



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2012 TMOB 100**  
**Date of Decision: 2012-06-05**

**IN THE MATTER OF AN OPPOSITION  
by Calgary Flames Limited Partnership  
to application No. 1,230,698 for the trade-  
mark The Red Mile in the name of  
1072160 Alberta Inc.**

[1] On September 17, 2004, 1072160 Alberta Inc. (the Applicant) filed an application to register the trade-mark The Red Mile (the Mark) on the basis of its use in Canada since January 1, 2004. The wares and services, as revised, are set out below.

Clothing, namely, t-shirts, handkerchiefs, bandanas; drinking glasses (the Wares).

Restaurant services, bar and lounge services (the Services).

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 22, 2008.

[3] On December 18, 2008, the Calgary Flames Limited Partnership (the Opponent) filed a statement of opposition pleading the grounds summarized below.

- (a) The Mark is not registrable pursuant to section 12(1)(b) because it is clearly descriptive or deceptively misdescriptive of the place of origin of the Wares and Services since the expression “the red mile” or “red mile” denote a specific geographic location in Calgary, Alberta.

- (b) The Mark is not registrable pursuant to section 12(1)(e) since its adoption is prohibited by section 10 since it has by ordinary and *bona fide* commercial use become recognized in Canada as designating a geographic area and as such the place of origin of wares and services.
- (c) The application does not comply with the requirements of section 30(b) because the Mark has not been used in Canada by the Applicant since the date claimed in the application in association with any or all of the Wares or Services, or if the Mark has been used, such use has ceased or has not been continuous.
- (d) The Mark is not distinctive, pursuant to section 2, because the Mark does not distinguish and is not adapted to distinguish the Wares and Services of the Applicant because the Mark (i) is descriptive or deceptively misdescriptive of their place of origin; (ii) was coined and adopted by others to designate a geographic area in Calgary, Alberta; (iii) is used by many others, including Calgary businesses, tourism organizations and groups, Calgary residents and the Opponent to identify a geographic area of Calgary; and (iv) is otherwise associated with the Opponent.

[4] The Applicant filed and served a counter statement in which it denied the Opponent's allegations.

[5] In support of its opposition, the Opponent filed the affidavits of Melanie Risdon-Betcher, Nicholas Aitken, and Wayne Leong. The Applicant filed the affidavits of Betty Hayer and Sheena Owens. As its reply evidence, the Opponent filed an affidavit of Diane Medeiros.

[6] Each party filed a written argument and attended a hearing held on March 19, 2012.

#### Onus and Material Dates

[7] The Applicant bears the legal onus of establishing, on a balance of probabilities that its application complies with the requirements of 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 CPR (3d) 293 (FCTD) at 298].

[8] The material dates that apply to the grounds of opposition are as follows:

- sections 38(2)(a)/30 - the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- sections 38(2)(b)/12(1)(b) - the filing date of the application [see *Fiesta Barbeques Ltd v General Housewares Corp* (2003), 28 CPR (4th) 60 at para 26 (FCTD)];
- sections 38(2)(b)/12(1)(e) - the date of my decision [see *Park Avenue Furniture Corp v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 at 422 (FCA)]; and
- sections 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 at 324-325 (FC)].

### **Grounds of Opposition**

#### *Section 30(b) Ground of Opposition*

[9] The section 30(b) ground of opposition alleges that the Mark has not been used in Canada by the Applicant or has not been used continuously in association with all of the Wares or Services.

[10] The legal onus is on the Applicant to show that its application complies with section 30(b) of the Act. To meet its evidential burden, the Opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [*John Labatt Ltd, supra*]. The Opponent's burden is, however, lighter with respect to the issue of non-compliance with section 30(b) because the facts supporting use of the Mark are particularly within the knowledge of the Applicant [*Tune Masters v Mr. P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB) at 89]. While the Opponent may rely upon the Applicant's evidence to meet its evidential burden in relation to this ground, the Opponent must show that the Applicant's evidence is "clearly" inconsistent with the

Applicant's claims as set forth in its application [*York Barbell Holdings Ltd v ICON Health & Fitness Inc* (2001), 13 CPR (4th) 156 at 162 (TMOB)].

