



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

Citation: 2016 TMOB 167
Date of Decision: 2016-10-14

IN THE MATTER OF AN OPPOSITION

Amira Enterprises Inc. **Opponent**

and

Seara Alimentos S.A. **Applicant**

1,511,822 for SEARA **Application**

[1] Amira Enterprises Inc. opposes registration of the trade-mark SEARA (the Mark) that is the subject of application No. 1,511,822 by Seara Alimentos S.A.

[2] Filed on January 19, 2011, the application is based on proposed use of the Mark in Canada in association with goods described as “meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables; jellies, jams, compotes; eggs, milk and milk products; edible oils and fats; ready meals based on meat dishes (beef, pork and poultry); semi ready meals based on meat dishes (beef, pork and poultry)”.

[3] The Opponent alleges that (i) the Mark is not registrable under section 12(1)(d) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act), (ii) the Applicant is not the person entitled to the registration of the Mark under section 16 of the Act, and (iii) the Mark is not distinctive under section 2 of the Act. The grounds of opposition revolve around the likelihood of confusion between the Mark and the Opponent’s trade-mark SERA.

[4] For the reasons that follow, I refuse the application.

The Record

[5] The application was advertised for opposition purposes in the *Trade-marks Journal* of April 3, 2013. The Opponent filed its statement of opposition on September 3, 2013. The Applicant then filed and served its counter statement on October 24, 2014.

[6] In support of its opposition, the Opponent filed the affidavit of Jennifer Leah Stecyk, a searcher employed by the Opponent's trade-mark agent. The Stecyk affidavit introduces into evidence a certified copy of the Opponent's registration No. TMA769,140 for the trade-mark SERA, as well as a number of Internet search results. In support of its application, the Applicant filed the affidavit of Jill Roberts, a graduate of the Law Clerk Program of Cambrian College. The evidence introduced in the Roberts affidavit will be discussed in my analysis below. The Opponent did not file any reply evidence. Neither affiant was cross-examined.

[7] Only the Applicant filed a written argument; neither party requested a hearing in the present proceeding.

The Parties' Respective Burden or Onus

[8] 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 Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298].

Is the Mark Confusing with the Opponent's Registered Trade-mark?

[9] In its statement of opposition, the Opponent alleges that the Mark is not registrable pursuant to section 12(1)(d) of the Act on the ground that it is confusing with the Opponent's trade-mark SERA of registration No. TMA769,140 for goods described as "Turkish food products namely: processed fruits namely dry fruits and jams, edible nuts, chick peas; processed vegetables namely: okra, eggplant, cabbage, ready to eat vegetables, pickles, pepper paste, vine leaves; flavourings, namely: syrups, lokoum (turkish delight), halva, bakery products, namely:

yafca (philo pastry dough)”. The registration is based on a claim of use of the trade-mark in Canada since September 1, 1998.

[10] The material date for considering this issue, which arises from the section 12(1)(d) ground of opposition, is the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[11] An opponent’s initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration(s) relied upon is(are) in good standing. In this regard, the Registrar has the discretion to check the register in order to confirm the existence of the registration(s) relied upon by an opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Having exercised the Registrar’s discretion, I confirm that registration No. TMA769,140 is in good standing.

[12] Since the Opponent has satisfied its initial evidential burden, the issue becomes whether the Applicant has met its legal burden to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent’s registered trade-mark.

[13] For the reasons that follow, I accept this ground of opposition and decide this issue in favour of the Opponent.

[14] 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 goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[15] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 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 goods, 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. These enumerated factors need not be attributed equal

weight [see *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al*, 2006 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) for a thorough discussion of the general principles that govern the test for confusion].

[16] I will now turn to the assessment of the section 6(5) factors.

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

[17] The overall consideration of the section 6(5)(a) factor involves a combination of inherent and acquired distinctiveness of the parties' trade-marks.

[18] With respect to the Opponent's trade-mark SERA, *The Canadian Oxford Dictionary* defines "sera" as the plural of "serum", whose meanings include "the amber-coloured protein-rich liquid in which blood cells are suspended and which separates out when blood coagulates", "a watery fluid in animal bodies" and "whey". According to *Larousse*, the term "sera" is also the future tense of the verb "être" (to be) in French. I further note that attached as Exhibit 3 to the Roberts affidavit are printouts of the search results conducted on the *Canada 411* website with 65 entries of individuals living in Canada whose surname is "Sera".

