

OPIC



CIPO

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

Citation: 2019 TMOB 51

Date of Decision: 2019-06-11

IN THE MATTER OF AN OPPOSITION

Cobblestone Vineyards LLC

Opponent

and

Trillium Beverage Inc.

Applicant

**1,748,863 for COBBLESTONE
STOUT**

Application

INTRODUCTION

[1] Cobblestone Vineyards LLC (the Opponent) opposes registration of the trade-mark COBBLESTONE STOUT (the Mark), which is the subject of application No. 1,748,863 by Trillium Beverage Inc. (the Applicant).

[2] The application is based on use in Canada since at least as early as April 2007 in association with beer.

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

[4] For the reasons that follow, the opposition is rejected.

THE RECORD

[5] The application for the Mark was filed on October 2, 2015, and was advertised for opposition purposes in the *Trade-marks Journal* of May 25, 2016.

[6] On October 25, 2016 the Opponent filed a statement of opposition under section 38 of the Act.

[7] The Applicant filed a counter statement on January 6, 2017.

[8] In support of its opposition, the Opponent filed a certified copy of registration No. TMA626,913 for the trade-mark COBBLESTONE. In support of its application, the Applicant filed the affidavit of Roger McNaughton, the Vice President Marketing of Trillium Beverage Inc. (sworn September 18, 2017). Mr. McNaughton was not cross-examined on his affidavit.

Evidential Burden and Legal Onus

[9] Before considering the grounds of opposition, it is necessary to review some of the technical requirements with regard to (i) the evidential burden on an opponent to support the allegations in the statement of opposition and (ii) the legal onus on an applicant to prove its case.

[10] With respect to (i) above, there is an evidential burden on an opponent to prove the facts in its allegations pleaded in the statement of opposition: *John Labatt Limited v Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298. An evidential burden on an opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on an applicant to show that the application does not contravene the provisions of the Act as alleged by an opponent (for those allegations for which an opponent has met its evidential burden). A legal onus on an applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against it.

GROUNDS OF OPPOSITION

Section 12(1)(d) ground of opposition

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

[12] The Opponent has pleaded that the Mark is not registrable because it is confusing with its registration No. TMA626,913 for the trade-mark COBBLESTONE. I have exercised my discretion and have checked the Register and note that this registration was expunged for non-use on February 28, 2019, as a result of a section 45 proceeding commenced at the request of counsel for the Applicant [the Registrar issued a notice under section 45 of the Act on July 12, 2016, see *Blake, Cassels & Grayson LLP v Cobblestone Vineyards LLC*, 2018 TMOB 138].

[13] Accordingly, the Opponent has not met its initial burden and this ground of opposition is rejected.

Sections 16(1)(a), 16(1)(c), and 2 grounds of opposition

[14] The Opponent has pleaded that contrary to sections 16(1)(a) and 16(1)(c) of the Act, the Applicant is not the person entitled to registration of the Mark because, as of the claimed date of first use in Canada, the Mark was confusing with the trade-mark COBBLESTONE, including in a design form (collectively, the Opponent's Trade-marks), previously used or made known in Canada in association with wines and table wine, and the trade-names COBBLESTONE VINEYARDS and COBBLESTONE VINEYARDS LLC, previously used in Canada in association with wines and table wine.

[15] An opponent meets its evidentiary burden under these grounds if it shows that as of the alleged date of first use of the applicant's trade-mark, the opponent's trade-mark or trade-name had been previously used or made known in Canada and had not been abandoned as of the date of advertisement of the applicant's application [section 16(5) of the Act]. As the Opponent has filed no evidence showing that the Opponent's Trade-marks were previously used or made

known, or any evidence of prior use of its trade-names, the Opponent has failed to meet its initial burden and these grounds of opposition are summarily dismissed.

[16] With respect to the ground of opposition under section 2 of the Act, the Opponent alleges that the Mark is not distinctive because it is not capable of distinguishing the Applicant's Goods from the wines and table wine sold by the Opponent under the Opponent's Trade-marks, nor is it adapted to so distinguish them.

[17] There is an initial burden on the Opponent to establish that as of the filing of the opposition, the Opponent's Trade-marks were known to a sufficient extent that could negate the distinctiveness of the applied-for Mark [*Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]. To do so, the Opponent must establish that its trade-marks are either known to some extent in Canada or are well known in a specific area of Canada [*Bojangles, supra* at paras 33-34]. In this case, the Opponent has filed no evidence demonstrating the extent to which the Opponent's Trade-marks have become known in Canada. As the Opponent has failed to meet its evidentiary burden, this ground of opposition is summarily dismissed.

Section 30(b) and 30(i) grounds

[18] The Opponent has not met its initial burden with respect to the grounds of opposition based on sections 30(b) and 30(i) of the Act.

[19] The material date for considering a ground of opposition under section 30 of the Act is the date of filing of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475].

[20] The Opponent has pleaded that contrary to section 30(b), at the date of filing of the application, the Applicant had not used the Mark as alleged, or at all, or had subsequently abandoned the Mark. However, no evidence or argument was filed in support of this ground of opposition.

[21] The Opponent has pleaded that contrary to section 30(i), at the date of filing of the application, the Applicant could not properly have been satisfied that it was entitled to use the

Mark in Canada in association with the Goods described in the application, given the facts set forth in the statement of opposition, and given that the Applicant knew or ought to have known of the Opponent's prior use and registration of the trade-mark COBBLESTONE in association with wines and table wines.

[22] 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 [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Mere knowledge of the existence of an opponent's trade-mark does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use the Mark [*Woot Inc v Woot Restaurants Inc/Les Restaurants Woot Inc*, 2012 TMOB 197]. In the present case, the Applicant has provided the necessary statement and this is not an exceptional case.

[23] Accordingly, both of these grounds of opposition are summarily dismissed.

DISPOSITION

[24] Accordingly, 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.

Jennifer Galeano
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Oyen, Wiggs, Green & Mutala LLP

FOR THE OPPONENT

Blake, Cassels & Graydon LLP

FOR THE APPLICANT