

IN THE MATTER OF AN OPPOSITION  
by Beaver Lumber Company Limited  
to application No. 609,908 for  
the trade-mark LUMBER PLUS  
filed by Alpa Lumber Inc.

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On June 21, 1988, the applicant, Alpa Lumber Inc., filed an application to register the trade-mark LUMBER PLUS for the services of "operation of a retail lumber and building supply store" based on use in Canada since 1983. The application as filed contained a disclaimer to the word LUMBER. The application was advertised for opposition purposes on November 30, 1988.

The opponent, Beaver Lumber Company Limited, filed a statement of opposition on December 22, 1988, a copy of which was forwarded to the applicant on February 3, 1989. The first ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(b) of the Trade-marks Act because it is either clearly descriptive or deceptively misdescriptive of the character or quality of the applied for services or of the conditions of their production. The second ground is that the applied for trade-mark is not distinctive for the same reasons.

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Bonnie Freedman. As its evidence, the applicant filed the affidavits of W. Hugh Taylor and Linda Thibeault. Both parties filed a written argument and an oral hearing was conducted at which both parties were represented.

As for the first ground of opposition, the material time for considering the circumstances respecting the issue arising pursuant to Section 12(1)(b) of the Act is the filing date of the application: see Oshawa Group Ltd. v. Registrar of Trade Marks (1980), 46 C.P.R. (2d) 145 at 147 and Carling Breweries Limited v. The Molson Companies Limited (1984), 1 C.P.R. (3d) 191 at 195. The issue is to be determined from the point of view of an everyday user of the wares or services. Furthermore, the trade-mark in question must not be carefully analyzed and dissected into its component parts but rather must be considered in its entirety and as a matter of first impression: see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks (1978), 40 C.P.R. (2d) 25 at 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks (1984), 2 C.P.R. (3d) 183 at 186. Finally, the trade-mark in question must be considered in relation to the actual wares or services with which it is used or intended to be used: see Thomas J. Lipton, Ltd. v. Salada Foods Ltd. (No. 3) (1979), 45 C.P.R. (2d) 156 at 161 (F.C.T.D.).

The Freedman affidavit introduces into evidence dictionary definitions for the word "plus." The most pertinent definition in the context of the applicant's mark is "with the addition of" or, more simply, "and." Another possibly relevant definition is "having a certain quality to an unusual degree" or, more simply, "enhanced."

In her affidavit, Ms. Freedman states that she visited a number of lumber and building supply stores in Toronto. The materials appended to her affidavit illustrate the range of products available at such stores. Such products comprised primarily lumber and related building supplies.

Given that the applicant's services are the operation of a retail outlet selling lumber and building supplies and given that consumers are familiar with that type of

retail outlet, I consider that it is likely that consumers viewing the trade-mark LUMBER PLUS in connection with such an outlet would react to it as meaning "lumber and...." In other words, the trade-mark LUMBER PLUS used with a lumber and building supply store is an elliptical expression which signifies to the customer that the store carries lumber plus building supplies. (The concept of an elliptical trade-mark was discussed in S.C. Johnson & Sons, Ltd. v. Marketing International Ltd. (1979), 44 C.P.R.(2d) 16 at 25 (S.C.C.).) The elliptical nature of the mark in this case is underscored by the applicant's own evidence which includes advertisements for its Burlington, Ontario store featuring the phrase "First a Lumber Store - Plus So Much More!" (see the Taylor affidavit). That evidence also lends some support to the supposition that the words LUMBER PLUS are of the type that other traders in the field might want to use in describing their retail operations.

The applicant submitted that the state of the trade-marks register dictates against such a finding. The Thibeault affidavit evidences over one hundred registered trade-marks incorporating the word PLUS, none of which contains a disclaimer to that word. Such evidence, however, is of little assistance since each case must be decided on its own facts. Furthermore, most of the registered marks located by Ms. Thibeault appear to use the word PLUS in the sense of an enhanced version of a particular ware or service. This is in contrast to the present case where the evidence of record points to a conjunctive meaning for the word PLUS in the context of the applicant's mark and services.

The applicant also submitted that the trade-mark LUMBER PLUS was not clearly descriptive in that the word PLUS as used in that mark is an indefinite term. The applicant submitted that if PLUS is taken to mean "and", then it is unclear as to what specific services are covered in addition to lumber-related services. If the applicant's statement of services only covered the operation of a retail lumber store, then the applicant's submission might have been persuasive. However, as noted above, the applicant's services cover "the operation of a retail lumber and building supply store" (emphasis added) and the evidence establishes that consumers are familiar with that type of outlet. Thus, in the context of the applicant's particular services, the word PLUS in the trade-mark LUMBER PLUS does point to specific additional services, namely, a retail store that sells building supplies in addition to lumber.

The applicant relied on the opposition decision in Nabisco Brands Ltd. v. Perfection Foods Ltd. (1986), 12 C.P.R.(3d) 456 (F.C.T.D.); affg. (1985), 7 C.P.R.(3d) 468 (T.M.O.B.) wherein the Chairman of the Trade Marks Opposition Board found that the trade-mark MILK PLUS was not clearly descriptive of 'inter alia' "flavoured milk beverages." However, no detailed reasons were given for that finding and it would appear that no evidence directed to that particular issue was filed. Furthermore, it must also be kept in mind that each case rests on its own facts. In this regard, it would appear that the word PLUS in the context of the trade-mark MILK PLUS is used in a somewhat laudatory fashion to suggest an enhanced or improved version of a "flavoured milk beverage" rather than a beverage containing milk plus other ingredients. In other words, the word PLUS in MILK PLUS does not clearly point to anything. This is in contrast to the word PLUS in the present case where the trade-mark LUMBER PLUS in association with the applied for services points to a retail store that sells lumber plus building supplies. Or, put more simply, MILK PLUS does not appear to be elliptical; LUMBER PLUS does.

The onus or legal burden is on the applicant to show that its trade-mark does not offend the provisions of Section 12(1) (b) of the Act. In the present case, I consider that the opponent has met its evidential burden. Based on the evidence of record, I am left in a state of doubt as to whether the mark is clearly descriptive of the character of the applied for services. Since the onus or legal burden is on the applicant, I must resolve that doubt against it. Consequently, the first ground of opposition is successful and the second ground need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 31st DAY OF December, 1991.

David J. Martin,  
Member,  
Trade Marks Opposition Board.