[19] Considering that the term "sera" is an ordinary word in English and in French that is neither descriptive nor suggestive of the Opponent's registered goods, I am of the view that it is inherently distinctive although it is not a particularly strong mark given its surname significance in Canada.

[20] In terms of the Mark, I note that the term "seara" does not appear to be a dictionary word in English or in French. Attached as Exhibit F to the Stecyk affidavit, is a printout from *Wikipedia* which describes "Seara" as "a town and municipality in the state of Santa Catarina in the South region of Brazil", along with printouts extracted from *seara.sc.gov.br* pertaining to the "Prefeitura Municipal De Seara", the content of which is in presumably Portuguese.

[21] I further note that attached as Exhibit C to the Stecyk affidavit are printouts from *Wikipedia* pertaining to an entity identified as "JBS Foods" and "JBS Foods S.A.", formerly

“Seara Foods”, said to be founded in the town of Seara, Santa Catarina, Brazil, as well as printouts from a website that appears to belong to an entity identified as “Seara International” extracted from *www.seara.com.br* in which the mark SEARA is shown with a design. In the absence of any submissions from the Opponent and considering that the relationship between the Applicant and the entities in question remains unclear, I am of the view that these printouts have little probative value in the present case in determining whether Seara is the place of origin of the applied for goods.

[22] In its written argument, the Applicant submits that the Mark has a greater degree of inherent distinctiveness because “unless the average Canadian were aware that there is a municipality in Brazil called Seara”, “on seeing the Applicant’s trademark, he or she would simply view it as a brand name”.

[23] I disagree.

[24] It has been held that geographical locations are not inherently distinctive [see *London Drugs Limited v International Clothiers Inc* 2014 FC 223 par 49 and *Distribution Prosol PS Ltd v Custom Building Products Ltd* 2015 FC 1170 par 37]. Moreover, I note that the Federal Court of Appeal recently confirmed in *MC Imports Inc v AFOD Ltd*, 2016 FCA 60 the approach taken by the Federal Court in *Sociedad Agricola Santa Teresa Ltd v Vina Leyda Limitada* 2007 FC 1301, 63 CPR (4th) 321 where the Court stated that “[t]hose ‘far away places with strange sounding names’ may call some more than others, but [paragraph] 12(1)(b), at least as far as ‘place of origin’ is concerned, is not dependent on the knowledge, or lack thereof, of the average Canadian consumer” [par 51].

[25] In the end, when the trade-marks are viewed in their entireties, I am of the view that neither party’s trade-mark is a particularly strong trade-mark. Even so, the Opponent’s trade-mark possesses a relatively higher degree of inherent distinctiveness.

[26] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. However, neither party provided any evidence of promotion or use of their respective marks in Canada. In this regard, I note that the Applicant attached, as Exhibits 11 and 12 to the Roberts affidavit, photos of food products bearing the Opponent’s

trade-mark SERA purchased in a food center located in Ottawa on June 2015 accompanied by the receipt. In its written argument, the Applicant submits that the labeling of the purchased products points to an entity other than the Opponent, even though the Opponent is also identified on the packaging of a number of the products purchased. For the purpose of the discussion under section 6(5)(a) of the Act, suffice it to say based on the evidence of this single purchase, I am unable to draw any meaningful conclusion with respect to the extent to which the Opponent's trade-mark has become known in Canada in association with the registered goods.

[27] In view of the foregoing, the section 6(5)(a) factor does not significantly favour either party.

Section 6(5)(b) - the length of time the trade-marks have been in use

[28] The application for the Mark is based upon proposed use in Canada and there is no evidence that the Mark has been used to date in Canada.

[29] In comparison, the Opponent's registration No. TMA769,140 claims use of the trade-mark SERA in Canada since September 1, 1998. However, the Opponent did not provide any evidence of the length of time its trade-mark has been in use in Canada. The mere existence of the Opponent's registration can establish no more than *de minimis use* and cannot give rise to an inference of significant and continuous use of the mark [see *Entre Computer Centers, Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB)]. Likewise, the single purchase made by Ms. Roberts does not show that use of the mark has been continuous since the time of purchase.

