



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

**Citation: 2012 TMOB 217**  
**Date of Decision: 2011-11-28**

**IN THE MATTER OF AN  
OPPOSITION by The Athletic  
Club Group Inc. to application  
No. 1,421,086 for the trade-mark  
in OAC OTTAWA ATHLETIC  
CLUB & Design the name of  
Ottawa Athletic Club Inc.**

FILE RECORD

[1] On December 9, 2008, Ottawa Athletic Club Inc. filed an application to register the trade-mark OAC OTTAWA ATHLETIC CLUB & Design, illustrated below:



The application is based on use of the mark by the applicant, and its predecessors in title, in association with the following services:

operation of a fitness club, conducting fitness classes, operation of a racquet club, namely tennis, squash and racquetball, operation of an aquatics facility, since 1983;  
personal training services, since 1989;  
operation of summer sports camps, since 1993;  
operation of an indoor golf facility, since 1995.

[2] The predecessors in title claimed in the subject application were (i) O.A.C. Holdings Limited and (ii) Ottawa Athletic Club & Glenview Services Corporation.

[3] The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated September 23, 2009 and was opposed by The Athletic Club Group Inc. on February 19, 2010. The Registrar forwarded a copy of the statement of opposition to the applicant on March 9, 2010, as required by s.38(5) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. The applicant responded by filing and serving a counter statement generally denying the allegations in the statement of opposition.

#### STATEMENT OF OPPOSITION

[4] The first ground of opposition, pursuant to s.30(b) of the *Trade-marks Act*, alleges that the applicant did not in fact begin to use the applied-for mark in association with the specified services as of the dates claimed in the subject application.

[5] The second ground of opposition, pursuant to s.30(a) of the *Trade-marks Act*, alleges that “the application does not contain a statement in ordinary commercial terms of the specific services in association with which the mark has been allegedly used.”

#### FILE RECORD - CONTINUED

[6] On September 1, 2010, the opponent filed as its evidence the affidavit of Jodi M. Gilmour and a certified copy of the file wrapper for the subject application. As will be discussed later, Ms. Jodi’s evidence raised questions concerning the existence of the second predecessor named in the subject application.

[7] On October 21, 2010, the applicant requested leave to amend the subject application to change the predecessor in title identified as the single entity Ottawa Athletic Club & Glenview Services Corporation to two distinct entities namely, Ottawa Athletic Club and Glenview Services Corporation. The applicant’s request for leave was granted by the Board ruling dated November 16, 2010. Just as an aside, it appears the applicant as well as this Board treated the change to the application as an amendment pursuant to Section 32 of the *Trade-marks Regulations* rather than as a correction pursuant to Section 33(1)(b) of the *Regulations*. In the instant case, however, nothing turns on the technical issue of how the change was effected.

[8] The applicant subsequently filed as its evidence the affidavit of Joy Kohli.

[9] As is the usual practice, governed by the *Trade-mark Regulations*, after the evidence stage was completed the Registrar sent a notice to the parties advising them that they may request an oral hearing. Shortly thereafter, the opponent requested leave (i) to amend its statement of opposition, and (ii) to file additional evidence in support of the amended pleadings. The applicant objected to the opponent's requests. After considering written submissions from both parties, the Board denied the opponent's requests in a ruling dated November 25, 2011. Excerpts from the ruling are shown below:

The opposition has reached the stage of the oral hearing, which has been requested by both parties. Each party has been informed that it will be notified in due course of the date, time and place of the hearing.

In the present case, the importance of the amendment and of the evidence by itself could arguably outweigh the debate between the parties whether the amendment could have been made earlier and the evidence filed earlier. However, when the stage the opposition has reached and the potential prejudice to the applicant are factored in, the balance tips decidedly against the opponent.

[10] Accordingly, the only issues in this proceeding are those defined by the statement of opposition as initially filed, as set out in paragraphs 4 and 5 above. Only the applicant submitted a written argument, however, both parties were represented at an oral hearing held on November 13, 2012.

#### OPPONENT'S EVIDENCE

*Jodi Gilmour*

[11] Ms. Gilmour identifies herself as an employee of the firm representing the opponent. As part of her duties she obtains various corporate searches and corporate reports. On June 17, 2010, she requested a corporation profile report of the companies initially claimed by the applicant as its predecessors in title namely, O.A.C. Holdings Limited and Ottawa Athletic Club & Glenview Services Corporation. With respect to O.A.C. Holdings Limited, two corporations were found, one identified as having "active" status and one identified as having "amalgamated" status. It appears that no corporate records were available for the entity identified as Ottawa Athletic Club & Glenview Services Corporation.

[12] Of course, it is likely that the applicant became aware of its error in identifying its predecessors in title upon review of Ms. Gilmour's affidavit, which prompted the applicant to request leave to amend the application as mentioned in paragraph 6, above.

#### APPLICANT'S EVIDENCE

*Joy Kohli*

[13] Ms. Kohli identifies herself as an articling student with the firm representing the applicant. The salient portions of her evidence are Exhibits C and D attached to her affidavit, described below:

##### *Exhibit C*

Copies of the Declaration under the *Partnership Registration Act* (Ontario) and the Limited Partnership Act (Ontario) for the limited partnership named "Ottawa Athletic Club." I note that the business was established in 1975 and that the business activity carried on is "Health, Recreation and Sports Facility."

##### *Exhibit D*

A Corporate Profile Report (Ontario) for Glenview Services Corporation, identified as having "amalgamated" status with an amalgamation date of 1993/03/01.

[14] Ms. Kohli's evidence confirms that the entities named as predecessors in title in the corrected application were in fact extant.

#### LEGAL ONUS AND EVIDENTIAL BURDEN

[15] The legal onus is on the applicant to show that the application does not contravene the provisions of the *Trade-marks Act* as alleged by the opponent in the statement of opposition. The presence of a legal onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant. However, there is also, in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition: see *John Labatt Limited v. The Molson Companies Limited*, 30 CPR (3d) 293 at 298 (FCTD). The presence of an evidential burden on the opponent with respect to a particular issue means that in order

for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

#### CONSIDERATION OF THE GROUNDS OF OPPOSITION

[16] With respect to the first ground of opposition, at the oral hearing the opponent argued that it has met its evidential burden to cast doubt on the applicant's claimed dates of first use by showing that one of the originally named predecessors in title did not exist. It was therefore incumbent, according to the opponent, for the applicant to adduce positive evidence of when it first began to use the applied-for mark. I do not accept either of the opponent's submissions. The application of record (that is, the corrected application) names three entities as predecessors in title and there is no evidence before me that raises doubts concerning the veracity of the applicant's claim to use of the applied-for mark, at the dates set out in the application, through its predecessors. In such circumstances it is not necessary for the applicant to adduce positive evidence of use at the claimed dates because the matter is not in issue.

[17] With respect to the second ground of opposition, the opponent has not adduced any evidence to support its allegation that the wares specified in the subject application are not stated in ordinary commercial terms.

[18] Accordingly, the first and second grounds are rejected for the reason that the opponent has not met its evidential burdens.

[19] I would add that had the applicant not corrected its application, then the opponent would have met its evidential burden in respect of the first ground of opposition and the application would have been refused.

#### DISPOSITION

[20] In view of the foregoing, the opposition is rejected. This decision has been made pursuant to a delegation of authority under s.63(3) of the *Trade-marks Act*.

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Myer Herzig  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office