



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

**Citation: 2011 TMOB 145**  
**Date of Decision: 2011-08-18**

**IN THE MATTER OF AN OPPOSITION  
by 610881 British Columbia Ltd also  
d/b/a Sun Plus to application  
No. 1,237,947 for the trade-mark RED  
RAVE in the name of Cott Corporation.**

[1] On November 19, 2004 Cott Corporation (the Applicant) filed an application to register the trade-mark RED RAVE (the Mark), based upon proposed use in Canada, in association with “nutritional drinks, namely energy drinks and sports drinks”.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of September 21, 2005. A statement of opposition was filed by 610881 British Columbia Ltd also d/b/a Sun Plus (the Opponent) that was forwarded to the Applicant on January 18, 2006. The Applicant filed and served a counter statement on March 10, 2006.

[3] The Opponent filed the affidavits of Bert Price and Lisa Saltzman, as well as a certified copy of Canadian trade-mark application No. 1,251,444. The Applicant filed the affidavit of Richard P. Kadlec. The Opponent filed the affidavit of Dulce Campos in reply. Only the Opponent filed written submissions and was represented at the oral hearing.

Grounds of Opposition

[4] The grounds of opposition may be summarized as follows:

*Section 38(2)(a)*

- Section 30(a) the application does not contain a statement in ordinary commercial terms; the specific nature of the wares associated with the Mark therefore cannot be determined.
- Section 30(e) the Mark is not registrable because at all material dates the Applicant did not by itself or through a licensee, nor by itself and through a licensee, intend to use the Mark on the subject wares in the normal course of trade as defined by s. 2 and 4 of the Act.
- Section 30(i) the Mark is not registrable because at all material dates including the date of filing the application, the Applicant could not have been satisfied that it was entitled to use the Mark in association with the wares because the Applicant knew or ought to have known, that RED RAVE was and is confusing with the Opponent's trade-mark RAVE previously used and made known in Canada since at least August 2002 in association with "non-alcoholic beverages namely energy drinks and soft drinks."

*Section 38(2)(c)*

- The Applicant is not the entity entitled to registration having regard to the provisions of s.16(3)(a) and 16(5) of the Act; at all material dates the Applicant's Mark was confusing with the Opponent's trade-mark RAVE which the Opponent previously had used and made known in Canada by itself or through a licensee, or by itself and through a licensee in association with "non-alcoholic beverages namely energy drinks and soft drinks" and which was not abandoned at the date of advertisement of the subject application.

*Section 38(2)(d)*

- The Mark is not distinctive of the Applicant in view of s. 2 of the Act by reason of the fact that RED RAVE does not actually distinguish the wares of the Applicant nor is it adapted to do so, from the wares and services of others, specifically but without limitation, RED RAVE is not distinctive having regard to the Opponent's trade-mark RAVE previously used and made known in Canada since at least August 2002 in association with "non-alcoholic beverages namely energy drinks and soft drinks."

## Opponent's Evidence

### *Affidavit of Ms. Lisa Saltzman*

[5] Ms. Saltzman is the Director of the trade-mark searching department with Onscope, a division of Marque d'or Inc. in Montréal, Quebec. In the course of her employment duties, Ms. Saltzman reviewed and searched the files and records of the Canadian Intellectual Property Office (CIPO). The database is created based on an annual license from CIPO and is updated on a weekly basis.

[6] On October 3, 2006 Ms. Saltzman was asked to provide search results for the commonality of the term RAVE on the Canadian trade-marks register in International classes 32 (beers; non-alcoholic beverages), and 33 (alcoholic beverages). Ms. Saltzman describes the parameters of her search and the results are attached as Exhibit LS-1 to her affidavit. A review of the Exhibit indicates that of the 36 trade-marks found (searched, opposed, registered, or advertised), only 2 marks contained or consisted of the word RAVE. These are the trade-marks at issue in this proceeding.

### *Affidavit of Mr. Bert Price*

[7] Mr. Price is the President of the Opponent, which also conducts business as Sun Plus; he has been an officer and director since the Opponent's incorporation in 2000.

[8] The affiant provides that in mid 2002, after much research and debate, the Opponent decided on the RAVE trade-mark as a new trade-mark for its line of energy and soft drinks. The Opponent then contacted its graphic designers to create distinctive graphics and packaging for its RAVE trade-mark.