[30] In the absence of evidence of actual use of either party's marks, the section 6(5)(b) factor does not favour either party.

Sections 6(5)(c) and (d) - the nature of the goods, trade and business

[31] Sections 6(5)(c) and (d) factors involve the nature of the goods, trade and business.

[32] When considering sections 6(5)(c) and (d) of the Act, it is the statements of goods as defined in the application for the Mark and in the Opponent's registration No. TMA769,140 that

govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[33] The Opponent's trade-mark SERA is registered for use in association with a variety of food products including processed fruits, processed vegetables, ready to eat vegetables, flavourings and bakery products. The Opponent has not provided any evidence of the actual trade it is engaged in. Although as mentioned above, the Applicant has provided evidence that food products bearing the Opponent's trade-mark are available at retail food centers in Ottawa [par 13 along with Exhibits 11 and 12 of the Roberts affidavit].

[34] In comparison, the Mark is also applied for use in association with a variety of food products including meat, fish, poultry and game, preserved, frozen, dried and cooked fruits and vegetables, dairy products, oils, and ready meals. In its written argument, citing *MonSport Inc v Vêtements de Sport Bonni (1978) Limitée* (1988), 22 CPR (3d) 356 (FCTD), the Applicant submits that even though the parties' goods could be sold in the same outlets, the majority of the Opponent's registered goods would nevertheless be sold in a different area of the store from those of the Applicant, leaving only a small number of goods, namely fruit and vegetable products, as well as jellies jams and compotes, that could be sold in proximity of each other.

[35] Contrary to the evidence presented in the *MonSport* case regarding sport clothes designed for comfort and those designed for "serious or partly serious athletes", the Applicant in the present proceeding did not provide any evidence of the actual trade it is engaged in. There is also no evidence that the parties' goods would never be sold in the same areas of the store or that the parties' goods are designed for distinct markets. Finally, in the absence of evidence, I am not prepared to draw an analogy between the different categories of goods sold in a department store and those sold in a food store.

[36] As mentioned above, attached as Exhibit C to the Stecyk affidavit are printouts from *Wikipedia* pertaining to an entity identified as "JBS Foods" and "JBS Foods S.A.", formerly "Seara Foods", said to be founded in the town of Seara, Santa Catarina, Brazil, as well as printouts from a website that appears to belong to an entity identified as "Seara International"

extracted from *www.seara.com.br* in which the mark SEARA is shown with a design. Once again, in the absence of any submissions from the Opponent and considering that the relationship between the Applicant and the entities in question remains unclear, I am of the view that these printouts have little probative value in the present case as the evidence does not speak to the use of the Mark in Canada. In this regard, I note that the printouts do not contain any information pertaining to the Applicant's presence or business in Canada.

[37] In the end, there is clear overlap between some of the parties' goods while others appear to be closely related as both pertain to food products. In addition, neither the Opponent's registration nor the subject application contains any restriction on the parties' channels of trade. Given that the parties' goods either overlap or are closely related, for the purpose of assessing confusion, I conclude that there is potential for overlap between the parties' channels of trade.

[38] Accordingly, these two factors clearly favour the Opponent.

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

[39] In *Masterpiece Inc v Alavida Lifestyles Inc et al* [*supra*], the Supreme Court of Canada indicates that the most important factor amongst those listed under section 6(5) of the Act is often the degree of resemblance between the parties' trade-marks [see also *Beverley Bedding & Upholstery Co v Regal Bedding & Upholstering Ltd* (1980), 47 CPR (2d) 145 (FC), at 149, affirmed (1982), 60 CPR (2d) 70 (FCA)].

[40] When considering the degree of resemblance, the law is clear that the trade-marks must be considered in their totality. It is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trade-marks. It is nevertheless possible to focus on particular features of a mark that may have a determinative influence on the public's perception of it [see *United Artists Corp v Pink Panther Beauty Corp* (1998), 80 CPR (3d) 247 at 263 (FCA)].

