



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

Citation: 2014 TMOB 72
Date of Decision: 2014-03-27

**IN THE MATTER OF AN OPPOSITION
by 911979 Alberta Ltd. and Shoppers
Drug Mart Inc. to application
No. 1,439,641 for the trade-mark
Sliceoflife in the name of Hero
Nutritionals, Inc.**

[1] 911979 Alberta Ltd. and Shoppers Drug Mart Inc. (collectively, the Opponent), oppose registration of the trade-mark Sliceoflife (the Mark), that is the subject of application No. 1,439,641 by Hero Nutritionals, Inc. (the Applicant).

[2] Filed on May 28, 2009, the application is based on use in Canada since January 8, 2008 in association with “dietary supplements, namely vitamins and minerals” (the Wares).

[3] The Opponent filed its statement of opposition on August 20, 2010. The Applicant denied all grounds by counter statement dated October 27, 2010. The Opponent subsequently requested and was granted leave to file an amended statement of opposition. On February 10, 2014 however, the Opponent withdrew all grounds of opposition, with the exception of the ground of opposition based upon sections 38(2)(a) and 30(b) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act).

[4] Thus, the only issue to be decided in this case is whether the Applicant’s application complies with section 30(b) of the Act. In this regard, the Opponent alleges that the Applicant has not used the Mark in association with the Wares in Canada since the claimed date of first use, namely, January 8, 2008.

[5] In support of its opposition, the Opponent filed the affidavit of Morné Van Wyk. However, such evidence was only pertinent to the grounds of opposition that the Opponent has since withdrawn. In support of its application, the Applicant filed the affidavit of Lorraine Collyer, sworn September 23, 2011. The affidavit of Ms. Collyer is the only pertinent evidence, since the Opponent is seeking to establish that the Applicant's own evidence is clearly inconsistent with the Applicant's claimed date of first use. Ms. Collyer was not cross-examined.

[6] Only the Opponent filed a written argument; however, both parties made representations at an oral hearing.

The Parties' Respective Burden or Onus

[7] 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 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; *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

Section 30(b) ground of opposition

[8] An opponent's initial burden under section 30(b) is light [*Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB) at 89] and can be met by reference not only to the opponent's evidence but also to the applicant's evidence [see *Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) (FCTD) 216 at p. 230]. Should an opponent rely upon the applicant's evidence to meet its evidential burden, the opponent must show that the applicant's evidence is clearly inconsistent with the applicant's claims as set forth in its application.

[9] As noted above, the Opponent is seeking to establish that the Applicant's own evidence is clearly inconsistent with its claimed date of first use. Specifically, the Opponent's submissions in this regard are two-pronged: firstly, the Opponent submits that Ms. Collyer's affidavit suggests that use of the Mark commenced in Canada nearly five months after the claimed date of

first use, and secondly, that the only evidence of use of the Mark in Canada at any time is by another entity, and there is no evidence that such use inured to the benefit of the Applicant.

[10] Before considering the submissions of the parties, I will begin with a brief overview of Ms. Collyer's affidavit.

Collyer Affidavit - summary

[11] Ms. Collyer identifies herself as the Chief Financial Officer for Hero Nutritional Products, LLC (Hero). She states that as part of its operations, Hero designs, has manufactured for it, distributes, markets, and sells a wide variety of goods, including vitamins and mineral supplements, and health food products. She explains that Hero's product lines include the SLICE OF LIFE product line, which is comprised of nutritional supplements for adults. She attaches as Exhibit A to her affidavit, "a printout of the "products" page of Hero's website, showing the Slice of Life product line."

[12] Ms. Collyer explains that each SLICE OF LIFE product packaged for retail sale carries a label bearing the Mark. In support, she attaches as Exhibit B and C to her affidavit respectively, photos of bottles as appearing on <http://sliceoflife.com/>, "containing each product in the Slice of Life product line" as they are packaged for retail sale and copies of labels which are affixed to the bottles in which the SLICE OF LIFE products are sold. The bottles and product labels clearly bear the Mark.