[9] On or about March 2005, the Opponent instructed its trade mark agent to file an application to register in Canada the trade-mark RAVE. The application No. 1,251,444 claimed a date of first use since at least August 2002 in respect of wares "non-alcoholic beverages namely energy drinks and soft drinks". A certified copy of this application was submitted as part of the Opponent's Rule 41 evidence.

[10] Mr. Price further states that in mid 2002 the Opponent began exporting its RAVE energy drinks to the United States. He explains that, in Canada, sales of energy drinks are regulated by the Natural Health Products Regulations and no energy drinks can be sold until an NHP number is obtained from Health Canada. In May of 2005, the Opponent was successful in obtaining an NHP number to sell its energy drinks in Canada.

[11] Attached as Exhibit A is a representative sample of invoices for the years 2002, 2003, 2004, 2005 and 2006 which confirm sales of RAVE energy drinks to the US (2002, 2003, 2004) and Canada (2005, 2006). Each invoice clearly displays the information “energy drink (RAVE)” in the list of goods sold. Attached as Exhibit B are representative labels used on the packaging in association with the sales of said wares; the trade-mark RAVE is clearly apparent on said labels.

[12] Mr. Price also provides the approximate volume of sales in Canada. In 2005, 364 cases equivalent to 3,750.7 cases of ready to drink cans were sold; in 2006 (to September), 619 cases equivalent to 6,378.3 cases of ready to drink cans were sold.

[13] The Opponent promotes its RAVE energy drinks at industry trade shows throughout Canada and the United States, and through its website that was launched in the early fall of 2004. Attached as Exhibit D are printouts from the website; the Opponent’s trade-mark appears clearly on these pages.

#### Applicant’s Evidence

##### *Affidavit of Mr. Richard Kadlec*

[14] Mr. Kadlec provides that he is employed by the Applicant as the Director of Marketing - Product Development for Canada. Prior to this position, he was Brand Development Manager for North America and Marketing Manager for Canada.

[15] The affiant explains that he has been responsible for developing and implementing the Applicant’s marketing strategies in all areas of Canada, and that for over three years he has overseen the Applicant’s energy drink portfolio in both Canada and the US, worked with sales executives and consulted in new product launches, and overseen the promotion of existing product lines.

[16] Mr. Kadlec further provides that the Applicant's energy drink has been available in Canada since at least as early as January 2005 exclusively at Canadian Costco Wholesale Corporation (Costco) locations. It appears that Costco operates a chain of restricted entry membership warehouses, open only to members, and offers three types of memberships, business, gold star (individual) and Executive. The warehouses are designed to help small-to-medium sized businesses reduce costs in purchasing for resale and for everyday business use. Individuals also purchase for their personal needs.

[17] The affiant explains that RED RAVE drinks are sold in Costco stores in cans and/or bottles, and attaches as Exhibit A graphic designs and photographs representative of the cans sold in Canada since the brand's introduction.

[18] Mr. Kadlec provides that advertising expenditures incurred by the Applicant in Canada in association with the promotion and marketing of its RED RAVE drinks have been substantial. In the last 4 years, amounts have been as follows: \$214,523 (2005); \$416,920 (2006); \$753,039 (2007) and \$289, 965 2008 (year to date of affidavit-June 26), for a total of \$1,674,447.

### Opponent's Reply Evidence

#### *Affidavit of Mr. Dulce Campos*

[19] Mr. Campos is a trade-mark researcher with Accupro Trademark Services LLP; his affidavit is directed to Internet searches and onsite visits of Costco located in Vancouver, British Columbia.

[20] Mr. Campos established that Costco sells fountain drinks by attending at a Costco location in Vancouver at 605 Expo Blvd, where he visited the food court and purchased a fountain beverage dispensed from an automatic beverage machine. He attaches as Exhibit B, photographs taken by him while at the location, as well as the receipt for the beverage purchased.

[21] In this regard, he also conducted an Internet search of the web site *www.costco.ca*, to confirm that each Costco location across Canada contained a food court. Printouts from the website are attached as Exhibit A confirming that each retail location contains a food court. While information contained on a website is generally not given much evidentiary weight when

introduced by a third party, in these circumstances, I see no reason to doubt the reliability of a business website's information about the layout of its stores.

[22] During the same visit to the Costco store in Vancouver, Mr. Campos purchased a case of energy drinks sold under the name RED RAVE. Attached as Exhibit C are photographs of the display of the beverages purchased; Exhibit D is the receipt for the beverages purchases, and Exhibit E is the carton packaging for the case.

