



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

Citation: 2016 TMOB 83
Date of Decision: 2016-05-31

IN THE MATTER OF AN OPPOSITION

W.T. Lynch Foods Ltd.	Opponent
and	
Hon's Wun-Tun House (2011) Ltd.	Applicant
1,571,110 for SIMPLE SINGLE SERVE	Application

[1] The Applicant has filed an application to register the trade-mark SIMPLE SINGLE SERVE (the Mark).

[2] The application was filed based upon proposed use of the Mark in Canada in association with the following goods, as amended:

Asian cuisine food products, namely, meal entrees, prepared meals, prepared vegetarian meals, noodles, dumplings, pasta, egg rolls, buns, chow mein, rice wraps, rice rolls, wun tun wraps, and dim sum; appetizers, namely, wraps, spring rolls, samosas and roti; sauces, namely, hot, soy, sweet and sour, curry, teriyaki, oyster and fish; snack foods, namely rice based and grain based, none of the aforementioned goods being dehydrated.

[3] The Opponent has opposed the application for the Mark on the basis that: (i) the application does not comply with section 30 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act); (ii) the Mark is not registrable under section 12(1)(d) of the Act; (iii) the Applicant is not entitled to registration of the Mark under section 16 of the Act; and (iii) the Mark is not distinctive under section 2 of the Act. The last three grounds of opposition revolve around confusion of the Mark with the Opponent's trade-mark SINGLE SERV (registration No. TMA175,077 – registered in association with “Foods consisting of dehydrated soups and gravies, hot chocolate powders, syrups and sundae toppings, in individual portions”) and trade-name SINGLE SERV FOODS.

[4] For the reasons that follow, I refuse the application.

The Record

[5] The application for the Mark was filed by the Applicant on March 29, 2012.

[6] It was advertised for opposition purposes in the Trade-marks Journal dated July 3, 2013. On December 3, 2013, the Opponent filed a statement of opposition to oppose it under section 38 of the Act. The Applicant then filed and served its counterstatement on February 28, 2014.

[7] In support of its opposition, the Opponent filed the affidavit of Scott Lynch, sworn June 26, 2014, together with Exhibits A and B. Mr. Lynch was not cross-examined on his affidavit.

[8] In support of its application, the Applicant filed the affidavit of Penelope Brady, sworn October 3, 2014, together with Exhibits A through S. Ms. Brady was also not cross-examined on her affidavit.

[9] Only the Opponent filed a written argument and attended an oral hearing.

Onus and Material Dates

[10] 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 evidential burden on the Opponent to adduce sufficient admissible evidence from which it could be reasonably concluded that the facts alleged to support each ground of opposition exist [see *John*

Labatt Limited v The Molson Companies Limited (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155; and *Wrangler Apparel Corp v The Timberland Company*, 2005 FC 722, 41 CPR (4th) 223].

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

- Sections 38(2)(a)/30 – the filing date of the application, namely, March 29, 2012 [see *Delectable Publications Ltd v Famous Events Ltd* (1989), 24 CPR (3d) 274 (TMOB) re: section 30(a); *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) re: section 30(b); *Canadian Railway Co v Schwauss* (1991), 35 CPR (3d) 90 at 94 (TMOB) re: section 30(e)]; and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB) re: section 30(i)].
- Sections 38(2)(b)/12(1)(d) – the date of my decision [see *Park Avenue Furniture Corp v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c)/16(3)(a), (b) and (c) – the date of filing the application, namely, March 29, 2012 [see section 16(3) of the Act].; and
- Sections 38(2)(d)/2 - the date of filing of the opposition, namely, December 3, 2013 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

Overview of the Parties' Evidence

The Opponent's Evidence

The Lynch Affidavit

[12] Mr. Lynch is the President of the Opponent.

[13] He attests that the Opponent has marketed and sold “foods consisting of dehydrated soups and gravies, hot chocolate powders, syrups and sundae toppings, in individual portions” in association with the trade-mark SINGLE SERV in Canada since 1971. He refers to trade-mark

registration TMA175,077, which is owned by the Opponent and registered in association with such goods.