[13] Ms. Collyer then states "(s)ince at least June, 2008, the Applicant has sold the following goods in the SLICE OF LIFE product line in Canada: Slice of Life B12 Boost, Slice of Life Omega 3·6·9, Slice of Life CoQ10, Slice of Life Vit C, Slice of Life Vitamin D₃ (the Slice of Life Goods)."

[14] With respect to sales of the Slice of Life product line, Ms. Collyer provides what she states are "total annual sales figures" for the years 2008 to June, 2011. Further to this, she attaches as Exhibit D, the following sales reports: copies of Hero's 2008-2009 "Sales by Item Detail sheets" and 2010-2011 "Inventory Sales History Reports", showing the Canadian dollar and unit sales figures for those years. The subject header on the sales reports for 2008 and 2009

indicates that the reports are for the reporting period January through December of each year. June 18, 2008 is the first invoice date entered on the 2008 sales report. I note further that the sum of the sales for the 2008 sales reports matches the total annual sales figure Ms. Collyer has already provided for 2008, suggesting that the sales reports reflect all sales made in that year. The 2009 sales report appears in the same format and lists February 20, 2009 as the first invoice date entered for this year. This further suggests that the reports are intended, as one would expect from the subject header, to be an accounting for all sales made during the entire reporting period (January through December).

[15] Lastly, Ms. Collyer provides several advertisements for Slice of Life products in Canada as follows:

Exhibit E – advertisements within the September-October edition of *Canadian Natural Health Retailer* magazine featuring Slice of Life products bearing the Mark, stated to be available to consumers free of charge through independent health food retailers.

Exhibit F – an excerpt from a Canadian distributor’s catalogue, September-December 2008 edition, featuring an advertisement for Slice of Life products.

Exhibit G – a sample advertisement, typical of those “placed by Canadian retailers for their catalogues and magazines, which are distributed across Canada.”

Submissions of the Parties and Analysis

[16] The Opponent submits that Ms. Collyer’s statement that “(s)ince at least June, 2008, the Applicant has sold the following goods in the SLICE OF LIFE product line in Canada: [...]” is inconsistent on its face with respect to the date of first use claimed in the application. While the Applicant disagrees that this statement is an admission that the Mark had not been used before that date, I agree with the Opponent that Ms. Collyer’s statement is consistent with the remainder of her affidavit and supporting evidence which appears to be inconsistent with the claimed date of first use.

[17] In this regard, the earliest invoice date according to the sales reports (Exhibit D) is June 18, 2008; more than five months after the Applicant’s claimed date of first use. As previously noted in the summary of Ms. Collyer’s affidavit, the sales reports in Exhibit D represent all sales made during that particular reporting period (January through December 2008).

[18] In support of its position, the Opponent draws parallels between the present case and the following cases wherein an opponent successfully relied upon the applicant's own evidence to meet its burden under section 30(b) of the Act: *Pharmacia AB v Homeocan Inc* (2003), 33 CPR (4th) 375 at paras 6-8 (TMOB), *Hearst Communications Inc v Nesbitt Burns Corp* (2000), 7 CPR (4th) 161 at paras 7-11 (TMOB), and *Clic Import Export Inc v 3430961 Canada Inc*, 2005 CarswellNat 448 (TMOB). In *Pharmacia* for example, the opponent relied upon in part, sales figures furnished by the applicant disclosing that sales began more than a year subsequent to the applicant's claimed date of first use. Further to this, the earliest invoice furnished by the applicant was dated nearly two years after the claimed date of first use. In *Hearst*, the applicant's affidavit included statements suggesting that what they believed constituted "use" of trade-mark began nearly two years following the applicant's claimed date of first use. Lastly, in *Clic Import Export*, the applicant's affidavit included statements that clearly indicated that the trade-mark as applied for was not used until several years after the applicant's claimed date of first use.