[23] Having reviewed the relevant evidence, I now turn to a discussion of the issues under the grounds of opposition.

#### Section 38(2)(a)/Section 30 Grounds of Opposition

[24] The material date for considering compliance with s. 30 is the filing date of the application (November 19, 2004) [see *Delectable Publications Ltd. v. Famous Events Ltd.* (1989), 24 C.P.R. (3d) 274 (T.M.O.B.); *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 at 475 (T.M.O.B)].

[25] 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 evidentiary 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 C.P.R. (3d) 293 (F.C.T.D.) at 298].

[26] With respect to the ground of opposition based on s. 30(a), I note that the Opponent did not plead any facts in support of this ground. Consequently, this ground is dismissed as the Opponent has not met its initial burden in regards thereto.

[27] With respect to the ground of opposition based on s. 30(e) of the Act, the Opponent may rely on the Applicant's evidence to meet its initial burden in relation to this ground but the Opponent must show that the evidence is clearly inconsistent with the Applicant's claim [see *Molson Canada v. Anheuser-Busch Inc.*, 2003), 29 C.P.R. (4th) 315 (F.C.T.D.), and *York Barbell Holdings Ltd. v. ICON Health and Fitness, Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)]. In the present case, the evidence establishes that use was commenced by the Applicant after the filing

date. Clearly, the evidence is not inconsistent with the Applicant's claim of intent to use, and accordingly, the s. 30(e) ground is dismissed.

[28] With respect to the ground of opposition based on s. 30(i) of the Act, no evidence was filed demonstrating that the Applicant was aware of any prior rights of the Opponent when it filed its application. Even if the Applicant was aware of the Opponent's use in Canada of the Opponent's trade-mark, that alone would not prevent the Applicant from making the statement required in good faith. Where an applicant has provided the statement required by s. 30(i), this ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant. [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. As the Opponent has not evidenced any bad faith on behalf of the Applicant, this ground is dismissed.

#### Sections 38(2)(c) and (d) of the Act

[29] The central issue in the remaining grounds of opposition is the likelihood of confusion pursuant to s. 6(5); the likelihood of confusion will be dealt with as it applies to the ground of opposition under s. 16(3).

[30] The Opponent alleges that pursuant to s. 16(3)(a) of the Act the Applicant is not the person entitled to registration of the Mark since, as of the date the Applicant filed its application the Mark was confusing with trade-mark RAVE used by the Opponent since 2004 in association with energy drinks. In order for this ground of opposition to be considered at all, the Opponent must meet an initial evidentiary burden establishing that its trade-mark RAVE was used prior to the filing date of the subject application and that it had not been abandoned at the date of advertisement of the subject application. The evidence is clear that the Opponent had commenced use of its trade-mark on energy drinks exported to the U.S. and properly labeled as per s. 4(3) of the Act. At the date of advertisement the Opponent had commenced use in Canada. Accordingly, in order for this ground of opposition to be dismissed, the Applicant must establish that there is no reasonable likelihood of confusion between the subject marks.

[31] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use

of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. The purchaser in mind is described as the casual consumer somewhat in a hurry (*Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.) at para. 58 [*Mattel*]). The question is whether this mythical consumer with a vague recollection of the first mark will, on seeing the second comer's mark, infer as a matter of first impression that the wares with which the second mark is used are in some way associated with the wares bearing the first mark (*United States Polo Assn. v. Polo Ralph Lauren Corp.*, [2000] 9. C.P.R. (4th) 51 (F.C.A.) at 58).

[32] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them.

[33] These factors need not be attributed equal weight; rather, the weight to be given to each relevant factor may vary, depending on the circumstances [see *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 (F.C.T.D.); *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)]. Furthermore, the list of factors set out is not exhaustive of matters that could be considered [see in general *Mattel supra*; *United Artists Corp. v. Pink Panther Beauty Corp.* (1988), 80 C.P.R. (3d) 247 (Fed. C.A.) at 263-264; *Veuve Cliquot Ponsardin v. Boutiques Cliquot Ltée.* (2006), 49 C.P.R. (4th) 401 (S.C.C.)].

[34] In most instances, the dominant factor in determining the issue of confusion is the degree of resemblance between the trade-marks in their appearance or sound or in the ideas suggested by them, and other factors play a subservient role in the overall surrounding circumstances [see *Beverly Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2d) 145, conf. 60 C.P.R. (2d) 70 (F.C.T.D.)]. Recently, in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 92 C.P.R. (4th) 361 (S.C.C.), the Supreme Court of Canada considered the importance of the s. 6(5)(e) factor in conducting an analysis of the likelihood of confusion (see para 49):



...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start.

