



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

**Citation: 2017 TMOB 11  
Date of Decision: 2017-02-02**

**IN THE MATTER OF OPPOSITIONS**

**Friedman and Soliman Enterprises, LLC** **Opponent**

**and**

**Hunky Haulers Inc.** **Applicant**

**1,653,908 for HUNKY HAULERS** **Applications**  
**1,653,704 for HUNKY HAULERS and**  
**Man Design**

[1] Friedman and Soliman Enterprises, LLC (the Opponent) opposes registrations of the trade-marks HUNKY HAULERS (word mark) and HUNKY HAULERS and Man Design (design mark as shown below) (collectively the Marks):



[2] Application Nos. 1,653,704 for the design mark and 1,653,908 for the word mark (collectively the Applications) were filed by Hunky Haulers Inc. (the Applicant) on November 26, 2013 and November 27, 2013, respectively, in association with the following services:

(1) Arrangement of transportation of goods by road; cartage and collections services, namely, transporting commercial and residential disposal material by truck for others.  
(2) Franchise services in the field of transportation of goods, namely, arrangement, cartage and collection services of commercial and residential disposal material by truck for others; establishment and brokerage of franchise operations, conducting market studies for franchise locations, providing advice regarding site selection and construction and equipping of a franchise location, conducting field inspections of franchise locations, negotiating leases for franchise locations, franchise consulting, negotiating and preparing franchise and related agreements, providing technical advice and assistance in connection with the establishment and operation of a franchised business, providing sales, marketing and advertising information for franchised operations, maintaining and supervising franchises, and all support services incidental to the operation of a franchised business.

(the Services)

[3] The Applications claim use in Canada since at least as early as November 2010.

[4] The grounds of opposition pleaded are based on sections 30(b) and 30(i) (requirements), 12(1)(d) (confusion with a registered trade-mark), 16 (entitlement) and 2 (distinctiveness) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act).

[5] For the reasons explained below, I refuse the Applications.

#### The Record

[6] The Applications were advertised in the *Trade-marks Journal* on October 15, 2014 (for application No. 1,653,704) and November 5, 2014 (for application No. 1,653,908).

[7] The Opponent filed statements of opposition on March 12, 2015. The Applicant filed and served counter statements on May 15, 2015, generally denying the allegations in the statements of opposition.

[8] The Opponent filed as its evidence the affidavit of Nicholas Friedman sworn on December 11, 2015. While an original affidavit was filed for each opposition, the affidavits are substantively identical, differing only in that one references the Applicant's HUNKY HAULERS mark while the other references the HUNKY HAULERS and Man Design mark. Mr. Friedman was not cross-examined on his affidavit evidence. The Applicant elected not to file evidence.

[9] Only the Opponent filed a written argument; no hearing was held.

### The parties' respective burden or onus

[10] The legal onus is on the Applicant to show that its Applications do not contravene the provisions of the Act as alleged in the statements of opposition. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* 2002 FCA 291 (CanLII), 20 CPR (4th) 155; and *Wrangler Apparel Corp v The Timberland Company* 2005 FC 722 (CanLII), 41 CPR (4th) 223].

### Preliminary comments

[11] As the Opponent's affidavit evidence, namely the affidavit of Nicholas Friedman filed for each opposition, is substantively identical as mentioned above, for the purposes of this discussion, they are referenced as a single affidavit.

[12] Mr. Friedman's affidavit is not limited to facts; it contains mainly legal arguments and conclusions in law. My summary of the affidavit is limited to those parts setting out facts relating to the section 30(b) ground of opposition since, as discussed below, it was unnecessary to consider grounds of opposition outside of section 30(b).

### Grounds of opposition based on section 30(b) of the Act

[13] The relevant date for this ground of opposition is the filing date of the application (November 26 and 27, 2013, for application Nos. 1,653,704 and 1,653,908, respectively) [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 (TMOB)].

[14] The Opponent has pleaded that the Applications contravene section 30(b) as follows:

...Paragraph 30(b) requires, in the case of a trade-mark that has been used in Canada, the date from which the applicant (or his named predecessor in title, if any), have so used the trade-mark in association with each of the general classes of wares or services described in the application.

The applied-for trade-mark has not been used with the [Services].

[15] In his affidavit, Mr. Friedman references corporate searches that indicate the Applicant was incorporated on March 30, 2011. Copies of federal and provincial (British Columbia) corporate searches were filed as Exhibit A.

[16] The Opponent, in its written argument, notes that the Applicant has claimed a date of first use four months earlier than its actual date of incorporation. The Applicant was not even incorporated in November 2010, and therefore had no existence on the date that it claimed first use of the Marks.

[17] The Opponent further adds that if the Applicant had a predecessor in title that existed in November 2010, no predecessor was disclosed or claimed in the Applicant's Applications for the Marks at the time the Applications were made. It further notes that since the filing of the Opponent's evidence, the Applicant has taken no steps to rebut the Opponent's evidence or explain the timing discrepancy.

[18] I note that the Applications have not been amended to include a predecessor in title.

[19] While the Opponent's section 30(b) ground of opposition was not framed to allege specifically that the applied for Marks have not been used with the Services since the date claimed because the Applicant did not exist on this date, it is well-established that at the decision stage, the statement of opposition must be read in conjunction with the evidence filed [see *AstraZeneca AB v Novopharm Ltd.* (2001), 2001 FCA 296 (CanLII), 15 C.P.R. (4<sup>th</sup>) 327 (F.C.A.)]. Considering both the evidence and the statement of opposition, I find that it can be understood that the section 30(b) ground of opposition would be read as encompassing an allegation of non-use of the Marks with the Services as of the claimed date of first use by the Applicant.

[20] I am satisfied from the Opponent's evidence, namely Exhibit A to the Friedman affidavit, that the Opponent has met its initial evidentiary onus in putting the Applicant's compliance with section 30(b) of the Act into issue.

[21] In view of this evidence, it was up to the Applicant to show use of the Marks since the date claimed. Given that the Applicant was incorporated after the claimed date of first use, it had to rely on use by a predecessor(s) in title and to identify this predecessor(s) in title in the Applications, which it failed to do, in order to rely on such date of first use.

[22] Under these circumstances, the Applications are contrary to section 30(b) of the Act [see *Servicemaster Company v 385 Mke Limited*, 2015 TMOB 188 (CanLII)]. Accordingly, the section 30(b) ground of opposition succeeds.

#### Other grounds of opposition

[23] In view of the apparent lack of interest on the part of the Applicant in its Applications as it has not filed any evidence, nor a written argument and did not request a hearing, coupled with the fact that the opposition has been successful under the section 30(b) ground of opposition, I do not intend to discuss the other grounds of opposition (sections 30(i); 12(1)(d); 16; 2) raised by the Opponent.

#### Disposition

[24] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse both applications.

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Jean Carriere  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

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

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No Hearing Held

**AGENTS OF RECORD**

Boughton Law Corporation

FOR THE OPPONENT

Drake Marks Associates

FOR THE APPLICANT