



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

Citation: 2019 TMOB 14

Date of Decision: 2019-02-22

IN THE MATTER OF AN OPPOSITION

Nimbus Water Systems Inc.

Opponent

and

La Galvanina S.P.A.

Applicant

**1,737,904 for
GALVANINA BLÚ & DESIGN**

Application

[1] Nimbus Water Systems Inc. (the Opponent) opposes an application for registration of the trade-mark GALVANINA BLÚ & Design (the Mark) filed by La Galvanina S.P.A (the Applicant). The Mark, reproduced below, consists of the word GALVANINA in stylized lettering, followed by the word BLÚ in a smaller, simpler font and a large, raised crescent design:



[2] For the reasons that follow, I reject the opposition.

THE RECORD

[3] On July 17, 2015, the Applicant filed an application bearing serial No. 1,737,904 for registration of the Mark (the Application).

[4] The Application is based on use of the Mark in Canada since May 25, 2009 in association with the goods “still waters; carbonated waters; mineral waters; flavoured mineral water; non-alcoholic fruit drinks; non-alcoholic fruit flavoured drinks; fruit juices; vegetables juices” (the Goods).

[5] The Application was published on March 23, 2016 in the *Trade-marks Journal* for the purposes of opposition.

[6] On August 23, 2016, the Opponent filed a statement of opposition. The grounds of opposition pleaded are based on sections 30(b) and 30(i) (compliance), 16(1)(a) (entitlement), 2 (distinctiveness) and 12(1)(d) (registrability) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act).

[7] The Applicant filed a counter statement on October 4, 2016, denying each ground of opposition pleaded.

[8] Only the Opponent filed evidence, which consists of the declaration of Andrew Ngo, dated February 6, 2017, and a certified copy of the Opponent’s registration No. TMA803,063 for the trade-mark BLU, registered for use in association with the goods “Bottled water, namely, reverse osmosis water and reverse osmosis carbonated water”.

[9] Mr. Ngo was not cross-examined on his declaration.

[10] Only the Opponent filed written arguments and a hearing was not requested.

EVIDENTIARY BURDEN

[11] The legal onus is on the applicant to show that the application complies with the provisions 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. Once this initial burden is met, the applicant must satisfy the Registrar, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB); *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29, 20 CPR (4th) 155].

OVERVIEW OF THE EVIDENCE

[12] The Opponent filed in evidence the declaration of Andrew Ngo, a student-at-law employed by the firm acting as the Opponent's agent in this matter. Mr. Ngo explains that he was instructed by a lawyer at his firm to visit certain webpages and to visit or call various stores in Toronto to locate products manufactured or packaged by the Applicant with a label that displays the term BLÚ. The results of his research are attached as exhibits to his declaration.

[13] In particular, Mr. Ngo attaches as Exhibit A to his declaration a selection of webpages that he printed on February 1, 2017, from what appear to be the Applicant's website, the website of a distributor in Brampton, Ontario, and the Amazon online store. The websites display images of what appear to be the Applicant's still and carbonated bottled mineral waters.

[14] Mr. Ngo attaches, as Exhibit B to his declaration, the first page of results from a Google image search that he conducted on February 1, 2017, using the keywords "galvanina" and "blu" in combination. Various bottles are depicted, some of which resemble those shown at Exhibit A.

[15] As Exhibit C to his declaration, Mr. Ngo attaches photographs of still and carbonated bottled spring waters on the shelves of a store in the Toronto area and after being purchased from that store. The bottles are similar to the ones depicted at Exhibit A and bear the Applicant's corporate name on the back label. Mr. Ngo attests that he made the purchase and took the photographs on February 3 and 6, 2017; he includes a store receipt for the purchase. Mr. Ngo also describes how he called or visited eight other stores on February 1 and 2, 2017, as well as contacting the aforementioned distributor and following up on resulting leads, but was unable to locate products from the Applicant bearing the trade-mark BLÚ, alone or in combination, at any additional locations.

[16] The exhibits to the Ngo declaration show the Applicant's water in dark blue bottles, labeled with a variation of the Mark comprising only the BLÚ and crescent design elements above the name of the goods. From the photographs at Exhibit C, it can be seen that the GALVANINA element is displayed on the back label. Mr. Ngo confirms that his review of the Google image search results at Exhibit B did not reveal any images of the Applicant's bottled water displaying GALVANINA adjacent to BLÚ. However, I note that the store receipt at Exhibit C identifies the products as "GALVANINA BLU CRBNT SPRING W" and "GALVANINA BLU NTRL SPRING W", and the product is also identified as GALVANINA BLU on the exhibited webpages from Amazon.

