



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

Citation: 2014 TMOB 235
Date of Decision: 2014-10-29

**IN THE MATTER OF AN OPPOSITION
by MoneyLogix Group, Inc. to
application No. 1,486,153 for the trade-
mark BMO MONEYLOGIC in the name
of Bank of Montreal**

Background

[1] Bank of Montreal (the Applicant) is the owner of application No. 1,486,153 for the trade-mark BMO MONEYLOGIC (the Mark). The application covers “online banking services”. The application was filed on June 22, 2010 and is based upon proposed use of the Mark in Canada.

[2] MoneyLogix Group, Inc. is the owner of the trade-mark MONEYLOGIX and the trade name MONEYLOGIX GROUP, INC., both of which it claims to have used in Canada in association with “real estate and financial services, including the provision of loans and mortgages”, since at least as early as April of 2009.

[3] MoneyLogix Group, Inc. (the Opponent) has opposed the application for the Mark based upon its alleged prior use and based upon an allegation that there is a likelihood of confusion between the Mark and its own trade-mark and/or trade-name.

[4] For the reasons that follow, the opposition is rejected.

File History

[5] The application for the Mark was advertised for opposition purposes in the *Trade-marks Journal* dated December 15, 2010. A statement of opposition was filed by the Opponent on May 13, 2011, under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition are based upon sections 30(i), 16(3)(a), 16(3)(c) and 2 of the Act. The Applicant filed a counterstatement on July 8, 2011.

[6] As evidence in support of its opposition, the Opponent filed the affidavit of Alex Haditaghi, sworn November 1, 2011 (the Haditaghi affidavit). Mr. Haditaghi was cross-examined on his affidavit and the transcript of his cross-examination has been made of record.

[7] As evidence in support of its application, the Applicant filed the affidavit of Veronica Tsou, sworn September 10, 2012 (the Tsou affidavit) and the affidavit of Nancy Marescotti, sworn September 4, 2012 (the Marescotti affidavit). Neither of the affiants was cross-examined.

[8] Both parties filed written arguments and attended a hearing.

Onus

[9] The Applicant bears the legal onus of establishing on a balance of probabilities that its application complies with the requirements of the Act. However, there is an initial evidential 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 Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

Issues

[10] There are three main issues to be determined in this case:

1. Does the application for the Mark comply with section 30(i) of the Act?
2. Is the Applicant the person entitled to the registration of the Mark?
3. Is the Mark distinctive of the Applicant's services?

Analysis

1. Does the application for the Mark comply with section 30(i) of the Act?

[11] The Opponent has pleaded that the application for the Mark does not comply with the provisions of section 30(i) of the Act because the Applicant could not have been satisfied that it was entitled to use the Mark in Canada, in view of the Opponent's prior use of its trade-mark and trade-name. The material date for assessing a ground of opposition under section 30(i) of the Act is the date of filing the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB)]. Section 30(i) of the Act merely requires that 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, a section 30(i) 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]. The Applicant has provided the necessary statement and this is not an exceptional case. Accordingly, the section 30(i) ground of opposition is unsuccessful.

2. Is the Applicant the person entitled to the registration of the Mark?

[12] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark under sections 16(3)(a) and 16(3)(c) of the Act in view of the Opponent's prior use of its trade-mark MONEYLOGIX and its trade-name MONEYLOGIX GROUP, INC., in Canada, since at least as early as April of 2009.

[13] In order to meet its initial burden with respect to its sections 16(3)(a) and 16(3)(c) grounds of opposition, the Opponent must show that its MONEYLOGIX trade-mark and MONEYLOGIX GROUP, INC. trade-name had been used in Canada prior to the June 22, 2010 filing date of the application for the Mark and had not been abandoned as of the date of advertisement of the application for the Mark, namely, December 15, 2010 [section 16(5) of the Act].

[14] I am not satisfied that the Opponent has met its initial burden because the evidence which has been filed by the Opponent does not enable me to conclude that any trade-mark or trade-name use which may have occurred as of the material date would have enured to its benefit.

[15] In support of these grounds of opposition, the Opponent relies upon the Haditaghi affidavit. Mr. Haditaghi is the Founder and Chairman of the Board of Directors of the Opponent [Haditaghi affidavit, para 1]. The Opponent was incorporated in the Province of Ontario on April 17, 2009 as Simurgh Capital Inc. and subsequently changed its name to MoneyLogix Group, Inc. on May 14 2009 [Haditaghi affidavit, para 4, Exhibit "A"].

