

LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 31**

**Date of Decision: 2021-02-23**

**IN THE MATTER OF AN OPPOSITION**

**Bellwoods Brewery Inc. & Bellwoods  
Holding Inc.**

**Opponents**

**And**

**Blyth Cowbell Brewing Inc.**

**Applicant**

**1,755,747 for COWBELL Logo Design**

**Application**

INTRODUCTION

[1] Bellwoods Brewery Inc. & Bellwoods Holding Inc. (the Opponent) oppose registration of the trademark COWBELL Logo Design (the Mark), shown below, which is the subject of application No. 1,755,747 filed by Blyth Cowbell Brewing Inc. (the Applicant).



[2] The application is based on proposed use in Canada in association with the following goods and services:

**Goods**

- (1) Beer, ale, lager, stout, porter, alcoholic brewery beverages.
- (2) Casual clothing, t-shirts, caps, hats, toques, scarves, sweatshirts, hooded sweatshirts, jackets.
- (3) Drink coasters, beer glasses, drinking glasses, cooler bags, beer can sleeves, beer bottle sleeves, noisemakers, golf towels, golf balls, golf umbrellas, signs, bumper stickers.

**Services**

- (1) Brewery services.
- (2) Restaurant services, bar services.

[3] The Opponent alleges grounds of opposition based on non-compliance with sections 30(e) and 30(i) of the *Trademarks Act*, RSC 1985, c T-13 (the Act), confusion with a registered trademark (section 12(1)(d)), entitlement (section 16), and distinctiveness (section 2). A key issue in the proceeding is the likelihood of confusion with the Opponent's trademarks set out below (referred to collectively as the Opponent's Bell Design trademarks), registered in association with almost identical goods and services:



TMA878,789



TMA859,184

[4] As the Applicant has not proven on a balance of probabilities that there is no reasonable likelihood of confusion between its Mark and at least one of the Opponent's marks, the opposition is successful.

THE RECORD

[5] The application for the Mark was filed on November 19, 2015, and was advertised in the *Trademarks Journal* on October 12, 2016.

[6] The Opponent filed a statement of opposition on January 5, 2017. The Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act before it was amended (see section 70 of the Act).

[7] The Applicant filed and served a counter statement denying each of the grounds of opposition.

[8] The Opponent filed the affidavit of Michael Clark. The Applicant filed the affidavit of Steven Sparling. The Applicant was also granted leave to file the affidavit of Melissa Doherty. None of the affiants were cross-examined.

[9] Both parties filed written submissions and were represented at a hearing.

## EVIDENTIAL BURDEN AND LEGAL ONUS

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

## GROUND SUMMARILY DISMISSED

### **Non-compliance – Sections 30(e) and 30(i)**

[11] The Opponent combined its arguments for these grounds and pleaded as follows:

The Applicant doesn't conform to the following requirements of section 30:

Section 30(e) in that the Applicant could not have been satisfied so as to make the statement that it intended to use the trademark in Canada in association with the proposed goods and services, in light of the Opponent's mark; and

Section 30(i) in that the Applicant could not have been satisfied that it was entitled to use the trademark in Canada in association with the goods described in the application. In particular, the Applicant could not have made this statement in light of the Opponent's use, filing, and registration of the Bellwoods & Bell Mark and the Bell Mark.

[12] In my view there is a difference between making a statement in an application that one intends to use the applied for mark versus making a statement that one is satisfied that it is entitled to the registration of the applied for mark. Regarding the section 30(e) ground, the issue is whether the Applicant's statement in its application that it intended to use the Mark true? [see *Home Quarters Warehouse, Inc v Home Depot, U.S.A., Inc* (1997), 76 CPR (3d) 219 (TMOB); *Jacobs Suchard Ltd v Trebor Bassett Ltd.* (1996), 69 CPR (3d) 569 (TMOB)].

[13] The fact that the Applicant was aware of the Opponent's marks does not by itself constitute evidence that the Applicant's statement of its intention to use its Mark was not true. The section 30(e) ground is accordingly dismissed because of the Opponent's failure to meet its evidential burden under this ground.

[14] With respect to section 30(i) of the Act, it has previously been held that mere knowledge of the existence of an opponent's trademark does not, in and of itself, support an allegation that an applicant could not have been satisfied of its entitlement to use the mark [see *Woot, Inc v WootRestaurants Inc Les Restaurants Woot Inc* 2012 TMOB 197]. In this case, Mr. Sparling even states in his affidavit that after careful consideration his team determined that the Mark they had adopted was sufficiently distinct from the marks used by the Opponent. This ground is therefore also accordingly dismissed.