[17] I also note that, in the close-up bottle images, including those from the Applicant's website reproduced at Exhibit A and those of the bottles purchased by Mr. Ngo depicted at Exhibit C, the crescent design is rendered as a thin waning crescent moon. The concept is emphasized on the first of the Applicant's webpages at Exhibit A, which displays a row of bottled water with a waning moon scene in the background.

[18] The webpages attached to Mr. Ngo's declaration constitute hearsay evidence. At best, they show that the webpages existed at the time Mr. Ngo's searches were performed and that certain products were marketed on them at that time. However, they do not establish that the depicted goods were sold in Canada at any relevant time or even that the webpages were ever visited by any Canadians other than the declarant. [For a similar conclusion, see *Génération Nouveau Monde Inc v Teddy SPA* (2006), 51 CPR (4th) 385 (TMOB)].

[19] Furthermore, display of a trade-mark in such advertising and promotional material does not in itself constitute use of a trade-mark in association with goods within the meaning of section 4 of the Act; an actual transfer of goods in the normal course of trade or in export is required to meet the definitions of use under that section. Accordingly, the only evidence of trade-mark *use* in the present case is the evidence of Mr. Ngo's purchase, documented at Exhibit C.

ANALYSIS OF THE GROUNDS OF OPPOSITION

[20] The Opponent pleads five grounds of opposition. As noted above, they are based on the following sections of the Act: 30(b) and 30(i) (compliance), 16(1)(a) (entitlement), 2 (distinctiveness) and 12(1)(d) (registrability).

Compliance with section 30(b) of the Act

[21] The Opponent pleads that the Application does not conform to the requirements of section 30(b) of the Act in that the Applicant has not used the Mark since the date of first use claimed in the Application, namely since May 25, 2009, and did not use the Mark continuously with all of the Goods prior to the filing date of July 17, 2015.

[22] In this respect, compliance with section 30(b) requires that a trade-mark be used continuously in the normal course of trade from the date of first use claimed to the filing date of the application [see *Benson & Hedges (Canada) Ltd v Labatt Brewing Co* (1996), 67 CPR (3d) 258 (FCTD); *Ivy Lea Shirt Co v Muskoka Fine Watercraft & Supply Co*, 2001 FCT 253, 11 CPR (4th) 489]. Compliance is assessed at the filing date [*Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB)].

[23] An opponent's initial burden with respect to section 30(b) is a lighter one, given that the relevant information regarding use is more readily available to the applicant [*Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB)]. If an opponent succeeds in discharging its initial evidential burden, then the applicant must, in response, substantiate its use claim. However, the applicant is under no obligation to do so if the date of first use is not first put into issue by an opponent meeting its evidential burden [see *Kingsley v Ironclad Games Corp*, 2016 TMOB 19, 2016 CarswellNat 644].

[24] In its written argument, the Opponent contends that, despite "extensive searching and investigation by Mr. Ngo, he was not able to locate any evidence that the Opposed Mark had ever been used in Canada or elsewhere with any of the goods in the Application at any time. Instead, a significantly different mark has been used, which does not include the word GALVANINA". The Opponent submits that using part of the trade-mark applied for "separately and descriptively", or otherwise using a trade-mark that differs from the one in the application,

results in non-compliance with section 30(b) [citing respectively *Molson Canada 2005 v Cardoso* (2007), 64 CPR (4th) 215 (TMOB); and *Coastal Culture Inc v Wood Wheeler Inc*, 2007 FC 472, 57 CPR (4th) 261 (FCTD)].

[25] I note that Mr. Ngo was a law student employed by the Opponent's agent firm at the time of execution of his declaration. Generally speaking, an affidavit or declaration of an employee of a party's agent is admissible only to the extent that the evidence relates to non-controversial and non-central matters [*Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2005 FC 1254, 43 CPR (4th) 21, aff'd 2006 FCA 133, 53 CPR (4th) 286]. Accordingly, evidence dealing with the issue of whether the Applicant had continuously used the Mark, as applied for, since the claimed date of first use, should have been introduced by a third party.