[16] In paragraph 5 of his affidavit, Mr. Haditaghi describes the Opponent as a financial services and real estate company, which is involved in the provision of short term loans, mortgages and real estate acquisitions. He states that the Opponent specializes in acquiring undervalued residential and commercial real estate and zoned properties and selling these properties after they undergo redevelopment. According to Mr. Haditaghi, the Opponent provides its real estate related financing and consulting services in association with its trade-name and trade-mark MONEYLOGIX [Haditaghi affidavit, para 5].

[17] The Applicant does not dispute the Opponent's incorporation or subsequent change of name. However, it notes that at the relevant material date, the Opponent's company (i.e. the Ontario corporation, MoneyLogix Group, Inc.) was and always had been, wholly owned by a Nevada Corporation having an identical name. The Applicant submits that the evidence points to the Nevada corporation as being the public face associated with the Opponent's services and not the Opponent (i.e. the Ontario corporation). I agree.

[18] During cross-examination, Mr. Haditaghi admitted that the Opponent is wholly owned by a Nevada corporation which operates under the same name as the Opponent, namely, MoneyLogix Group, Inc. [Haditaghi transcript, Q. 7]. Mr. Haditaghi confirmed that the Opponent (the Ontario corporation) and the Nevada company share the same principal office or place of address and some of the same directors and officers [Haditaghi transcript, Q's 8-21]. According to Mr. Haditaghi, the relationship between the Ontario corporation and the Nevada company ended sometime around June of 2011, at which time the Nevada company was sold

[Haditaghi transcript, Q's 27-30]. The Nevada corporation is listed on the NASDAQ as MLXG [Haditaghi transcript, Q's 23-24].

[19] Mr. Haditaghi states that the Opponent owns and operates a website located at *www.moneylogixgroup.com*, which displays the Opponent's trade-mark MONEYLOGIX in association with information about the Opponent's business and services. Mr. Haditaghi states that the Opponent is also the owner of the domain name *moneylogix.net*, which redirects customers to the *www.moneylogixgroup.com* website. Attached as Exhibits "B" and "C" to the Haditaghi affidavit are copies of Whois search results for the domain names and copies of pages from the Opponent's website, which display the MONEYLOGIX trade-mark.

[20] The registrant of the domain names is listed as "MoneyLogix" in Exhibit "B" and Mr. Haditaghi of "MoneyLogix group Inc." is listed as the administrative and technical contact for the domain name registrations. Although Mr. Haditaghi states that the domain names are owned by the Opponent, there is no way to ascertain this from the Whois search results, since the Opponent and the Nevada company operate under the same name, at the same address and Mr. Haditaghi holds a position in both [Haditaghi affidavit, paras 6-7, Haditaghi transcript, Q's 7-21].

[21] The copies of the website pages attached as Exhibit "C" all reference the NASDAQ identifier MLXG, which Mr. Haditaghi confirmed on cross-examination is a reference to the Nevada company which owns the Opponent [Haditaghi transcript, Q's 23-24].

[22] Attached as Exhibits "D" to Mr. Haditaghi's affidavit are copies of letterhead and business cards showing the trade-mark MONEYLOGIX, which Mr. Haditaghi states are representative of those which are used by employees during the performance and advertisement of the Opponent's services.

[23] Attached as Exhibit "E" is a representative sample of the first and last slides of a June 2009 presentation showing the trade-mark MONEYLOGIX, which Mr. Haditaghi states is representative of presentations which were used by employees during client meetings and in the performance of the Opponent's real estate financing and consulting services. Mr. Haditaghi does not indicate in his affidavit how many presentations were made or to whom they were presented.

During cross-examination, he was asked whether any reference is made to the Nevada company during the presentations and he replied that reference was only made to the Opponent [Haditaghi affidavit, Q 226]. However, at an earlier point during cross-examination, Mr. Haditaghi indicated that the Opponent “would probably disclose that the parent company would be as a publicly-traded company” [Haditaghi transcript, Q 219].

[24] Mr. Haditaghi states that in addition to advertising its services through its website, the Opponent’s services and business are also advertised and promoted through word of mouth and attendance at networking events [Haditaghi affidavit, para 12]. Mr. Haditaghi does not provide any further information in his affidavit regarding how the Opponent’s services are promoted at such events or which events are attended by the Opponent. However, during cross-examination, Mr. Haditaghi did elaborate on the Opponent’s advertising and promotional activities and indicated that such activities consisted of holding events, taking investors marketing brochures, flyers, investor presentations and road shows (in Barrie and Wasaga Beach) and press releases [Haditaghi transcript, Q 239].

