

**IN THE MATTER OF AN OPPOSITION by 722140 Ontario Limited and Cardinal Meat Specialists Limited to application No. 726,545 for the trade-mark CHUNKY CLASSIC BEAR PAW filed by Lou Albanese trading as The Meat Factory**

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On April 14, 1993, the applicant, Lou Albanese trading as The Meat Factory, filed an application to register the trade-mark CHUNKY CLASSIC BEAR PAW BURGER based upon use of the trade-mark in Canada since February, 1993 in association with “Meat products namely beef burgers, chicken burgers, turkey burgers, veal burgers, and pork burgers”. The applicant disclaimed the right to the exclusive use of the word CHUNKY apart from its trade-mark. Further, during the examination stage, the applicant amended its application to delete the word BURGER from its trade-mark.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of February 16, 1994 and the opponents, 722140 Ontario Limited and Cardinal Meat Specialists Limited, filed a statement of opposition on July 18, 1994, a copy of which was forwarded to the applicant on August 31, 1994. The applicant served and filed a counter statement on December 8, 1994 in which it effectively denied the opponents’ grounds of opposition. The opponents filed as their evidence the affidavits of Peter M. Vigna and Isis E. Caulder while the applicant submitted as his evidence the affidavit of Louie Albanese. Both parties filed a written argument and no oral hearing was conducted in respect of this opposition.

The first two grounds of opposition are based on Subsections 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 evidential burden on the opponents to establish the facts relied upon by them 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]. The material time for considering the circumstances respecting the issues of non-compliance with Section 30 of the *Act* is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475].

The opponents have alleged that the present application does not comply with Subsection 30(b) of the *Trade-marks Act* since the applicant has not used the trade-mark CHUNKY CLASSIC BEAR PAW in association with the wares covered in the present application since February 1993 as alleged in the present application. While the legal burden is upon the applicant to show that his application complies with Subsection 30(b) of the *Act*, there is as noted above an initial evidential burden on the opponents to establish the facts relied upon by them in support of this ground. The evidential burden on the opponents respecting the issue of the applicant's non-compliance with Subsection 30(b) of the *Act* is a light one [see *Tune Masters v. Mr. P's Mastertune*, 10 C.P.R.(3d) 84, at p. 89]. Moreover, the opponents' evidential burden can be met by reference not only to the opponents' evidence, but also to the applicant's evidence [see, in this regard, *Labatt Brewing Company Limited v. Molson Breweries, a Partnership*, 68 C.P.R.(3d) 216, at p. 230].

In their written argument, the opponents have alleged that the applicant, Louie Albanese, has not used the trade-mark CHUNKY CLASSIC BEAR PAW and never himself intended to use the trade-mark. Rather, according to the opponents, the evidence of record shows that the trade-mark has always been used by the company, The Meat Factory Limited, which was incorporated in Ontario on July 7, 1980, prior to the applicant's filing date and his claimed date of first use. Further, the opponents submitted that while Mr. Albanese in his affidavit has stated that the company's use is licensed, Mr. Albanese does not state the terms of the license which would demonstrate the control Mr. Albanese would exercise over the quality of the wares, whether it is in writing and when the alleged license became effective.

In his affidavit, Mr. Albanese, President and owner of The Meat Factory Limited, states as follows in paragraph 4 of his affidavit:

4. That I am the owner of the following trade mark applications and registrations:

...

Each of the above noted trade mark applications and registrations (hereinafter The Meat Factory Marks) are used and will be used in association with burgers and/or other meat products. The Meat Factory Ltd. is licensed by me to use each of The Meat Factory Marks. In my capacity as President and Owner of The Meat Factory Ltd., I ensure that all of the products used in association with each of The Meat Factory Marks meets stringent standards as to character and quality determined by

myself.

The above evidence of Mr. Albanese relating to the licensed use of the trade-mark CHUNKY CLASSIC BEAR PAW by The Meat Factory Ltd. and the affiant's assertions that he ensures that all products used in association with each of his trade-marks meet stringent standards as to character and quality as determined by himself has not been challenged by way of cross-examination by the opponents. Further, no evidence has been furnished by the opponents which would appear to contradict any of Mr. Albanese's statements. I have therefore rejected the first ground of opposition.

As their second ground, the opponents alleged that the applicant could not have been satisfied that he was entitled to use the trade-mark CHUNKY CLASSIC BEAR PAW in Canada in association with meat products, given that the applicant was aware of the opponent Cardinal Meat Specialists Limited's prior rights to the trade-mark BEAR PAW and that the trade-mark applied for was not distinctive nor adapted to distinguish his wares from those of other traders and more particularly those of the opponent Cardinal Meat Specialists Limited, as set out in the remaining grounds of opposition. Again, the material date for considering this ground is the applicant's filing date and, while the legal burden is upon the applicant to show that his application complies with Subsection 30(i), there is as noted above an initial evidential burden on the opponents to establish the facts relied upon by them in support of this ground. In this regard, the opponents' evidence does not establish that the applicant was aware of Cardinal Meat Specialists Limited's prior rights to the trade-mark BEAR PAW prior to filing the present application or that the applied for trade-mark was not distinctive nor adapted to distinguish his wares from those of Cardinal Meat Specialists Limited prior to filing his application. Indeed, the opponents' assertions appear to be inconsistent with Exhibit N to the Albanese affidavit which is a copy of a trade-mark application filed by Cardinal Meat Specialists Limited on October 13, 1993 for the trade-mark BEAR PAW, application No. 739,200, based upon "proposed use" of the trade-mark in Canada in association with "Fresh and prepared meat products namely burgers". I have therefore dismissed this ground.