[41] In its written argument, the Applicant submits that the parties' trade-marks bear little resemblance to one another as "the only common feature is that the words comprising each of the

trademarks begin and end with the same letters”. In terms of sound, the Applicant contends that the Mark has three syllables and is pronounced as SEE-ARE-A while the Opponent’s trade-mark is sounded as SER-A, like “the female given name ‘Sara’”.

[42] The trade-marks need not be identical to one another for there to be resemblance. When considered in their entirety, I am of the view that there are considerable similarities in appearance between the Opponent’s trade-mark SERA and the Mark, SEARA.

[43] In terms of sound, given the similarities between the terms SERA and SEARA, I am of the view that there could be some resemblance between them when sounded by the average Canadian consumer.

[44] Finally, in terms of the ideas suggested, I note that there is no evidence that the Opponent’s trade-mark suggests, or that it would be perceived or understood by the average Canadian consumer as the female given name “Sara”, given that the term SERA is an ordinary word in English and in French, in addition to its surname significance. In comparison, the Opponent’s evidence shows that the Mark is the name of a geographic location in Brazil, with no other meanings in English or in French. At the end, I am of the view that there is no similarity between the ideas suggested by the Mark and that of the Opponent’s trade-mark.

[45] In view of the foregoing, this factor favours the Opponent.

Additional surrounding circumstances

[46] In its written argument, the Applicant points to the existence of a third party registration for the trade-mark SERRA of registration No. TMA502,539 for “cheese” and “olive oil”, the particulars of which are attached as Exhibit 1 to the Roberts affidavit. In this regard, the Applicant notes that when sounded, this third party trade-mark is identical to that of the Opponent’s trade-mark and is visually very similar and “far closer” to the Opponent’s trade-mark than the Mark.

[47] Also attached as Exhibits 1 and 2 to the Roberts affidavit are printouts of the particulars of 13 other applications and registrations extracted from the *Canadian trade-marks database* for trade-marks that include the terms “serra” or “sera” for a variety of goods and services.

[48] State of the register evidence is purported to show the commonality or distinctiveness of a trade-mark or portion of a trade-mark in relation to the register as a whole. It is only relevant insofar as inferences may be made with respect to the state of the marketplace, and inferences about the state of the marketplace can only be drawn when a significant number of pertinent registrations are located [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD); and *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[49] In the present case, I am unable to draw any meaningful inferences concerning the state of the marketplace from the state of the register evidence presented in the Roberts affidavit. In this regard, setting aside the Opponent's cited registration (TMA769,140) in the results, as well as applications that are not yet allowed (Application Nos. 1,686,856 and 1,713,370), I find little similarities between registration No. TMA675,996 for the trade-mark reproduced below, and the parties' trade-marks in question.



[50] Likewise, I find little similarities between the goods in question and those of registration Nos. TMA646,478 and TMA767,701 for nutritional and dietary supplements, or those of registration Nos. TMA246,488 and TMA731,244 for fish food, medication and disinfectant for curing home fishes, aquariums, accessories for aquariums, cleaning agents and fertilizers for aquaria and pond plants, and other aquaria and pond water products, or those of registration No. TMA781,588 for kitchenware and housewares, or those of registration No. TMA857,095 for parts for pipes, hoses, pumps and “dosing apparatus for portable and liquid material”.

[51] With the remaining four registrations for trade-marks that include the term SERRA for food products (registration Nos. TMA523,919, TMA502,539, as well as TMA586,174 and TMA708,370 which belong to the same registered owner), there is not a sufficient number of

relevant registrations to allow me to infer the state of the marketplace pertaining to food products in terms of the likelihood of confusion between the Opponent's trade-mark and the Mark.

Conclusion in the likelihood of confusion

[52] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having considered all of the surrounding circumstances, while the Opponent's trade-mark does not possess a high degree of inherent distinctiveness, in view of the fact that the Mark is a geographical location which is not inherently distinctive, of the clear overlap and the close connection between the parties' goods and the potential for overlap in their channels of trade, as well as the similarities of the parties' marks in appearance and sound, I am not satisfied that the Applicant has discharged its burden to prove, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent's registered trade-mark SERA.