[14] Mr. Lynch further attests that since 1971, the Opponent has marketed and sold a variety of food products in association with the trade-name SINGLE SERV FOODS, and that presently goods bearing the SINGLE SERV trade-mark and the trade-name SINGLE SERV FOODS are sold in Canada through wholesale outlets, retail outlets and food service providers. He attests that sales of the Opponent's goods bearing the SINGLE SERV trade-mark and the trade-name SINGLE SERV FOODS, now exceed \$200,000 per year.

[15] In support of the aforementioned, Mr. Lynch provides the following:

- Exhibit A – a copy of a label bearing the trade-name SINGLE SERV FOODS used since 1971.
- Exhibit B – copies of invoices for sales of the goods in Canada, dated between December 2012 and June 2014.

[16] Lastly, Mr. Lynch explains that since 1971, the Opponent has advertised and marketed its goods bearing its SINGLE SERV trade-mark in Canada in print advertisements and monthly food service distribution flyers. He attests that marketing expenditures since that time in Canada with respect to advertising of goods bearing the SINGLE SERV trade-mark and SINGLE SERV FOODS trade-name have been in excess of \$100,000.

The Applicant's Evidence

The Brady Affidavit

[17] Ms. Brady is a trade-mark agent employed by the Applicant's trade-mark agents and representative for service.

[18] She attests that on October 29, 2014, she performed a Google search for the term SINGLE SERV. She attaches as Exhibit A to her affidavit, a printout of the first two pages of the search results she obtained. On that same day, she attests that she also performed a Google

search for the term SINGLE SERVE, and she attaches a printout of the first two pages of that search result as Exhibit B. She explains that the second page of the search result in Exhibit B yielded a number of pictures of food products under the heading “Images for single serve.” She clicked on these pictures and attaches as Exhibit C, printouts of the products and information that appeared, including:

- Heavenly Delights Single Serve collection cookies;
- Nuun Electrolyte Enhanced Drink Tabs Single Serve Tablets;
- Go Lean! Crunch - \$1 off Kashi Coupon = FREE Single Serve Cereal at Target!;
- Del Monte Debuts Plastic Wrap for Single Serve Bananas; and
- Zipz Single-Serving Wine for Sipping Small – single-serve plastic goblets.

However, this evidence does not demonstrate that the words “single serve” or “single serv” have been commonly adopted since there is no evidence of sales in Canada of any of the products located through these web searches [*Generation Nouveau Monde Inc v Teddy SPA*, 2006 CanLII 80484 (TMOB)]. Furthermore, in many cases, these words are being used to describe an individual portioned product and are not being used as a trade-mark.

[19] Ms. Brady then attests that on October 29, 2014, she conducted a search of the Opponent’s website *www.lynchfoods.com*, and she attaches as Exhibit F a printout of the homepage headed “Discover Lynch Foods”. She explains that she clicked on the link “Lynch Foodservice” at the top of the homepage and she attaches as Exhibit G, a copy of the printout obtained from the page that she was directed to, entitled “Discover Lynch Food Service”. She states that this page included a number of links including links entitled “Beverage”, “Dessert”, and “Soup & Gravy”. Ms. Brady investigated each of these links and attaches as Exhibits H through M printouts obtained from these links for various products, such as hot chocolate powder, chocolate syrup, beef soup base, chicken soup base, and complete brown gravy mix.

[20] In the course of further investigating the Opponent’s website, Ms. Brady attests that she then went back to the “Discover Lynch Foods” homepage. She explains that in the “quick search” box located on the homepage she entered the terms “single serve”, “single” and “serv”, the results of which she attaches as Exhibits N, O, and P respectively, and which she indicates

shows “No Results Found”. She attests that she then entered the term “hot chocolate” in the “quick search” box, the results of which she attaches as Exhibit Q, which she indicates shows the hot chocolate items located by this search.

[21] Lastly, Ms. Brady attests that she once again went back to the homepage of the Opponent’s website and clicked on links for “Lynch Retail” and “Terms and Conditions”. She attaches as Exhibit R to her affidavit, a printout of the page obtained under the “Lynch Retail” link, which shows the food items listed on this page. She further attaches as Exhibit S to her affidavit, a printout of the page entitled “Disclaimer Terms and Conditions” which she was directed to from the link “Terms and Conditions”. Neither the Opponent’s trade-mark SINGLE SERV nor the trade-name SINGLE SERV FOODS appear on any of the aforementioned printouts obtained from Opponent’s website.

