

IN THE MATTER OF AN OPPOSITION by Le Pub John Bull Inc./  
John Bull Pub Inc. to application No. 555,890 for the trade-mark  
JOHN BULL filed by Ind Coope Limited

On January 21, 1986, Ind Coope Limited filed an application to register the trade-mark JOHN BULL based upon proposed use of the trade-mark in Canada in association with "beer and ale".

The opponent, Le Pub John Bull Inc./ John Bull Pub Inc., filed a statement of opposition on September 23, 1988 in which it alleged that the applicant is not the person entitled to registration of the trade-mark JOHN BULL, that the applicant's trade-mark is not distinctive and further that the applicant's application is not in compliance with Section 30(i) of the Trade-marks Act in that the applicant's mark is confusing with the opponent's trade-marks LE PUB JOHN BULL, JOHN BULL PUB and JOHN BULL, as well as with the opponent's trade-name LE PUB JOHN BULL INC./ JOHN BULL PUB INC. which had previously been used in Canada by the opponent in association with the operation of taverns, night clubs and restaurants which serve alcohol.

The applicant filed a counter statement in which it denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavits of Harry Dittrich, Chantal Poirier and Lucie Cloutier while the applicant submitted as its evidence the affidavits of Kim Pelletier and Timothy Collins.

At the request of the opponent, the Opposition Board issued an order for cross-examination of Kim Pelletier on her affidavit. As Ms. Pelletier was not available to attend for cross-examination on her affidavit, the applicant requested and was subsequently granted leave pursuant to Rule 46(1) of the Trade-marks Regulations to submit the affidavit of Marion Noonan in place of the Pelletier affidavit. By way of an Office letter dated December 18, 1990, the Opposition Board amended the order for cross-examination by replacing reference to Kim Pelletier to Marion Noonan. However, the opponent did not proceed with the cross-examination of Marion Noonan and the order was subsequently withdrawn.

As evidence in reply, the opponent submitted the affidavits of Guy Sirois and Sophie Dufresne. However, neither of these affidavits is strictly confined to matter in reply to either the Noonan or Collins affidavits. As a result, the Sirois and Dufresne affidavits are not admissible as reply evidence in this opposition pursuant to Rule 45 of the Trade-marks Regulations.

The applicant alone filed a written argument and neither party requested an oral hearing.

The opponent's first ground of opposition is based on Section 30(i) of the Trade-marks Act, the opponent alleging that the applicant could not have been satisfied as of the filing date of its application that it was entitled to use its trade-mark JOHN BULL in Canada in view of the opponent's trade-marks and trade-name. However, no evidence has been adduced by the opponent that the applicant was aware of either the opponent's trade-marks or its trade-name prior to filing its application in Canada. Further, the applicant could have stated in its application that it was satisfied that it is entitled to use the trade-mark JOHN BULL in Canada in association with beer and ale if it considered that its trade-mark was not confusing with the opponent's trade-marks and trade-name. I have therefore dismissed the first ground of opposition.

As its second and third grounds, the opponent has alleged that the applicant is not the person entitled to registration in view of the prior use by the opponent in Canada of its trade-marks LE PUB JOHN BULL, JOHN BULL PUB and JOHN BULL and trade-name Le Pub John Bull Inc./ John Bull Pub Inc. in association with the operation of taverns, night clubs and restaurants which serve alcohol. With respect to these grounds, there is an initial burden on the opponent in view of the provisions of Sections 16(5) and 17(1) of the Trade-marks Act to establish its use of its trade-marks and trade-name in Canada prior to the applicant's filing date (January 21, 1986), as well as to show that it had not abandoned its trade-marks and trade-name as of the date of advertisement (August 24, 1988) for opposition purposes of the applicant's application in the Trade-marks Journal.

