years, establishing new popularity records for Canadian theatre.” [paragraph 4]
- “Canadian university archives maintain extended collections of SPRING THAW programs and posters, and items are included in published anthologies...” [paragraph 5]
- “SPRING THAW material, with reference to the words SPRING THAW, continues to be included in anthologies of Canadian humour presently available in bookstores and otherwise...” [paragraph 6]
- “The SPRING THAW material continues to be used from time to time throughout Canada and abroad, with useage of the trade-mark SPRING THAW. Given the nature of SPRING THAW's services and wares [production and presentation of television performances, radio performances, musical, comedy and dramatic stage performances; books, records and tapes], actual productions and useage are cyclical in nature. There have been negotiations between myself and the CBC for use of SPRING THAW material in CBC television's 50th Anniversary special called ‘The Joke's On Us – 50 years of CBC Satire’. The specific sketch from SPRING THAW used was an item called ‘Foreign Relations’, which is referenced in the program to the Best of SPRING THAW mentioned above. This program was originally broadcast on September 6, 2002 and has been rebroadcast since.” [paragraph 8]

Mr. Moore has not provided any exhibits to support his statements. More importantly, the lack of exhibits makes it impossible to reach a conclusion as to whether the Opponent has ever used its mark in accordance with s. 4. Many of his statements refer to SPRING THAW material, and sketches or characters from these productions seem to have lived on independently of the Opponent's trade-mark. If the Opponent's mark was actively promoted, why is there is no documentary evidence?

Overall, I find that I cannot reach any conclusion concerning the extent to which the Opponent's mark was known in Canada as of the filing of these oppositions in 2003. The Opponent has not met its evidential burden and the first arm of the distinctiveness grounds of opposition accordingly fail.

The second arm of the distinctiveness grounds also fail, because I have already found that the Applicant's marks are not clearly descriptive or deceptively misdescriptive.

Disposition

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject both oppositions pursuant to s. 38(8).

DATED AT TORONTO, ONTARIO, THIS 9th DAY OF MAY 2007.

Jill W. Bradbury
Member
Trade-marks Opposition Board