Grounds of Opposition based on Non-compliance with Section 30

[22] The grounds of opposition based on non-compliance with section 30 of the Act are four-fold as follows:

- The application does not comply with section 30(a) of the Act in that it does not contain a statement in ordinary commercial terms of the specific goods and services in association with which the alleged trade-mark has allegedly been used or is proposed to be used;
- The application does not comply with section 30(b) of the Act in that the Applicant has applied for the alleged trade-mark based on proposed use whereas the application should have been based on actual use in Canada;
- The application does not comply with section 30(e) of the Act in that as of the filing date, namely March 29, 2012, the Applicant had already used the applied-for goods as set out in the application. Further, the Applicant did not intend to use the alleged trade-mark in Canada in association with the applied-for goods on the basis of proposed use; and
- The application does not comply with section 30(i) of the Act in that the Applicant could not have been satisfied that it was entitled to use the alleged trade-mark SIMPLE SINGLE SERVE in association with the goods listed in the application given the prior

use of the Opponent's trade-mark registration No. TMA175,077, which has been previously used in Canada by the Opponent or a predecessor in title or a licensee of the Opponent, and has not been abandoned by the Opponent.

[23] The Opponent's initial evidential burden under section 30(a) is a light one. In fact, the Opponent may need only present sufficient argument in order to meet its initial burden [see *McDonald's Corporation and McDonald's Restaurants of Canada Ltd v MA Comacho-Saldana International Trading Ltd carrying on business as Macs International* (1984), 1 CPR (3d) 101 at 104 (TMOB)].

[24] In its written argument, the Opponent narrowed its objection with respect to the application's compliance with section 30(a) to the goods described as "chow mein" and "wun tun wraps"; however, the Opponent has neither provided any evidence nor argument to support a finding that these goods are defined in anything other than ordinary commercial terms. Consequently, the Opponent has failed to meet its burden and, as a result, I dismiss the ground of opposition based on section 30(a) of the Act.

[25] With respect to section 30(b) of the Act, an opponent's initial burden has been characterized as light due to an opponent's limited access to information regarding use relative to the applicant. While an opponent can meet its initial burden by reference to its own evidence, its burden can in some cases be met with reference to the applicant's evidence [*Corporativo de Marcas GJB, SA De CV v Bacardi & Company Ltd* 2014 FC 323 (CanLII); *Molson Canada v Anheuser-Busch Inc* 2003 FC 1287; 2003 FC 1287 (CanLII), 29 CPR (4th) 315 (FC)]. Similarly, with respect to section 30(e) of the Act, the initial burden upon an opponent is relatively light and can be met by reference to the applicant's evidence; the rationale being that it is difficult to prove a negative, and certainly more so in a case of a proposed use application [see *Molson Canada v Anheuser-Busch Inc*, 2003 FC 1287, 29 CPR (4th) 315].

[26] Despite such a light burden, however, the sections 30(b) and (e) grounds of opposition can be summarily dismissed on the basis that the Opponent has not met its initial evidentiary burden in respect thereof. Indeed, there is no evidence to support that a finding that the Applicant had commenced use of the Mark prior to the date of filing of the application. Furthermore, the application formally and substantively complies with section 30(e) of the Act since it contains a

statement that the Applicant by itself and/or through a licensee intends to use the trade-mark in Canada and there is no evidence suggesting that the Applicant did not actually intend to use the Mark when it filed its application.

[27] Lastly, with respect to the final ground of opposition based on non-compliance with section 30 of the Act, section 30(i) merely requires than an applicant declare in its application that it is satisfied that it is entitled to registration of its trade-mark. Where an applicant has provided the requisite statement, this ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155].

[28] The Applicant has provided the necessary statement and there is no evidence to suggest that this is an exceptional case. Furthermore, mere awareness of the Opponent's mark (in this case, there is no such evidence) would not necessarily have prevented the Applicant from being satisfied that it was entitled to use its Mark.