[26] In any event, Mr. Ngo's evidence dates from February 2017, approximately one and a half years after the filing date of July 17, 2015. There is no evidence to suggest that the variation of the Mark located by Mr. Ngo was in use between May 25, 2009 and July 17, 2015 or, more importantly, that the Mark as applied for was not in use instead of, or in addition to, this variation. Moreover, the only evidence regarding actual sales of goods under the Mark in Canada is limited to the Toronto area; it is possible that the Mark as applied for is or was used elsewhere in Canada. Thus the Opponent's evidence postdates the claimed date of first use by close to eight years, and would not put into issue the date of first use claimed by the Applicant in its application, even though I am fully aware that the Opponent's evidential burden is quite low.

[27] I therefore dismiss this ground of opposition for failure by the Opponent to meet its initial evidential burden.

Compliance with section 30(i) of the Act

[28] The Opponent pleads that the Application does not conform to the requirements of section 30(i) of the Act because the Applicant could not have been satisfied of its entitlement to use the Mark in Canada in association with the Goods. Specifically, the Opponent pleads that, at the filing date, the Applicant was aware that its use of the Mark would be likely to cause confusion with the Opponent's trade-mark BLU, which the Opponent had previously used in Canada.

[29] Section 30(i) of the Act only requires an applicant to declare itself satisfied that it is entitled to use its trade-mark in Canada in association with the goods and services described in the application. Awareness of an allegedly confusing trade-mark does not preclude an applicant from making the required statement, since the applicant may nevertheless be satisfied of its own entitlement to use the trade-mark it is applying to register in association with the goods and services in its application. Accordingly, where, as here, the required statement is included in the application, an opponent may only rely on section 30(i) in specific cases, such as where bad faith or fraud on the part of the applicant is alleged, or where federal legislation arguably prevents the registration of the mark [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB); and *Interprovincial Lottery Corp v Western Gaming Systems Inc* (2002), 25 CPR (4th) 572 (TMOB)].

[30] In the present case, there is no allegation of that nature in the statement of opposition or evidence in the record to that effect. The Opponent also makes no submissions with respect to this ground of opposition in its written argument.

[31] Consequently, the ground of opposition based on section 30(i) of the Act is dismissed.

Entitlement to registration under section 16(1)(a) of the Act

[32] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because, at the date when the Applicant claims to have first used the Mark in association with the Goods, namely May 25, 2009, the Mark was confusing with the trade-mark BLU previously used in Canada by the Opponent.

[33] To meet its initial burden under this ground, an opponent must evidence not only the previous use of its trade-mark in accordance with sections 16(1) to (3) of the Act but also that the opponent had not abandoned its trade-mark at the date of advertisement of the applicant's application, as stipulated in section 16(5).

[34] In the present case, the Opponent has not evidenced use of its trade-mark BLU as alleged in the statement of opposition. Although the Opponent's registration claims use of the trade-mark BLU since at least as early as March 2009, the mere filing of a certificate of registration is

insufficient to meet an opponent's evidential burden under a section 16 ground of opposition [see *Rooxs Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB)].

[35] Consequently, I dismiss the ground of opposition based on section 16(1)(a) of the Act for failure of the Opponent to meet its initial burden.

Distinctiveness of the Mark under section 2 of the Act

[36] The Opponent pleads that the Mark is not distinctive within the meaning of section 2 of the Act, because the Mark does not actually distinguish, nor is it adapted to distinguish, the Goods from the goods and services of others, and in particular from the goods of the Opponent. In this respect, the Opponent pleads its own prior use of "the confusingly similar trademark BLU".

[37] In order to succeed under this ground, an opponent must establish that, as of the filing date of the statement of opposition, its trade-mark had become sufficiently known to negate the distinctiveness of the applicant's mark [see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427].

[38] In the present case, given that the Opponent has not filed any evidence of use or advertising of its trade-mark, the Opponent has failed to meet its initial burden under this ground of opposition.

[39] Consequently, I also dismiss the ground of opposition based on lack of distinctiveness of the Mark.

Registrability of the Mark under section 12(1)(d) of the Act

[40] The determinative issue in this proceeding is whether the Mark is registrable under section 12(1)(d) of the Act. The Opponent pleads that it is not, by reason of being confusing with the Opponent's registered trade-mark BLU.