[35] I will therefore commence with this issue, as this will influence the need for consideration of the other factors.

*Section 6(5)(e) - The degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them*

[36] While it is true that the first portion of a trade-mark is the most relevant for purposes of distinction, the marks must be considered in their totality with a view to ascertaining the overall degree of resemblance in appearance, sound, or idea suggested. It must first be noted that the common element -“rave”, is a dictionary word having no strong descriptive meaning in connection with the wares. In my view the word “rave” renders the marks similar in appearance, when sounded, and in idea suggested, since the addition of the “red” in the Applicant’s Mark is a weak element. “Red” is a common word used, in this case, to describe a type of “rave”, or perhaps to suggest the colour of the drink. In other words, the inclusion of “red” in the Mark does not remove emphasis from “rave” nor alter the idea suggested by “rave” in any substantial way. The Applicant has in effect, usurped the Opponent’s trade-mark in its entirety. Accordingly, this factor favours the Opponent.

*Section 6(5)(c) and (d) - The nature of the wares, services or business; the nature of the trade*

[37] The Applicant applied to register its Mark in association with “nutritional drinks, namely energy drinks and sports drinks”, while the Opponent’s wares are “non-alcoholic beverages namely energy drinks and soft drinks (use being shown in association with “energy drinks”). Clearly the wares associated with the marks at issue are either identical or at least overlap substantially.

[38] As for the nature of the trades, prior to the material date, the Opponent’s trade involved the exportation of energy drinks to the United States, to distributors for resale to retail customers.

The evidence further indicates that the wares are sold to institutional or commercial customers, particularly in the food service, health care, and convenience markets. The wares are packaged in a format for use in beverage dispensing machines/units or through bar fountain dispensing guns.

[39] The Applicant on the other hand, has based its application on proposed use.

Consequently, there is no evidence relating to the Applicant's trade prior to the filing date. In any event, notwithstanding the Applicant's subsequent sales relationship with Costco, since the application does not include any limitations in this regard nothing would prevent the Applicant's wares from being sold through the same channels as the Opponent's wares [see *Mattel Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 (S.C.C.) at para. 53, see also para. 74; *Eminence S.A. v. Registrar of Trade Marks* (1977), 39 C.P.R. (2d) 40 (F.C.T.D.)].

*Section 6(5)(a) - Inherent distinctiveness of the trade-marks and the extent to which they have become known*

[40] It is my view that both trade-marks, although dictionary words, are inherently distinctive as neither "rave" nor "red rave" has any clear connotation in association with the wares. At most "rave" suggests a reaction to the drink and "red rave" might suggest that the drink is red; however, neither trade-mark can be said to describe the wares. Consequently, this factor is in the Opponent's favour. Neither trade-mark had become known in Canada at the filing date.

*Section 6(5)(b) -The length of time each has been in use*

[41] The Opponent's trade-mark had been in use (pursuant to s. 4(3)) since 2002; at the filing date the Applicant had not yet commenced use. Clearly this factor is in the Opponent's favour.

*Likelihood of Confusion*

[42] In conclusion, both parties are in the beverage industry and it is my view that the wares are either identical or at least substantially overlapping. The marks are virtually identical in appearance, sound and idea suggested; the weak adjective "red" does not alter the resemblance between the trade-marks. Accordingly, when viewing the trade-marks in their totality, it is my view that the average consumer, as a matter of first impression and imperfect recollection, would be likely to perceive RED RAVE energy drinks to be associated with the Opponent as a variant

or type of its RAVE energy drinks [see *Kist International Inc. v. Cobi Foods Inc.* (1987), 14 C.P.R. (3d) 540 (T.M.O.B.)]. Consideration of the other factors under s. 6(5) does not affect these findings. I must therefore conclude that the Applicant has failed to discharge its burden of proof to establish that on a balance of probabilities there is no likelihood of confusion between the Mark and the Opponent's trade-mark RAVE. Accordingly, this ground of opposition is successful.

[43] Having found the Opponent successful under the s. 16(3)(a) ground of opposition, there is no need to consider the ground of non-distinctiveness.

#### Disposition

[44] In view of all of the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

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P. Heidi Sprung  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office