

**IN THE MATTER OF AN OPPOSITION by
Apollo Pharmaceutical Inc. and Apollo
Pharmaceutical (Canada) Inc. to application No.
1,134,864 for the trade-mark APOLLO in the
name of Rwachsberg Holdings Inc.**

On March 20, 2002, Apollo Nutraceuticals Inc. filed an application to register the trade-mark APOLLO (the “Mark”). The application is based upon use of the Mark in Canada since at least as early as 2000 in association with the following wares:

nutraceuticals, namely, vitamins, minerals; health supplements, namely: herbal supplements, namely ginkgo biloba, echinacea, cranberry, pine bark, saw palmetto, aloe vera, green tea and passion flower; food supplements, namely, omega, isoflavones, garlic, natural soy lecithin, shark cartilage, brewers yeast, papaya, garlic oil, garlic and parsley; dietary supplements, namely, apple cider vinegar, fat binder, carbohydrate control, fat burner, metabolism enhancer, glucosamine and chondroitin.

In 2003, the application was assigned to R. Wachsberg Holdings Inc.

The application was advertised for opposition purposes in the Trade-marks Journal of September 1, 2004.

On February 1, 2005, Apollo Pharmaceutical Inc. and Apollo Pharmaceutical (Canada) Inc. (collectively the “Opponent”) filed a statement of opposition.

A counter statement was filed and served.

On March 16, 2005, the application was amended to list the original applicant, Apollo Nutraceuticals Inc., as the predecessor-in-title of R. Wachsberg Holdings Inc. An affidavit was subsequently filed to support a request that the trade-mark owner’s name be corrected to read Rwachsberg Holdings Inc. (instead of R. Wachsberg Holdings Inc.). Thus the application is now in the name of Rwachsberg Holdings Inc.

The term “Applicant” will be used below to refer to both Rwachsberg Holdings Inc. and its predecessor-in-title, Apollo Nutraceuticals Inc.

In support of its opposition, the Opponent filed the affidavits of Jaclyn A. Marmara and Sandra D.W. Kleinert.

In support of its application, the Applicant filed the affidavits of Richard Wachsberg and Danielle Lanteigne, plus a certified copy of the file history with respect to the present application.

Pursuant to r. 44 of the *Trade-marks Regulations*, the Applicant obtained leave to file a further affidavit of Richard Wachsberg.

No cross-examinations were conducted.

Only the Applicant filed a written argument. An oral hearing was not requested.

Onus

The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 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 Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

Section 30 Grounds of Opposition

The Opponent has pleaded multiple grounds pursuant to s. 30. The material date that applies to a s. 30 ground of opposition is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.) at 475].

i) s. 30(a)

The Opponent has pleaded that the application does not comply with s. 30(a) in that the application does not contain a statement in ordinary commercial terms of the specific wares in association with which the Mark is proposed to be used, in particular “fat binder”, “carbohydrate control” and “fat burner” are not ordinary commercial terms.

There is no evidence supporting the allegation that those three specific terms are not ordinary commercial terms. Accordingly this ground is dismissed on the basis that the Opponent has not met its initial burden.

ii) s. 30(b)

The Opponent has pleaded that the application does not comply with s. 30(b) in that:

- a) the Mark was not in use in Canada in association with the wares identified in the application since the date claimed in the application, namely 2000;
- b) the claimed use by the Applicant’s predecessor(s) in title is not properly claimed in the application.

There is no evidence supporting the allegation that the Applicant’s Mark was not in use in 2000. Ms. Marmara, a law student articulated to the firm representing the Opponent, gives evidence of her unsuccessful attempts to locate the Applicant’s wares in 2005. If her evidence is admissible, it does not support a conclusion that the Applicant’s Mark was not in use in Canada five years earlier. Moreover, the Applicant has relied upon the decision in *Valenite Inc. v. Modco Coatings Ltd.* (2001), 13 C.P.R. (4th) 348 (T.M.O.B.) as support for its position that evidence of an affiant visiting a number of stores in one city or geographic area is not sufficient evidence to meet an opponent’s evidential burden under s. 30(b). For both of these reasons, I find that the Opponent has not met its initial burden regarding the first arm of its s. 30(b) ground.

Regarding the second arm of the s. 30(b) ground, I note that the Mark was only assigned to the current owner of the Mark on November 28, 2003. Accordingly, when the application was filed in 2002, it correctly referred to Apollo Nutraceuticals Inc. as the user of the Mark.

The s. 30(b) ground is accordingly dismissed in its entirety.

iii) s. 30(i)

The Opponent has pleaded that the application does not comply with s. 30 in that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the wares described in the application, since at the date of filing of the application, the Applicant did not exist as a legal entity nor had the Applicant used the Mark.

This ground is dismissed on the basis that the Opponent has not met its initial burden. As noted in the Applicant's written argument, the Opponent has provided evidence that the original applicant, Apollo Nutraceuticals Inc., was incorporated in 2000 [Exhibit "A", Kleinert affidavit].

In any event, where an applicant has provided the statement required by s. 30(i), a s. 30(i) 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]

Distinctiveness Ground of Opposition

The Opponent has pleaded that the Mark is not distinctive in that:

- i) it does not distinguish nor is it adapted to distinguish the services [sic] of the Applicant from the services provided by others in the Canadian marketplace in association with trade-marks and trade-names comprised of the term Apollo for wares and services in the field of health and medicine;
- ii) pursuant to the assignment in favour of the Applicant, rights in the Mark subsisted with two or more persons and those rights were exercised contrary to s. 48(2) of the Act; and
- iii) the Mark was used by a person without the direct or indirect control by the owner of the character or quality of the wares in association with which the Mark was used, contrary to the requirements of s. 50 of the Act.

The material date for considering the issue of distinctiveness is the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)].

As of February 1, 2005, there is no evidence of the use of the term Apollo by the Opponent or any third parties. Accordingly, the Opponent has not met its evidential burden with respect to the first arm of its pleading.

The Opponent has also not met its evidential burden with respect to the second and third arms of its pleading. Instead, the Applicant has evidenced that the Mark was assigned and that it was subsequently used under a licence, pursuant to which the new owner controlled the character and quality of the wares.

The distinctiveness ground of opposition is accordingly dismissed in its entirety.

Disposition

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

DATED AT TORONTO, ONTARIO, THIS 24th DAY OF NOVEMBER 2008.

Jill W. Bradbury
Member
Trade-marks Opposition Board