[41] In its written argument, the Opponent submits that the trade-marks at issue are confusing because the Applicant "has appropriated the Opponent's registered and inherently distinctive

mark BLU in its entirety as the dominant element of the Opposed Mark, and has done so for substantially the same goods”.

[42] The relevant date for the analysis of this ground of opposition is the date of the Registrar’s decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[43] As mentioned previously, the Opponent filed a certified copy of its registration No. TMA803,063 for the trade-mark BLU. I have exercised my discretion to check the register and I confirm that this registration is extant [see *Quaker Oats Co of Canada Ltd v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB) regarding the Registrar’s discretion in the context of section 12(1)(d)]. Thus the Opponent has met its initial burden with respect to this ground of opposition. As a result, in order for me to allow the Application, I must now be convinced on a balance of probabilities that there is no likelihood of confusion between the Mark and the Opponent’s trade-mark [*Dior, supra*].

[44] The test for confusion is outlined in section 6(2) of the Act, which stipulates that the use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would likely lead to the inference that the goods associated with each of those trade-marks are manufactured, sold or leased by the same person.

[45] Some of the surrounding circumstances to be taken into consideration when assessing the likelihood of confusion between two trade-marks are set out in section 6(5) of the Act: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time the trade-marks have 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 criteria are not exhaustive and it is not necessary to give each one of them equal weight [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22, 49 CPR (4th) 321; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361].

[46] The test for confusion is set out in the following terms by Mr. Justice Binnie in *Veuve Clicquot, supra*, at paragraph 20:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [applicant's mark], at a time when he or she has no more than an imperfect recollection of the [opponent's] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

Degree of resemblance between the trade-marks

[47] As indicated by the Supreme Court of Canada in *Masterpiece, supra*, in most instances, the degree of resemblance between the trade-marks at issue is the most important factor. One must consider the degree of resemblance between the marks from the perspectives of appearance, sound and ideas suggested. The preferable approach is to begin by determining whether there is an aspect of each trade-mark that is “particularly striking or unique” [*Masterpiece, supra*, at paragraph 64]. In this respect, the first portion of a trade-mark is generally considered to be the most important for the purpose of distinction [see *Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)]. However, it is not the proper approach to set the trade-marks side by side and carefully examine them to find similarities and differences; each trade-mark must be considered as a whole [see *Veuve Clicquot, supra*].

[48] In the present case, the Opponent submits that there is a high degree of resemblance between the trade-marks at issue because the Mark incorporates the whole of the Opponent's registered trade-mark BLU. The Opponent submits that the additions of the design elements and “trade name GALVANINA” are not sufficient to distinguish the Mark, since BLU is “the element that would have a determinate influence on the public's perception of [the Mark]”. The Opponent maintains that the Applicant's use of the Mark without the GALVANINA element “highlights the importance of the element BLU”.

[49] In support of its position, the Opponent seeks to draw an analogy between the present case and that in *Parade Publications Inc v Children's Apparel Manufacturers' Assn* (1993), 52 CPR (3d) 107 (TMOB), where a likelihood of confusion was found to exist between the trade-marks PARADE and CAMA PARADE.

[50] However, in my view, the striking aspect of the Opponent's trade-mark is the fact that it consists of only the three-letter word BLU, whereas I find that there are two striking or unique aspects to the Mark, one being the coined word GALVANINA in larger, stylized lettering, and the other being the idea of a "blue moon" conveyed by the particular combination of the word BLÚ with the crescent design.

[51] When the Mark is considered as a whole, the coined word GALVANINA, being the first element of the trade-mark and in a larger, stylized font, detracts from the impact of the word BLÚ in smaller, simple letters, and diminishes the degree of resemblance between the two trade-marks in appearance and sound. As a matter of first impression, the visual impacts of the marks at issue are very different, owing to the additional dominant features in the Applicant's mark and the difference in length of the respective marks.

[52] Further, the parties' trade-marks are distinguishable in terms of ideas suggested. The Mark gives the impression of being written in a foreign language, perhaps Italian, and conveys the idea of a "blue moon", possibly over a foreign land. These are not ideas suggested by the Opponent's trade-mark. Rather, the Opponent's trade-mark suggests either an acronym or a minimalist spelling of the word "blue".