[11] Section 30(b) requires that there be continuous use of the applied-for trade-mark in the normal course of trade from the date claimed to the filing date of the application [*Benson & Hedges (Canada) Ltd v Labatt Brewing Co* (1996), 67 CPR (3d) 258 (FCTD) at 262]. The requirements for use are set out in section 4 of the Act. With respect to services, a trade-mark is deemed to be used in association with services if it used or displayed in the performance and advertising of those services. The services do not necessarily have to have been performed or sold for there to have been use, so long as they are offered to prospective customers in association with the mark and the services are available to be performed [*Modis Inc. v. Modis Communications Inc.*; 2004 CarswellNat 4627 (TMOB) at para 24].

[12] The affidavit of Ms. Hayer, President of the Applicant provides the following:

- When Ms. Hayer's daughter was playing children's soccer on a team with red jerseys, in 1978, the parents would joke that the children were "the red mile" since they chased the ball in a single file line (para 4).
- Ms. Hayer sponsored various women's soccer teams and as a homage to her daughter would donate jerseys on which "THE RED MILE" was printed as far back as 1992. Ms. Hayer attaches photos of jerseys with THE RED MILE donated between 1993 and 2000 (Exhibit B).
- The Applicant started a women's and men's designer fashion boutique on January 1, 2004 called the Asha Michelle Boutique (para 13). Ms. Hayer attaches photographs of bandanas, and t-shirts featuring the RED MILE SALOON trade-mark sold in 2005 (para 14, Exhibit E). I find that the RED MILE SALOON trade-mark does not constitute use of the Mark since consumers are not likely to regard use of RED MILE SALOON as use of the Mark [*Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB) at 538].
- The Applicant provided event hosting services commencing in the first quarter of 2004 in association with THE RED MILE trade-mark (paras 16-18, Exhibits F, H). It should be noted that event hosting services were not covered in the subject application.

- The Applicant has endeavored to carry on business as a restaurant and lounge but has largely been unable to despite significant investments (paras 19-33). The only evidence of the Applicant providing restaurant services relates to the period from May 2008 to December 2009 wherein an establishment named THE RED MILE was operated in Prince George, British Columbia (paras 30-31).

[13] Having regard to the foregoing, the Applicant's evidence is clearly inconsistent with section 30(b) of the Act and the Opponent has met its burden. Therefore, the Applicant now has the onus of showing use of the Mark with each of the Wares and Services from January 1, 2004 to September 17, 2004.

[14] With respect to the Wares, the Applicant has not met its onus of proving use of the Mark in association with the Wares since the Applicant has not filed evidence showing the use of the Mark in association with each of the Wares as of January 1, 2004. With respect to the Services, the Applicant's evidence clearly demonstrates that it had not used the Mark as of January 1, 2004 since the Services were not offered in association with the Mark, nor was the Applicant in a position to perform them as of this date. Accordingly, this ground of opposition is successful.

#### *Distinctiveness Ground of Opposition*

[15] The Opponent pleads the mark is not distinctive because the Mark (i) is descriptive or deceptively misdescriptive of the place of origin of the Wares and Services, (ii) was coined and adopted by others to designate a geographic area in Calgary, Alberta, (iii) is used by many others, including Calgary businesses, tourism organizations and groups, Calgary residents and the Opponent to identify a geographic area of Calgary and (iv) is otherwise associated with the Opponent.

[16] There is an initial burden on the Opponent to establish that, as of October 22, 2008, the expression THE RED MILE was known to such an extent that it could negate the distinctiveness of the Mark. The Opponent will have met its burden if this expression is known in Canada to some extent or if it is well known in a specific area of Canada to designate a geographic area in Calgary [*Bojangles' International, LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC) at para 33].