The third ground is based on Subsection 16(1) of the *Trade-marks Act*, the opponents alleging that the applicant is not the person entitled to registration of the trade-mark CHUNKY

CLASSIC BEAR PAW in that, as of the claimed date of first use, the applicant had not used the trade-mark in Canada. To the extent that these allegations support a non-entitlement ground, I am satisfied that they have been addressed under the first ground of opposition. I have therefore rejected this ground.

The fourth ground is also based on Subsection 16(1) of the *Trade-marks Act*, the opponents alleging that the applicant is not the person entitled to registration of the trade-mark CHUNKY CLASSIC BEAR PAW in that, as of the claimed date of first use, the applicant's trade-mark was confusing with the trade-mark BEAR PAW which had been previously used in Canada by the opponent Cardinal Meat Specialists Limited. There is an initial burden upon the opponents in respect of this ground to establish use of the trade-mark BEAR PAW by Cardinal Meat Specialists Limited prior to February 1993 in association with its wares, as well as to satisfy the Registrar that Cardinal had not abandoned its trade-mark as of the date of advertisement of the present application in the *Trade-marks Journal* [February 16, 1994]. In my opinion, the Vigna affidavit does not establish that Cardinal Meat Specialists Limited "used" the trade-mark BEAR PAW in Canada in association with burgers as contemplated by Subsection 4(1) of the *Trade-marks Act* prior to February 1993 or even prior to the applicant's filing date of April 14, 1993. Further, Mr. Vigna has not provided a date of first use during 1993 when Cardinal Meat Specialists Limited commenced using the trade-mark BEAR PAW on its packaging as per Exhibit B to his affidavit. However, such use was likely subsequent to the filing on October 13, 1993 of the trade-mark application for the mark BEAR PAW which was based upon proposed use of the trade-mark by Cardinal. Furthermore, it may well be that Cardinal Meat Specialists Limited sold burgers in the shape of a bear's paw prior to the applicant's adoption of his trade-mark. However, that alone is not sufficient to meet the burden upon the opponents in respect of this ground of opposition insofar as establishing prior use of the trade-mark BEAR PAW by Cardinal Meat Specialists Limited. This ground is also unsuccessful.

The final ground relates to the alleged non-distinctiveness of the applicant's trade-mark, the opponents alleging that the applicant's mark does not distinguish and is not adapted to distinguish the applicant's wares from the wares of others and, in particular, the wares of the opponent Cardinal

Meat Specialists Limited. The material time for considering the circumstances regarding the issue of distinctiveness is the date of the opposition, that is, July 18, 1994 [see *Re Andres Wines Ltd. and E.&J. Gallo Winery*, 25 C.P.R. (2d) 126 (F.C.A.), at p.130; *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.*, 37 C.P.R.(3d) 412 (F.C.A.), at p. 424; and *Molson Breweries, a Partnership v. Labatt Brewing Company Limited*, (Court No. T-162-96, dated June 25, 1998, yet unreported, at p. 25)]. Furthermore, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes his wares from those of others throughout Canada [see *Muffin Houses, Inc. v. Muffin House Bakery Ltd.*, 4 C.P.R.(3d) 272 (T.M.O.B.)]. There is, however, an evidential burden on the opponents to prove the allegations of fact in support of their ground of non-distinctiveness [see *Clarco Communications Ltd. v. Sassy Publishers Inc.*, 54 C.P.R.(3d) 418, at p. 431 (F.C.T.D.)].

It would appear that the opponent, Cardinal Meat Specialists Ltd., commenced marketing burgers in packaging bearing the mark “*the original Bear Paw*” in late 1993 although the exact date of first use has not been provided by the opponents. However, the opponents’ activities involving the mark appearing on its packaging prior to the date of opposition are not such as to raise an issue as to the distinctiveness of the applicant’s trade-mark, bearing in mind that the opponent, 722140 Ontario Limited, requested an extension of time to oppose on April 18, 1994 and, further, the opponents are deemed to have had notice of the advertisement of the present application in the *Trade-marks Journal* of February 16, 1994 and arguably prior to that date, bearing in mind the filing of the application by Cardinal in October of 1993. Thus, I am not convinced that whatever use there has been by the opponent Cardinal of the mark “*the original Bear Paw*” on its packaging constitutes a *bona fide* use of the trade-mark BEAR PAW which ought to be considered in challenging the distinctiveness of the applicant’s trade-mark. I have therefore rejected this ground of opposition

In view of the above, and having been delegated by the Registrar of Trade-marks by virtue of Subsection 63(3) of the *Trade-marks Act*, I reject the opponents’ opposition pursuant to Subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC, THIS DAY 17<sup>th</sup> OF DECEMBER, 1998.

G.W.Partington,  
Chairperson,  
Trade Marks Opposition Board.