[19] The Applicant submits that in both the *Pharmacia* and *Hearst* cases, the factors considered to come to a conclusion that the applicant's own evidence was inconsistent with the claimed date of first use are not present here. For instance, the Applicant submits that in *Pharmacia*, the evidence of sales raised serious doubts as it pertained to sales in a subsequent year. In the present case, the 2008 sales report lists invoices dated only five months after the claimed date of first use, which the Applicant submits is entirely consistent that the Mark was used ("marketed and sold") in January. The Applicant submits that the invoice date listed on the sales reports are not the point at which the Mark is used; the invoice is generated after the product is marketed and sold.

[20] Furthermore, the Applicant submits that Ms. Collyer's statement that "(s)ince at least June, 2008, the Applicant has sold the following goods in the SLICE OF LIFE product line in Canada: [...]" is not a fatal admission as in the *Clic Import Export* case. Specifically, the Applicant submits that Ms. Collyer does not say that the Mark was not first used in January 2008 and as such, the Opponent is seeking that an adverse interest be drawn. The Applicant submits that the Opponent ought to have cross-examined Ms. Collyer on her affidavit, "as one must confront the party with whom the inference was made."

[21] However, I agree with the Opponent that the Applicant's own evidence is clearly inconsistent with the date of first use claimed by the Applicant in its application. In this regard, Ms. Collyer's above-noted statement is consistent with the date of the earliest invoice disclosed in the sales reports, which reflect all sales made between January and December 2008. The submission of the Applicant that the invoice date is not the point at which the Mark is used may be true. However, the evidence does not support that the Wares were marketed and sold in January. In this regard, there is nothing in the evidence to explain that the normal course of trade of the Applicant is to sell its product and wait five months before invoicing a customer. Furthermore, the Applicant should have put forth the best evidence available, and not rely on cross-examination to correct deficiencies in its evidence or as a means to put forth further facts into evidence.

[22] Having regard to the foregoing, I find that the Opponent has discharged its initial burden under this ground of opposition. I must now assess whether the Applicant has satisfied its onus of establishing that at the time of filing, its application complied with section 30(b) of the Act.

[23] As per my comments above, the Applicant has not filed any evidence to establish that it had commenced use of the Mark in Canada as of the date claimed in the application. Furthermore, absent evidence to the contrary, I am only prepared to infer that use of the Mark commenced in Canada on or around the date of the earliest invoice, as per the sales reports in Exhibit D. In any event, I agree with the Opponent that any use shown is by Hero Nutritional Products, LLC, and it is not clear from the evidence that such use accrued to the benefit of the Applicant pursuant to section 50 of the Act.

[24] In this regard, Ms. Collyer has not explained who this entity is in relation to the Applicant. It appears from the evidence that there is a corporate relationship between the two, as for example, the Applicant's website (Exhibit A to the Collyer affidavit) clearly advertises the Slice of Life product. However, corporate structure alone is insufficient to establish the existence of a licence within the meaning of section 50(1) of the Act that requires the Applicant to have direct or indirect control of the character or quality of the wares in order to benefit from any use of the mark by Hero Nutritional Products, LLC [see *MCI Multinet Communications*

Corp v MCI Multinet Communications Inc (1995), 61 CPR (3d) 245 (TMOB); *Loblaws Inc v Tritap Food Broker* (1999), 3 CPR (4th) 108 (TMOB)].

[25] The Applicant submits that Ms. Collyer makes no distinction in her affidavit between Hero Nutritional Products, LLC and the Applicant. However, I agree with the Opponent that Hero Nutritional Products, LLC and Hero Nutritionals, Inc. appear to be separate legal entities. Furthermore, Ms. Collyer consistently refers to Hero Nutritional Products, LLC throughout her affidavit. At best, the evidence is ambiguous as to the relationship between the Applicant and Hero Nutritional Products, LLC; an ambiguity to be resolved against the Applicant [*Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)].

[26] In view of the above, the Applicant has not satisfied its onus of establishing that at the time of filing, its application complied with section 30(b) of the Act. Accordingly, this ground of opposition is maintained.

Disposition

[27] Having regard to the foregoing, 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