[17] The Opponent's affiant, Ms. Melanie Risdon-Betcher, a radio announcer in Calgary from 2004-2007, provides the following evidence:

- (a) In May 2004, the NHL playoffs were taking place between the Calgary Flames and the Detroit Red Wings (para 3). On May 3, 2004, during Ms. Risdon-Betcher's radio show, she invited listeners to suggest a name for the approximately 15 block area of 17<sup>th</sup> Avenue running east/west from the Saddledome hockey arena. She coined the expression "The Red Mile" after receiving listeners' suggestions (para 3).
- (b) Ms. Risdon-Betcher attaches a copy of a Globe and Mail article dated June 7, 2004 entitled "Calgary's Red Mile Proves Tampa-proof; City loves moniker for street where Flames fans flock to cheer their team" and a copy of the article "Flames fans are STOKED" in the Calgary Herald of May 9, 2004 referencing her announcement of "The Red Mile" (Exhibit A).

[18] The Opponent's affiant, Wayne Leong, Director and President of 599515 Alberta Ltd. who operates a restaurant and bar known as Melrose Café, provides the following

- (a) The expression the Red Mile has appeared in signage and pictures displayed in the Melrose Café since 2004 until at least September 14, 2009 (para. 5; Exhibits B and D).
- (b) The expression the RED MILE also appears as part of the trade-mark THE HEART OF THE RED MILE on promotional items such as t-shirts, hoodies, and bandanas distributed periodically from July 2004 until 2007 (paras 8-11, 21, Exhibits E-F, P) and on restaurant menus since 2005 (para 25; Exhibit T).
- (c) Mr. Leong also attaches to his affidavit various articles using the expression Red Mile to describe the area along 17<sup>th</sup> Avenue South West where Calgarians first congregated in 2004 during the Calgary Flames play-off run (Exhibit A). I note that at least eight of these articles appeared in The Calgary Sun or Calgary Herald between May 20, 2004 and April 20, 2006.

[19] The Opponent's affiant Nicholas Aitken, a summer student with the Opponent's agent provides a copy of an article from the Calgary Herald dated April 13, 2009 "Calgary's Red Mile braces for mayhem" (Exhibit 11). This article discusses plans to manage the crowd during that year's Stanley Cup play-offs. Mr. Aitken also attaches a Wikipedia page for the Red Mile which states that "the Red Mile is the name given to a several block stretch of 17<sup>th</sup> Avenue S.W. in Calgary, Alberta, Canada during the Calgary Flames 2004 Stanley Cup playoff run" (Exhibit 3). In view of the fact that both parties submitted print-outs from Wikipedia as part of their evidence and each had the opportunity to reply to the other's Wikipedia evidence, I am giving some weight to this evidence [*Canadian Council of Professional Engineers v Alberta Institute of Power Engineers* (2008), 71 CPR (4th) 37 (TMOB) at para 35]. Furthermore, while the evidence summarized in this paragraph is dated after the material date, it is relevant to the extent that it confirms that Red Mile denotes a geographic location and supports the inference that this would have been the case at the material date.

[20] The Opponent's evidence is sufficient to meet its burden. While the Opponent has not provided any admissible evidence of the circulation of newspapers, I take judicial notice that The Calgary Sun, Calgary Herald and Globe and Mail had some circulation in the Calgary area [*Northern Telecom Ltd v Nortel Communications Inc* (1987), 15 CPR (3d) 540 (TMOB) at 543]. As such, I am satisfied that the general public in Calgary has been exposed to various publications which use the expression the Red Mile to describe a particular geographic location in Calgary.

[21] The Applicant's evidence, contained in the affidavit of Sheena Owens, that the expression Red Mile has been used to refer to other locations including a horse racing track in Kentucky, a village in the United Kingdom and the Oscar awards red carpet (Exhibits A, C and M) does not assist the Applicant as this evidence does not support the conclusion that the Mark has been adapted to distinguish the Wares and Services of the Applicant from the use of the expression Red Mile referring to a location in Calgary.

[22] The Opponent's evidence demonstrates that the expression Red Mile has been used and was known to Calgarians as designating a particular geographic location in Calgary as of the

material date. The Applicant's evidence does not show that the Mark had acquired distinctiveness at the material date. Accordingly, this ground of opposition is successful.

*Remaining Grounds of Opposition*

[23] As I have already found in favour of the Opponent under two grounds, I do not consider it necessary to address the remaining grounds of opposition.

Disposition

[24] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(8) of the Act.

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Natalie de Paulsen  
Member,  
Trade-marks Opposition Board  
Canadian Intellectual Property Office