[25] Mr. Haditaghi states that the Opponent is also advertised in online trade directories. Attached as Exhibit “F” is a representative sample of an online trade directory advertisement for the Opponent. Notably, the NASDAQ identifier MLXG is present on the trade directory advertisement attached as Exhibit “F”.

[26] Attached as Exhibit “G” to Mr. Haditaghi’s affidavit are copies of representative samples of press releases which have been written about the Opponent and published online. The press releases all reference the NASDAQ identifier MLXG.

[27] During cross-examination, it was pointed out to Mr. Haditaghi that on the website pages attached as Exhibit “C”, there is a statement that “MoneyLogix Group is no longer a publicly traded...” [Haditaghi transcript, Q 73]. Mr. Haditaghi confirmed that only the Nevada company (not the Opponent) was ever publicly traded [Haditaghi transcript, Q 71]. When asked to confirm that the statement in Exhibit “C” thus referred to the Nevada company, Mr. Haditaghi initially stated that this was not the case [Haditaghi transcript, Q 73]. However, when asked why that statement would have appeared on the website since the Ontario corporation never was publicly traded, Mr. Haditaghi stated that it was “to probably eliminate confusion” because the Nevada

company no longer existed [Haditaghi transcript, Q 74]. Mr. Haditaghi then confirmed that the relationship between the Opponent and the Nevada company ended some time in 2010 or 2011 [Haditaghi affidavit, Q's 28 to 30 and 75–81].

[28] Ms. Tsou accessed the Opponent's website on June 14, 2012 [Tsou affidavit, para 4]. She printed out all pages located on the Opponent's website and attached them as Exhibit "1" to her affidavit. She makes particular note of the page entitled "History", which makes reference to the initial launch of MoneyLogix Group Inc. (MLXG:OTCBB) and then later indicates that "MoneyLogix group, inc. no longer a publicly traded".

[29] Ms. Tsou also accessed the Wayback Machine and searched for the Opponent's website. Attached as Exhibit "3" to the Tsou affidavit is a copy of the Opponent's website as it existed on October 13, 2009. On each page, the NASDAQ identifier "MLXG" appears in the top right hand corner.

[30] In paragraph 10 of his affidavit, Mr. Haditaghi states that the Opponent's revenues in Canada in association with its MONEYLOGIX trade-mark were in excess of \$4.6 million from May 2009 to the date of swearing of Mr. Haditaghi's affidavit (November 1, 2011). He further states that the Opponent spent in excess of \$60,000 CAD on advertising and promoting its services during that same time period [Haditaghi affidavit, para 11].

[31] During cross-examination, Mr. Haditaghi confirmed that from 2009 up until the date of swearing of his affidavit (November 1, 2011), the Opponent had only four transactions take place [Haditaghi transcript, Q's 237-238]. Three of those transactions were loans (one to a real estate broker and the other two to builders) and the fourth transaction related to the acquisition and disposition of a property [Haditaghi transcript, Q's 87-97].

[32] During cross-examination, Mr. Haditaghi confirmed that the loans were made by the Opponent and that the acquisition of the property was also made by the Opponent [Haditaghi transcript, Q's 94-97 and 128-156]. However, no evidence other than Mr. Haditaghi's sworn statement to this effect was put forward to show that the loans were, in fact, issued by the Opponent, rather than by the Nevada company and the evidence which was put forward

regarding the property acquisition is somewhat contradictory to Mr. Haditaghi's sworn statements.

[33] During cross-examination, Mr. Haditaghi was presented with a printout of a report filed with the Security and Exchange Commission in Washington by the Nevada corporation [Haditaghi transcript, Q 129, Exhibit "1"]. The report suggests that the property was acquired in the name of the Nevada company through a share purchase agreement, with shares subsequently being assigned to the Opponent, such that the property became wholly owned by the Opponent and the Nevada company became the indirect owner, by virtue of wholly owning the Opponent [Haditaghi transcript, Q's 141-147]. Mr. Haditaghi disagreed with this interpretation when it was put to him on cross-examination and stated unequivocally that the transaction was done through the Opponent, that the Nevada corporation had nothing to do with it and that only the Opponent's name would have been listed on the Agreement [Haditaghi transcript, Q's 148-153].