[29] At the hearing, the Opponent requested that the Board take judicial notice of facts that it deems demonstrates bad faith on behalf of the Applicant (ie – an application subsequently filed by the Applicant for the same mark in association with substantially the same goods), submitting that the Applicant was taking advantage of the process and that the application is a nuisance filing. The Opponent submits that these facts only recently came to its attention, subsequent to the filing of its written argument. While the Registrar exercises discretion to check the register to confirm the existence of a registration or application relied upon under a section 12(1)(d) or non-entitlement ground of opposition, the Registrar does not exercise discretion to take under other circumstances [*Quaker Oats of Co of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 at 411 (TMOB); *Royal Appliance Mfg Co v Iona Appliances Inc* (1990), 32 CPR (3d) 525 (TMOB); and *GlaxoSmithKline Inc v Scar Heal, Inc*, 2014 TMOB 45 at para 20]. In any event, in my view, such evidence would be insufficient to demonstrate bad faith on behalf of the Applicant with respect to the current application.

[30] The Opponent has therefore failed to meet its evidential burden, and I dismiss the section 30(i) ground accordingly.

Non-registrability Ground of Opposition – Section 12(1)(d)

[31] The Opponent has plead that the Mark is not registrable having regard to the provisions of section 12(1)(d) of the Act in that it is confusing with its SINGLE SERV registration No. TMA175,077.

[32] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing. The Registrar has the discretion to check the register in order to confirm the existence of any registrations relied upon by an opponent [see *Quaker Oats of Canada, supra*]. I have exercised the Registrar's discretion to confirm that the Opponent's registration is in good standing as of today's date, which, as previously indicated, is the material date for assessing a section 12(1)(d) ground of opposition [per *Park Avenue Furniture Corp, supra*]. The Opponent has therefore satisfied its evidential burden.

[33] I now have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's registered trade-mark SINGLE SERV.

The test for confusion

[34] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that the use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[35] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; b) the length of time each has been in use; c) the nature of the goods, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. The above-noted criteria are not exhaustive and it is not necessary to give each one of them equal weight [see, in general, *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 1 SCR 772 (SCC) at para 54; and *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401]. I also refer to *Masterpiece Inc v Alavida*

Lifestyles Inc (2011), 92 CPR (4th) 361 (SCC) at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

Section 6)(5)(a) – inherent distinctiveness and the extent to which the marks have become known

[36] The overall consideration of the section 6(5)(a) factor, involves a combination of inherent and acquired distinctiveness of the parties' marks.

[37] The Mark consists of the words SIMPLE SINGLE SERVE, all of which are common dictionary words. The following definitions, as located in the Canadian Oxford Dictionary, 2nd edition appear applicable [see *Tradall SA v Devil's Martini* (2011), 92 CPR (4th) 408 (TMOB) at para 29 re: judicial notice of dictionary definitions]:

Simple: not complicated or elaborate; without luxury or sophistication.

Single: one only, not double or multiple.

Serve: [*transitive*] set out or present (food) for those about to eat it: *asparagus served with butter* / | *dinner is served*.

Not only are these words common dictionary words, but the words “single serve” suggest that the goods comprise individual portions, with the word “simple” implying that such individually apportioned servings either contain a rather modest list of ingredients and/or are straightforward and uncomplicated to prepare and consume.

[38] The Opponent's mark on the other hand is comprised of solely of the words SINGLE SERV, which is the phonetic equivalent of the words “single serve” as in the Mark, and in which the same dictionary meanings are applicable. That is, that the Opponent's goods comprise individual portions or servings.

[39] Neither the Applicant's nor the Opponent's mark possess a high degree of inherent distinctiveness given they are comprised of ordinary dictionary words that are suggestive of the nature of the goods to which they are associated. While the Opponent submits that the word SIMPLE is a generic term and is not distinctive, I am of the view that the addition of the word SIMPLE marginally increases the inherent distinctiveness of Applicant's Mark; despite the

Opponent's unique spelling with respect to the word SERV. The word "simple" in the Applicant's Mark, albeit not inherently strong, is one further potentially distinguishing element, as its meaning in relation to the Applicant's goods given its alternate implications, is less straightforward than the words "single serve".

[40] Nonetheless, as previously indicated, the strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use.