In support of its alleged prior use and non-abandonment of its trade-marks and trade-name, the opponent submitted the affidavit of Harry Dittrich, President of the opponent. In paragraph 1 of his affidavit, Mr. Dittrich states the following:

"1) THAT I am President of LE PUB JOHN BULL INC./ JOHN BULL PUB INC., opponent in the present opposition matter. I also own the pub using the trade-name JOHN BULL PUB, which is located in Montreal, in the Province of Quebec."

Further, in paragraph 4, the affiant states:

"4) THAT, at the time of the May 7, 1968 opening of the pub going by the trade-name JOHN BULL PUB, the pub was owned by BULLDOG PUB INC., my company, which was incorporated by letters patent on May 3, 1967. This company changed its name on May 12, 1970 to become JOHN BULL PUB INC., as can be seen from the certified copy of the change of name certificate, which is annexed, to this my affidavit, under Exhibit "B"."

From the above paragraphs, it is unclear as to whether the opponent or the affiant, Harry Dittrich, was the owner of the JOHN BULL PUB as of the applicant's filing date or as of the date

of advertisement of the applicant's application. This ambiguity as to who is the owner and therefore the user of the trade-mark JOHN BULL PUB is not clarified by paragraphs 7 and 8 of the Dittrich affidavit where the affiant states as follows:

"7) THAT, since the opening of JOHN BULL PUB, I have advertised the JOHN BULL PUB name and services associated with the JOHN BULL PUB name in various university and Montreal urban newspapers. Recently, I have advertised in the 1988 McGill Student Handbook (given to students at course registration in late August, early September) and have sponsored a party for Concordia University students advertised in the Concordia Link newspaper, in order to attract the large student population found in the downtown area. From time to time, mention of the JOHN BULL PUB is also made in the Montreal Gazette newspaper, especially regarding our regular Saturday stand-up comedy nights; Sunday night musical jam sessions or live jazz events. I submit as Exhibit "D", to this my affidavit, samples of these advertisements or articles."

"8) THAT I have also promoted the JOHN BULL PUB by use of flyers, handed out to the public on the streets of Montreal or tacked to bulletin boards. I submit, to this my affidavit, Exhibit "E", which includes samples of JOHN BULL PUB flyers advertising such events as a JOHN BULL PUB anniversary party; Halloween parties; musical jam sessions and a sample of a ticket for one of JOHN BULL PUB's New Year's Eve parties."

Having regard to the above, as well as the exhibits annexed to the Dittrich affidavit, the opponent's evidence is consistent with use of the trade-mark JOHN BULL PUB by the affiant, Harry Dittrich, rather than by the opponent. As a result, I have concluded that the opponent has failed to meet the burden upon it under Sections 16(5) and 17(1) of the Act of establishing its prior use and non-abandonment of the trade-marks referred to in the statement of opposition. I have therefore rejected this ground of opposition.

The third ground of opposition is based upon the opponent's prior use of its trade-name LE PUB JOHN BULL INC./ JOHN BULL PUB INC. However, no use has been shown by the opponent of this trade-name. Rather, Exhibit "F" to the Dittrich affidavit shows use of the corporate name The John Bull Pub Inc. on a sample envelope and stationery which is, in my view, arguably not use of the trade-name identified in the statement of opposition. In any event, no dates are provided by Mr. Dittrich as to when the stationery and envelopes were used by the opponent even were such evidence to be considered as use of the trade-name identified in the third ground of opposition. I have therefore rejected this ground.

As its final ground, the opponent has alleged that the applicant's trade-mark is not distinctive in that it is confusing with the opponent's trade-marks and trade-name identified in the statement of opposition. Having regard to the deficiencies in the opponent's evidence noted above, I do not consider that the opponent has met the evidential burden upon it of establishing the facts being relied upon by it in respect of this ground. On that basis alone I would reject the final ground of

opposition.

In view of the above, I reject the opponent's opposition pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 30<sup>th</sup> DAY OF SEPTEMBER 1994.

G.W. Partington,  
Chairman,  
Trade marks Opposition Board.