



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

**Citation: 2013 TMOB 85**  
**Date of Decision: 2013-04-30**

**IN THE MATTER OF OPPOSITIONS  
by Secur-Net s.e.n.c. to application  
Nos. 1,477,967 and 1,477,969 for the  
trade-marks SECUR-NET and SECUR-  
NET – CHILD SAFE POOL COVER in  
the name of H2O! Recreational Products  
Inc.**

[1] On April 21, 2010, H2O! Recreational Products Inc. (the Applicant) filed applications to register the trade-marks SECUR-NET and SECUR-NET – CHILD SAFE POOL COVER on the basis of use in Canada since at least as early as February 2008 in association with “pool covers”.

[2] The applications were advertised in the *Trade-marks Journal* of October 6, 2010.

[3] Secur-Net s.e.n.c. (the Opponent) filed a statement of opposition against each of these applications on March 7, 2011. The Applicant filed and served a counter statement in each case. Both the Opponent and the Applicant elected to file no evidence and no written arguments. An oral hearing was not held.

Onus on the Parties

[4] The Applicant bears the legal onus of establishing, on a balance of probabilities, that each of its applications complies with the requirements of the *Trade-marks Act*, RSC 1985, c T-13 (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 Ltd v Molson Companies Ltd.* (1990), 30 CPR (3d) 293 (FCTD) at 298].

### Grounds of Opposition

[5] In each case, the Opponent pleaded grounds of opposition pursuant to sections 38(2)(a), (c) and (d) of the Act. The identical grounds of opposition can be summarized as follows:

- a) the application does not comply with sections 30(b), (h) and (i) of the Act;
- b) the application does not comply with section 30 of the Act because the Applicant is not a person;
- c) the Applicant is not entitled to registration of the trade-mark under section 16(1)(a) of the Act in view of confusion with the Opponent's trade-marks SECUR-NET and SECUR-NET – CHILD SAFE POOL COVER, previously used or made known in Canada by the Opponent, its predecessors in title or its licensees, in association with pool covers;
- d) the Applicant is not entitled to registration of the trade-mark under section 16(1)(c) of the Act in view of confusion with the Opponent's trade-name SECUR-NET previously used by the Opponent, its predecessors in title or its licensees, in association with pool covers;
- e) the Applicant is not entitled to registration of the trade-mark under the introductory paragraph of section 16(1) of the Act in that: (i) the application does not comply with the requirements of section 30 of the Act; (ii) the use of the trade-mark by the Applicant does not enure to its benefit; and (iii) the Applicant is not a person; and
- f) the trade-mark is not distinctive under section 2 of the Act because: (i) it does not actually distinguish the wares of the Applicant from those of the Opponent; and (ii) the trade-mark is that of the Opponent.

### Analysis of the Grounds of Opposition

[6] I first deal with the grounds of opposition that I dismiss in each case for having been either improperly or insufficiently pleaded.

[7] Since the application is for the registration only of words not depicted in a special form, I dismiss the non-compliance ground of opposition based upon section 30(h) of the Act for having been improperly pleaded.

[8] The ground of opposition alleging that the application does not comply with section 30 of the Act because the Applicant is not a person is dismissed for having been insufficiently pleaded. The Opponent was required to provide sufficient detail to enable the Applicant to reply. The Opponent provided no material facts and no evidence in support of its allegation.

[9] I dismiss the ground of opposition based upon the introductory paragraph of section 16(1) of the Act for having been improperly pleaded. The introductory paragraph of section 16(1) does not form the basis of a ground of opposition as defined in section 38(2) of the Act since section 16(1) of the Act as a whole relates to the entitlement grounds of opposition.

[10] Finally, I dismiss the second part of the non-distinctiveness ground of opposition alleging that the trade-mark is that of the Opponent for having been insufficiently pleaded. Indeed, even on a fair reading of the statement of opposition in its entirety, the exact nature of the Opponent's allegation remains unclear. In any event, if one finds that the ground of opposition has been sufficiently pleaded, then it ought to be dismissed for the Opponent's failure to meet its evidentiary burden.

[11] I now turn to the grounds of opposition that I dismiss in each case for the Opponent's failure to meet its initial evidentiary burden.

[12] The Opponent has not furnished any evidence in support of its allegations that the application does not comply with section 30(b) of the Act. Furthermore, as there is no evidence on file, this is clearly not a case where the Opponent may rely upon the Applicant's evidence to meet its relatively low onus with respect to this ground of opposition [see *York Barbell Holdings Ltd v ICON Health & Fitness, Inc.* (2001), 13 CPR (4th) 156 (TMOB)].

[13] Where an applicant has provided the statement required by section 30(i) of the Act, 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]; there is no such evidence here.

[14] In order to meet its initial burden in support of the non-entitlement ground of opposition based upon section 16(1)(a) of the Act, the Opponent was required to show that its alleged trade-marks had been used or made known in Canada prior to the date of first use claimed by the Applicant; it has not done so.

[15] In order to meet its initial burden in support of the non-entitlement ground of opposition based upon section 16(1)(c) of the Act, the Opponent was required to show that its alleged trade-name had been used in Canada prior to the date of first use claimed by the Applicant; it has not done so.

[16] Finally, on a fair reading of the statement of opposition, it may be concluded that the first part of the non-distinctiveness ground of opposition revolves around the likelihood of confusion between the trade-mark and the Opponent's alleged trade-marks and trade-name. In order to meet its initial burden, the Opponent was required to show that its alleged trade-marks and trade-name had become known sufficiently in Canada, as of the filing date of the statement of opposition, to negate the distinctiveness of the trade-mark [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC); *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]; it has not done so.

#### Disposition

[17] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition to each application under section 38(8) of the Act.

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office