[41] The application for the Mark is based upon proposed use, and the Applicant has not filed any evidence of use of the Mark. The Opponent, on the other hand, submits that the Lynch affidavit provides evidence that its mark SINGLE SERV, registered on March 12, 1971, has been used in Canada by the Opponent and has not been abandoned by the Opponent. I disagree. Mr. Lynch makes assertions of use of the SINGLE SERV mark, statements regarding marketing expenditures, and invoices; however, he does not provide evidence with respect to how this mark appeared on or in association with the goods. Rather instead, the label at Exhibit A, as Mr. Lynch attests, is evidence of a copy of a label bearing the trade-name SINGLE SERV FOODS. Furthermore, the invoices do not include the mark, and despite Mr. Lynch's attestation that the Opponent advertised and marketed its goods in monthly food service distribution flyers, he does not provide any further details or corroborating evidence. While it is true that the Opponent's registration for the SINGLE SERV mark includes a declaration of use which was filed on March 11, 1971, in the absence of evidence of actual use or making known of the mark, at most, this entitles me to assume minimal use and cannot give rise to an inference of significant and continuous use of the mark [see *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB) at 430].

[42] However, in the end, while I conclude that the Applicant's Mark possesses a marginally greater degree of inherent distinctiveness, I find that the overall consideration of the section 6(5)(a) factor does not significantly favour either party.

Section 6(5)(b) – the length of time of use

[43] As stated above, neither party has provided evidence of use of their respective marks and as the mere existence of the Opponent’s registration can establish no more than *de minimus* use, it cannot give rise to an inference of significant and continuous use.

[44] Accordingly, the section 6(5)(b) factor does not favour either party.

Sections 6(5)(c) and (d) – the nature of the goods and business or trade

[45] It is the Applicant’s statement of goods as defined in its application versus the Opponent’s registered goods that govern my determination of this factor [see *Esprit International v Alcohol Countermeasure Systems Corp* (1997), 84 CPR (3d) 89 (TMOB)]. These statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. While evidence of the parties’ actual trades is useful in this respect [*McDonald’s Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA)].

[46] In the present case, both the subject application and the Opponent’s registration are in respect of food products. While neither party is restricted according to particular channels of trade, the Lynch affidavit indicates that the Opponent’s goods are presently sold to the public across Canada, including wholesale and retail outlets, and food service providers.

[47] With respect to the Applicant’s statement of goods, the food products are defined as “Asian cuisine” food products, and include appetizers, sauces, and snack foods. The statement of goods in the Opponent’s registration, on the other hand, is in respect of “foods consisting of dehydrated soups and gravies, hot chocolate powders, syrups and sundae toppings, in individual portions.” I note that there are several cases where the products at issue were food products sold through the same channels of trade wherein the Registrar found such food products to be intrinsically different and, as such, would be sold in different sections of the same grocery store [see for example *Edelweiss Food Products Inc v World’s Finest Chocolate Ltd* (2000), 5 CPR (4th) 256 (meat and chocolate); and *Clorox Co v Sears Canada Inc* (1992), 41 CPR (3d) 483 (fruit cake and barbecue sauce)]. However, while some of the Applicant’s goods and the

Opponent's goods can be characterized this way, as for example, the Applicant's goods and the Opponent's hot chocolate powders, syrups and sundae toppings, there appears to be a stronger relationship between the remaining goods, such that the remaining goods, absent evidence to the contrary, have potential for overlap. As but one example, the Opponent's gravies (which constitute a sauce) and the Applicant's sauces. Notwithstanding whether they are in dehydrated form, they are sauces nonetheless, which absent evidence to the contrary would conceivably be sold in the same sections of the same grocery stores.

[48] Accordingly, I find this factor favours the Opponent; however, only with respect to the registered goods "foods consisting of dehydrated soups and gravies, in individual portions".

Section 6(5)(e) – degree of resemblance in appearance, when sounded, or in idea suggested

[49] When considering the degree of resemblance between the marks, the law is clear that the marks must be considered in their totalities; it is not the correct approach to lay the trade-marks side by side and compare and observe similarities or differences among the elements or components of the marks. The Supreme Court of Canada in *Masterpiece, supra* advised that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trade-mark that is particularly striking or unique.