[53] With respect to the Opponent's submissions that the Applicant's use of the Mark without the word GALVANINA "highlights the importance of the element BLU", I am not prepared to make such an inference on the basis of the evidence furnished in this case. The single sale in the Toronto area is an insufficient basis from which to draw conclusions about public perception in Canada. With respect to any influence the exhibited websites may have had, as noted above, there is no evidence that Canadians other than Mr. Ngo visited them or that the variation of the Mark was otherwise brought to Canadians' attention online.

[54] In any event, even if the Opponent is correct in its assertion that the Applicant uses GALVANINA as a trade name separately from BLÚ and the crescent design, the issue of confusion is to be decided with respect to the trade-mark as applied for, not as actually used [*PEI Licensing Inc v Disney Online Studios Canada Inc*, 2012 TMOB 49, 2012 CarswellNat 837; *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[55] I would also note that, when the dominant portion of a trade-mark is a common descriptive or suggestive word, its importance diminishes [*Park Avenue, supra; Vancouver Sushiman Ltd v Sushiboy Foods Co* (2002), 22 CPR (4th) 107 (TMOB)]. Accordingly, in the present case, there would be a tendency to discount the importance of the word BLU in the parties' marks, to the extent that it suggests an alternate spelling of the common descriptive word "blue". The Applicant's incorporation of BLÚ into the "blue moon" concept in the Mark further decreases the likelihood that consumers would consider both trade-marks as indicating the same source.

[56] Finally, I find the present case to be distinguishable from that in *Parade Publications*. In *Parade Publications*, the opponent's trade-mark PARADE was inherently distinctive and had become known in Canada. Furthermore, the word PARADE was the dominant element of the applicant's mark, which differed from the opponent's trade-mark only by the addition of the short, four-letter acronym "CAMA". Thus, although CAMA is the first element in CAMA PARADE, when the trade-marks PARADE and CAMA PARADE are considered as a whole, they are "very similar in appearance and sounding, as well as in the ideas suggested by them" [*Parade Publications, supra*, at paragraph 12]. In contrast, the Mark in the present case features larger, dominant elements both before and after the shared element BLU, and the overall first impression created by each of the parties' trade-marks, visually, phonetically and in ideas suggested, is very different.

[57] Overall, this factor favours the Applicant.

Inherent distinctiveness and the extent to which the trade-marks have become known

[58] The Opponent submits that its trade-mark is inherently distinctive because the word BLU is coined and does not have any clearly descriptive connotation in association with bottled water.

[59] However, to the extent that BLU would be perceived as a coined term in the nature of an acronym, I note that trade-marks consisting mainly of one or more letters of the alphabet are generally considered to possess a low degree of inherent distinctiveness [see *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)].

[60] Furthermore, to the extent that BLU would be perceived as a misspelling of the word “blue”, and would be sounded accordingly, I find the Opponent’s trade-mark could create an association with water. In this respect, I am prepared to take judicial notice of the fact that water is often portrayed using the colour blue.

[61] In contrast, the first and dominant element of the Applicant’s mark, GALVANINA, appears to be a coined word with no obvious connection to water. If GALVANINA would create in the mind of the Canadian consumer any associations with the geographical source of the Applicant’s spring water, the Opponent has furnished no evidence to that effect. Furthermore, to the extent that the remaining portion of the Mark conveys the idea of a “blue moon”, it too bears no immediate connection to bottled water.

[62] Moreover, the combination GALVANINA BLÚ suggests a foreign connotation. It has been held that words in a foreign language have a measure of inherent distinctiveness, unless the evidence shows that the meaning of the foreign word is known to the Canadian consumer [see *Thai Agri Foods Public Co v Choy Foong Int’l Trading Co Inc*, 2012 TMOB 61, 2012 CarswellNat 1368]. There is no such evidence here.

[63] The degree of distinctiveness of a trade-mark can be enhanced through use and promotion in Canada [see *Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD); *GSW, supra*]. However, in the absence of evidence of use, it has been held that the Registrar can only infer a *de minimis* use of a registered trade-mark from the certificate of registration [see *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB)]. *De minimis* use does not support a conclusion that the trade-mark has become known to any significant extent, nor that the trade-mark has been used continuously.

[64] In the present case, there is no evidence to substantiate the Opponent’s use of its trade-mark BLU as claimed in the certificate of registration, nor is there any evidence that this trade-mark has otherwise been promoted or brought to the attention of Canadian consumers in a way that might enhance the mark’s distinctiveness.