[53] In its written argument, the Applicant submits that the Opponent's trade-mark is a weak mark such that small differences between the parties' marks will serve to differentiate and to obviate any likelihood of confusion. In support, the Applicant points to the surname significance of the Opponent's trade-mark, as well as evidence of the name of an entity other than the Opponent on the labeling of products bearing the Opponent's trade-mark, and cites *Joseph Ltd v XES -NY Ltd* (2005) 44 CPR (4th) 314 (TMOB) which dealt with the likelihood of confusion between the trade-marks JOSEPH versus JOSEPH A. QU'EST-CE QUE C'EST SILK? and *Skydome Corp v Toronto Heart Industries* (1997) 72 CPR (3d) 543 (FCTD) which dealt with the likelihood of confusion between the trade-marks TORONTO COME TO PLAY and WHERE THE WORLD COMES TO PLAY.

[54] I am of the view that the two cited cases can be distinguished from the present case. In the *Joseph* decision, the degree of resemblance between the two marks is significantly less than the marks in question when viewed in their entirety. As for the *Skydome* decision, the Court also pointed out the major differences between the two marks such as one is a complete sentence while the other is separated into two parts, and that the first word of the marks, often the most important, is also different.

[55] In contrast, we are in the presence of two weak marks, including one with no inherent distinctiveness, neither of which has acquired any distinctiveness in the Canadian marketplace, with clearly overlapping or at least closely related goods sold through the same channels of trade. Even though the parties' marks are not identical, they are highly similar in appearance and in sound, with the same beginning and same ending. While I agree with the Applicant that the Opponent's trade-mark does not deserve a wide ambit of protection in the absence of any evidence of acquired distinctiveness, I am nevertheless of the view that in the present case, taking into consideration the factors mentioned above and bearing in mind that the test is one of first impression and imperfect recollection, the use of these two particular marks in the same area would nevertheless be likely to lead to the inference that the food products associated with those trade-marks are manufactured or sold by the same entity.

[56] Accordingly, the section 12(1)(d) ground of opposition is successful.

Was the Applicant the person entitled to registration of the Mark?

[57] The Opponent alleges that the Applicant is not the person entitled to registration of the Mark pursuant to section 16(3)(a) of the Act, on the ground that it is confusing with the Opponent's trade-mark SERA, "which has been previously used in Canada by the Opponent in association with a wide range of food products including processed fruits, dried fruits, processed vegetables, ready to eat vegetables, pickles, nuts, jellies, jams, syrups, sauces, spices, spices for meats, tea and other foods and food products and which trade-mark had not been abandoned as of the date of advertisement of [the subject application]".

[58] The Opponent has the initial burden of proving that its alleged trade-marks was used in Canada prior to the material date and had not been abandoned at the date of advertisement of the application for the Mark [section 16(5) of the Act]. It has not done so [see *Rooxs, Inc v Edit-SRL* 23 CPR (4th) 265 at 268].

[59] Accordingly, the section 16(3)(a) ground of opposition is dismissed for the Opponent's failure to meet its initial burden.

Is the Mark distinctive of the Applicant's goods?

[60] The Opponent alleges that the Mark is not distinctive under section 2 of the Act as it does not distinguish, nor is it adapted to distinguish, the Applicant's goods from those of the Opponent "in view of the extensive and longstanding use and promotion by the Opponent of the confusingly similar trade-mark SERA in Canada".

[61] In order to meet its initial burden with respect to the non-distinctiveness ground of opposition, the Opponent was required to show that its alleged trade-mark had become known sufficiently in Canada, as of the filing date of the statement of opposition, that is September 3, 2013, to negate the distinctiveness of the 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.

[62] In the absence of evidence of use and/or reputation of its trade-mark, the Opponent has not met its initial evidential burden with respect to the non-distinctiveness ground.

[63] Accordingly, the non-distinctiveness ground of opposition is dismissed.

Disposition

[64] In view of 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.

Pik-Ki Fung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No hearing held.

AGENTS OF RECORD

Osler, Hoskin & Harcourt LLP

FOR THE OPPONENT

Moffat & Co.

FOR THE APPLICANT