[50] I find that there is a significant degree of resemblance between the Mark and the Opponent's trade-mark in appearance, sound and idea suggested, as the Mark incorporates the entirety of the Opponent's trade-mark. That is, both parties' marks include the words SINGLE and SERVE (or equivalent thereof when sound sounded). The Opponent submits that these words are the distinctive portions of both marks which are the same, as the word SIMPLE is a generic term which is not distinctive and not the dominant portion of the Applicant's Mark. I agree that the word SIMPLE does not diminish the resemblance between the parties' trade-marks as it appears to be suggestive of the goods (see analysis under 6(5)(a)) [*Reno-Dépôt Inc v Homer TLC Inc* (2009), 84 CPR (4th) 58 (TMOB) at para 58].

[51] Having regard to the above, I am of the view that the differences in the parties' trade-marks are not significant enough to outweigh their similarities in appearance, sound and ideas

suggested, as a matter of first impression and imperfect recollection. The section 6(5)(e) factor therefore favours the Opponent.

Conclusion in the likelihood of confusion

[52] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Furthermore, having regard to all the surrounding circumstances set out above, including the overlap in the nature of the parties' goods and channels of trade, as well as the similarity of the parties' marks in appearance, sound, and ideas suggested, I am not satisfied that the Applicant has discharged its burden to prove, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent's registered trade-mark SINGLE SERV (registration No. TMA175,077). While I acknowledge that weak marks are only entitled to a very narrow ambit of protection, I believe that the Applicant's Mark falls within the ambit of protection to be accorded to the Opponent's mark. As previously discussed, the Mark incorporates the entirety of the Opponent's trade-mark, and the difference between the parties' marks is insignificant. As mentioned earlier, the degree of resemblance between the parties' marks is the statutory factor that is often likely to have the greatest effect in deciding the issue of confusion. This is particularly the case where the parties' goods (or services), and the parties' channels of trade, are the same or overlapping [see *Reynolds Consumer Products Inc. v. P.R.S. Mediterranean Ltd.* (2013), 111 CPR (4th) 155 (FCA) at paras. 26 -30].

[53] Accordingly, the section 12(1)(d) ground of opposition is successful, but only with respect to the Opponent's registered goods "foods consisting of dehydrated soups and gravies, in individual portions".

Non-entitlement Grounds of Opposition

Section 16(3) grounds

[54] In order to meet its initial burden under section 16(3)(a) of the Act, the Opponent must show that the trade-mark SINGLE SERV alleged in support of its ground of opposition based on section 16(3)(a) of the Act was used in Canada prior to the date of filing of the application for

the Mark (namely, March 29, 2012) and had not been abandoned at the date of advertisement of the application for the Mark (July 3, 2013) [section 16(5) of the Act].

[55] For the reasons that follow, I conclude that the Opponent has failed to meet its burden under this ground, as it has failed to show any use of its SINGLE SERV trade-mark.

[56] In particular, while the Opponent's affiant Mr. Lynch makes an assertion of use of the SINGLE SERV trade-mark, there is no collaborative evidence beyond this bald statement. In this regard, there is no evidence as to how the mark appeared on the Opponent's goods or packaging, or was in any other manner so associated with the goods, as required by section 4(1) of the Act. Indeed, the Exhibit A label is attested by Mr. Lynch as being that of a copy of a label bearing the trade-name SINGLE SERV FOODS, and the Opponent's trade-mark SINGLE SERV does not appear on the label.

[57] Furthermore, any reference to use in the Opponent's registration is not sufficient to satisfy the Opponent's evidential burden under section 16(3)(a) of the Act[see *Roos, Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB)].

[58] Based on the foregoing, the Opponent has failed to meet its evidential burden under section 16(3)(a) of the Act. Accordingly, this ground of opposition is dismissed.

[59] With respect to the ground of opposition based upon section 16(3)(b) of the Act, in order to meet its initial burden, the Opponent must establish that its SINGLE SERV application was filed (or deemed filed in Canada) prior to the deemed filing date of the Applicant's application (March 29, 2012), and was pending at the date of advertisement of the Applicant's application (July 3, 2013) [section 16(4) of the Act].

[60] While the Opponent has not evidenced its application No. 326,841 for the mark SINGLE SERV relied on in the statement of opposition, I have exercised my discretion to inspect the trade-mark register to confirm the existence of the mark [see *Royal Appliance Mfg, supra*]. In doing so, I note that the Opponent's initial burden is not met regarding its section 16(3)(b) ground because its application No. 326,841 issued to registration on March 12, 1971 and therefore was not pending as of the date of advertisement of the Mark. Accordingly, the section 16(3)(b) ground is dismissed.

