

IN THE MATTER OF AN OPPOSITION by La Société Calzaturificio Tecnica, S.p.A. to application No. 753,361 for the trade-mark MOONBOOTS filed by Pajar Distribution Ltée/Pajar Distribution Ltd.

On April 27, 1994, the applicant, Pajar Distribution Ltée/Pajar Distribution Ltd., filed an application to register the trade-mark MOONBOOTS based upon use of the trade-mark in Canada since at least as early as April, 1970 in association with “Footwear, namely after-ski and snowmobile boots”.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of June 28, 1995 and the opponent, La Société Calzaturificio Tecnica, S.p.A., filed a statement of opposition on November 28, 1995, a copy of which was forwarded to the applicant on December 14, 1995. The applicant served and filed a counter statement in which it effectively denied the opponent’s grounds of opposition. Neither party filed evidence and, while the applicant submitted a written argument, neither party requested an oral hearing. Further, the opponent requested leave pursuant to Rule 44(1) of the *Trade-marks Regulations* to adduce further evidence in this opposition. However, that request was refused by the Opposition Board by way of the Office letter of January 23, 1998.

The first three grounds of opposition are based on Subsections 30(a), 30(b) and 30(i) of the *Trade-marks Act*. While the legal burden is upon the applicant to show that its application complies with Section 30 of the *Trade-marks Act*, there is an initial evidentiary burden on the opponent to establish the facts relied upon by it in support of its Section 30 grounds [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; and *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R.(3d) 293]. Further, the material time for considering the circumstances respecting the issues of non-compliance with Section 30 of the *Act* is the applicant’s filing date [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475]. As no evidence or written argument has been furnished by the opponent, the opponent has failed to meet the initial burden upon it in respect of any of its Section 30 grounds. As a result, these grounds of opposition are unsuccessful.

The remaining grounds of opposition all turn on the issue of confusion between the applicant's trade-mark MOONBOOTS and the opponent's registered trade-mark MOONBOOT which the opponent claims that it has used in Canada since at least as early as March, 1970 in association with footwear. As no evidence has been submitted by the opponent, the opponent has failed to establish its prior use and non-abandonment of the trade-mark MOONBOOT in Canada in association with footwear. As a result, the opponent has failed to meet the initial burden upon it under Subsection 16(5) and 17(1) of the *Trade-marks Act* in respect of the non-entitlement ground of opposition. Consequently, the Paragraph 16(1)(a) ground of opposition is unsuccessful.

As its final ground, the opponent alleged that the trade-mark MOONBOOTS is not distinctive. However, as no evidence has been furnished by the opponent in support of its allegations relating to the alleged non-distinctiveness of the applicant's trade-mark, the opponent has failed to meet the evidential burden upon it in respect of this ground. I have therefore dismissed the non-distinctiveness ground of opposition.

The only remaining ground of opposition is based on Paragraph 12(1)(d) of the *Trade-marks Act*, the opponent alleging that the applicant's trade-mark MOONBOOTS is not registrable in that it is confusing with its registered trade-mark MOONBOOT. In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Subsection 6(5) of the *Trade-marks Act*. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the date of my decision, the material date in respect of the Paragraph 12(1)(d) ground of opposition [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (FCA)].

While the opponent has not filed a copy of its registration as evidence, the Registrar does have the discretion to check the register in order to confirm the existence of the registration relied upon by the opponent [see *Quaker Oats of Canada Ltd./ La Compagnie Quaker Oats du Canada Ltée v. Menu Foods Ltd.*, 11 C.P.R. (3d) 410]. In doing so, I noted that the correct registration No.

for the opponent's trade-mark MOONBOOT is registration No. 188,202 and that the trade-mark was expunged from the register on April 25, 1995. As the material date for considering this ground is as of the date of my decision, this ground of opposition is also unsuccessful.

Having been delegated by the Registrar of Trade-marks by virtue of Subsection 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to Subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC, THIS 6th DAY OF AUGUST, 1998.

G.W. Partington,
Chairperson,
Trade-marks Opposition Board.