[65] With respect to the Applicant’s trade-mark, as noted above, the webpages attached to Mr. Ngo’s declaration do not establish that the depicted goods were sold in Canada and there is

no evidence that the webpages themselves were ever accessed by Canadians other than Mr. Ngo. Consequently, it is not possible to determine the extent to which the Mark, or the exhibited variation of the Mark, has become known in Canada.

[66] Overall, this factor favours the Applicant.

Length of time the trade-marks have been in use

[67] When assessing the length of time a trade-mark has been in use, the Registrar may rely on the date of first use specified in the Opponent's certificate of registration [see *Cartier Men's Shops Ltd v Cartier Inc.* (1981), 58 CPR (2d) 68 (FCTD)]. However, in the absence of any other evidence of use, only a *de minimis* use can be inferred [see *Entre Computer, supra*]. In this case, the Opponent's certificate of registration claims use of the trade-mark BLU since at least as early as March 2009; however, since no evidence has been furnished to substantiate this claim, only *de minimis* use can be inferred.

[68] For the Applicant, evidence of use of the Mark is, at best, limited to the single sale of still and sparkling bottled waters shown at Exhibit C to the Ngo declaration. As discussed above, there is an issue as to whether the Mark is displayed as applied for on the bottles sold, given the physical separation between the word GALVANINA and the remaining elements of the Mark. In any event, however, this sale did not occur until February 3, 2017.

[69] Accordingly, this factor slightly favours the Opponent. In any event, it will not be a determining factor in the outcome of my decision.

Nature of the parties' goods and trades

[70] When considering the nature of the goods and the nature of the trades of the parties, it is the statement of goods as defined in the applicant's application and the statement of goods in the opponent's registration that must be assessed, having regard to the channels of trade that would normally be associated with such goods [see *Mr Submarine, supra*; and *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export* (1986), 12 CPR (3d) 110 (FCA)]. The statements must be read with a view to determining the probable type of business or trade intended by the parties, rather than all possible trades that might be encompassed by the

wording; evidence of the parties' actual trades is useful in this respect [see *McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA)].

[71] The Opponent's trade-mark is registered for use in association with the goods "bottled water, namely, reverse osmosis water and reverse osmosis carbonated water". From a plain reading of this statement of goods and of the statement of goods in the Application, it appears that the nature of the parties' goods is the same as regards the Applicant's "still waters", "carbonated waters", "mineral waters" and "flavoured mineral water", and closely related as regards the Applicant's "non-alcoholic fruit drinks", "non-alcoholic fruit flavoured drinks", "fruit juices" and "vegetables juices".

[72] The Ngo declaration provides evidence that the Applicant's channels of trade currently include the sale of bottled water through grocery stores, but provides no information in respect of the Applicant's drinks and juices. There is no evidence of the Opponent's type of business or of its channels of trade whatsoever. Nevertheless, given the nature of the goods at issue, and the absence of evidence to the contrary, I am prepared to infer that the channels of trade for the parties' waters would be the same or similar, and that there would be at least some overlap with respect to the Applicant's remaining beverages.

[73] Therefore, these factors favour the Opponent.

Conclusion with respect to confusion

[74] Following my analysis of all the relevant factors, I conclude that, on a balance of probabilities, there is no likelihood of confusion between the Mark and the Opponent's registered trade-mark BLU. The differences between the marks, visually, phonetically and in ideas suggested, are sufficient to avoid a likelihood of confusion as to the source of the parties' respective goods, despite the overlap in the goods and presumably also in the parties' trades.

[75] I reach this conclusion bearing in mind that the Mark incorporates the element BLU in its entirety, but also that this element has a relatively low degree of inherent distinctiveness, particularly in association with water, and that there is no evidence of it having acquired any distinctiveness in the hands of the Opponent. Had there been evidence that the Opponent's trade-

mark BLU has become known in Canada through sales made over a significant period of time, while the Mark has not, my conclusion might perhaps have been different.

[76] For these reasons, I dismiss the ground of opposition based on section 12(1)(d) of the Act.

DISPOSITION:

[77] In view of all the foregoing and pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

Jean Carrière
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

Bereskin & Parr LLP/S.E.N.C.R.L., S.R.L.

FOR THE OPPONENT

Palmer IP Inc.

FOR THE APPLICANT