[61] Lastly, in order to meet its initial burden under section 16(3)(c) of the Act, the Opponent must show that its *Single Serv Foods* trade-name was used in Canada prior to the date of filing of the application for the Mark (March 29, 2012) and had not been abandoned at the date of advertisement of the application for the Mark (July 3, 2013) [section 16(5) of the Act].

[62] The Opponent relies upon the product label attached under Exhibit A to the Lynch affidavit, in addition to associated assertions of use of the trade-name by the Opponent. With respect to the Exhibit A label, I note that it identifies the product as “Swiss Treat” hot chocolate and shows the trade-name SINGLE SERV FOODS at the bottom of the label. Mr. Lynch states that this label has been used since 1971. Corresponding sales of this product appear in the invoices attached under Exhibit B to Mr. Lynch’s affidavit, all of which, however, post-date the material date under this ground. In any event, I note that the trade-name SINGLE SERV FOODS does not appear on the invoices themselves, and Mr. Lynch’s assertion of use of the trade-name is broad and ambiguous as he simply asserts that the Opponent “has marketed and sold a variety of food products in association with the trade-name SINGLE SERV FOODS.”

[63] In the alternative, if I were to accept that the Opponent had met its burden under this ground of opposition, it would be limited to the goods “hot chocolate”. For reasons enunciated under the ground of opposition based upon section 12(1)(d), most particularly, with respect to the confusion analysis factor under section 6(5)(c), I find the Opponent’s “hot chocolate” to be intrinsically different from the Applicant’s goods, such that confusion is unlikely [see *Edelweiss, supra* and *Clorox, supra*]. Accordingly, the ground of opposition based upon section 16(3)(c) is also dismissed.

Non-distinctiveness Ground of Opposition

[64] The Opponent has plead that the Mark is not distinctive within the meaning of section 2 of the Act, in that, it does not actually distinguish and is not adapted to distinguish the Applicant’s goods from the goods of others, including but not limited to those of the Opponent. Further to this, the Opponent has plead that the Mark is not distinctive in that it is confusing with the trade-marks of others including but not limited to the Opponent, pursuant to section 6 of the Act, namely, registration No. TMA175,077.

[65] There is an initial evidential burden on the Opponent to establish the facts relied upon in support of its non-distinctiveness ground. Once the burden has been met, there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its goods and services from those of others [See *Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 298; *Muffin Houses Incorporated v The Muffin House Bakery Ltd*, (1985) 4 CPR (3d) 272 (TMOB); *Imperial Tobacco Canada Limited v Philip Morris Products SA*, 2013 TMOB 175 (TMOB) para 24, aff'd 2014 FC 1237 para 15-16 and 68; *JTI-Macdonald TM Corp v Imperial Tobacco Products Limited*, 2013 FC 608 para 55].

[66] This means that in order to meet its initial burden under this ground, the Opponent must establish that as of the filing date of the statement of opposition, namely, December 3, 2013, the Opponent's mark had become known sufficiently to negate the distinctiveness of the Mark [see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427; *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, (2004), 34 CPR (4th) 317 (FC); and *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 at 58 (FCTD)].

[67] As discussed above in the section 12(1)(d) ground of opposition, in addition to the non-entitlement ground of opposition under section 16(3)(a), the Opponent has failed to show any use of its SINGLE SERV trade-mark. Furthermore, there is no evidence of advertising or marketing or any other evidence that shows that the Opponent's mark had established a reputation in Canada such to negate the distinctiveness of the Mark [per *Bojangles, supra* and *Metro-Goldwyn-Mayer, supra*]. Accordingly, the ground of opposition based upon non-distinctiveness of the Mark is dismissed as the Opponent has failed to meet its burden under this ground.

Disposition

[68] As I have concluded that the ground of opposition based on sections 38(2)(b)/12(1)(d) was successful, 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.

Kathryn Barnett
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

Hearing Date: 2016-01-21

Appearances

Alpesh Patel For the Opponent

No one appearing For the Applicant

Agents of Record

Johnston Law For the Opponent

Coastal Trade-mark Services Ltd. For the Applicant