[34] However, Ms. Tsou subsequently obtained a copy of the Share Purchase Agreement which was filed with the Security and Exchange Commission and the Nevada company is clearly listed as being the "Purchaser" [Tsou affidavit, Exhibit 7]. The Opponent has not challenged the admissibility of Ms. Tsou's evidence, nor has it filed any evidence in reply.

[35] As the Applicant pointed out during the hearing, in order to determine the party to whom the rights in a trade-mark or trade-name would accrue, it is necessary to determine who presented the services to the public.

[36] The copies of the Opponent's website pages, the press releases and the online trade directory advertisements which have been put in evidence all make reference to the NASDAQ identifier for the Nevada parent company. Very little information has been provided regarding the presentations which were given by the Opponent and Mr. Haditaghi's conflicting statements during cross-examination have made it somewhat unclear whether the Nevada parent company was referenced during presentations or not. When asked why the later version of the Opponent's website contained a statement advising that the Opponent was "no longer a publicly traded", Mr. Haditaghi indicated that it was "to probably eliminate confusion because the fact is there is no longer a MoneyLogix Nevada...".

[37] In view of the foregoing, it is not clear to me that the advertising and promotional materials and activities which have been put in evidence relate to the Opponent, rather than to its parent Nevada company and it is also unclear that consumers would be able to ascertain which company's services were being advertised or promoted.

[38] Moreover, I cannot ascertain whether the services which were being provided were in fact being provided by the Opponent. Despite what Mr. Haditaghi may have asserted in his affidavit or during cross-examination, the evidence suggests that the property acquisition which occurred was initially made by the Nevada company and no assertions have been made regarding the existence of a license agreement between the Nevada company and the Opponent. In addition, no evidence has been provided to support Mr. Haditaghi's statements concerning the loan transactions which took place.

[39] In view of the foregoing, I am unable to conclude that any trade-mark or trade-name "use" which may have occurred as of the relevant material date would have enured to the benefit of the Opponent.

[40] I therefore conclude that the Opponent has failed to meet its initial burden in respect of its sections 16(3)(a) and 16(3)(c) grounds of opposition.

[41] Accordingly, these grounds of opposition are unsuccessful.

3. Is the Mark distinctive?

[42] The Opponent has pleaded that the Mark is not distinctive of the Applicant's services, as it does not "actually distinguish the Applicant's services from the services of others, including the real estate and financial services of the Opponent, nor is it adapted so as to distinguish them".

[43] The material date for assessing this ground is the filing date of the statement of opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

[44] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its services from those of others throughout Canada, there is

an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness [*Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d) 272 (TMOB)].

[45] Ordinarily, an opponent would meet this initial evidential burden by showing that as of the filing date of the statement of opposition, its trade-mark or trade-name had become known sufficiently in Canada to negate the distinctiveness of the Mark. It has been held that the reputation of an opponent's trade-mark/trade-name should be substantial, significant or sufficient [*Bojangles' International, LLC v Bojangles Café Ltd* (2004), 40 CPR (4th) 553, affirmed (2006), 48 CPR (4th) 427 (FC)].

[46] Since the Opponent in this case has pleaded that the Mark is not distinctive in that it does not distinguish the services of the Applicant from those of "others", including those of the Opponent and since the Applicant has not challenged the sufficiency of this pleading, I can arguably consider the use which has been shown in the Haditaghi affidavit, whether or not such use was by the Opponent or by its parent Nevada company.

[47] However, I do not find this evidence to be sufficient to establish that the trade-mark MONEYLOGIX or the trade-name MONEYLOGIX GROUP, INC. had become known sufficiently in Canada to negate the distinctiveness of the Mark. As of the relevant material date, namely, May 13, 2011, only four transactions had occurred and Mr. Haditaghi has only provided detailed information regarding one of the four transactions (the property acquisition and disposition). Moreover, very little detail has been provided regarding the extent of the advertising and promotional activities which took place. For example, no information has been provided regarding the number of Canadian visitors which may have frequented the website located at *www.moneylogixgroup.com* prior to the material date or how far and wide the press releases and online trade directory advertisements would have reached. There is also a lack of detailed information regarding when, where and how many presentations took place.

[48] Accordingly, this ground of opposition is also unsuccessful.

Disposition

[49] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Lisa Reynolds
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office