#### **Non-entitlement – Section 16(3)(b)**

[15] With respect to this ground of opposition, the Opponent pleads that the Applicant is not the person entitled to registration of the Mark because, as of the filing date of the application, the Mark was confusing with the Opponent's previously filed applications for its Bell Design trademarks.

[16] An opponent may not rely on its trademark applications if they were not pending as of the date of advertisement of the opposed mark [see section 16(4) of the Act]. In this case, the applications relied on by the Opponent for the mark Bellwoods Brewery and Design and Bell Design matured to registration on September 14, 2013, and May 27, 2014 respectively. As neither of these applications were pending as of October 12, 2016, the date of advertisement of the applied-for Mark, the Opponent has not met the statutory requirements for this ground. Accordingly, this ground is also summarily dismissed.

#### REMAINING GROUNDS OF OPPOSITION

#### **Non-registrability - Section 12(1)(d)**

[17] The Opponent has pleaded that the Mark is not registrable because it is confusing with the Opponent's Bellwoods Brewery and Design mark (TMA859,184) and Bell Design mark (TMA878,789).

[18] The material date for this ground of opposition is the date of this decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trademarks* (1991), 37 CPR (3d) 413 (FCA)].

[19] I have exercised my discretion to check the Register to confirm that both of these registrations are extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial burden. As I consider the Opponent's best chance of success to be with respect to registration No. TMA878,789, I will concentrate my analysis on this Bell Design trademark. This trademark is registered in association with the goods and services set out in the attached Schedule A.

#### Test to determine confusion

[20] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold or leased by the same person, whether or not the goods or services are of the same general class or appear in the same Nice Class [see also *Obsidian Group Inc v Attorney General of Canada*, 2020 FC 586].

[21] 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 trademarks 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 trademarks 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) and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)]. In *Masterpiece*, the Supreme Court also states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis, so that is where I will begin my analysis.

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

[22] The Opponent's submissions on the degree of resemblance between the marks are set out in paragraphs 47 – 51 of its written argument. These submissions may be summarized as follows:

- By appearance, both marks are bells. Both marks are also outlined, with cutouts. Both marks have a handle/hanging portion, bell portion and ringer portion.
- The Opponent has adduced evidence that the flared bell shape is also used in cowbells.
- Both marks evoke heritage feelings, consistent with the idea of craft brewing.

[23] The Applicant takes the position that the differences between the marks eliminate any possibility of confusion. The Applicant sets out the differences between the marks in the following chart at page 12 of its written argument:

	<b>Applicant’s Mark</b>	<b>Opponent’s Marks</b>
<b>Design</b>	The mark was designed using a graphics design program and is highlighted by crisp and sharp edges.	The mark was designed using the woodcut process which is known to produce irregular lines and edges with a noticeable variation in color distribution.
<b>Classification</b>	Stylistic representation of a North American cowbell or cowbell percussion instrument.	Realistic representation of a farmhouse porch bell, farm bell or church bell.
<b>Detail</b>	Simplistic	Detailed
<b>Style</b>	Modern and sleek	Traditional and rustic
<b>Dimensions</b>	Two dimensional	Three Dimensional
<b>Clapper Design</b>	Oversized clapper in the shape of a hop.  The hop clapper is the prominent and distinguishing feature of the mark	The spherical clapper is proportionate to the bell.

[24] When considering the degree of resemblance between trademarks, the trademarks 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 marks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 (CanLII), CarswellNat 1402 at para 20; *International Stars SA v Simon Chang Design Inc*, 2013 FC 1041 at para 9]. In *Masterpiece*, at para 64, the Supreme Court further advises that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trademarks that is particularly striking or unique.

[25] The Applicant's focus on the individual parts of the Mark's design that are different from the Opponent's marks, appears to involve the type of side-by-side comparison warned against by the jurisprudence. While the hop design for the clapper portion of the Mark is a distinctive visual element of the Mark, this component comprises about 20% of the Applicant's total design. The dominant feature of the Mark is still a bell design, as is the dominant feature of the Opponent's trademark. It is what stands out the most and its presence in both parties' marks results in a visual similarity between the marks.

[26] Therefore, while there are certainly obvious differences between the marks in issue, I find that the differences enumerated by the Applicant do not detract from the overall visual appearance and ideas suggested between the Mark and the Opponent's Bell Design trademark. In my view, these are not differences that a casual consumer would notice as a matter of first impression having an imperfect recollection of the Opponent's trademark, *i.e.* I do not consider that the casual consumer somewhat in a hurry would know the difference between a cowbell and a farm or porch bell.

[27] I therefore find that the Mark bears a fair degree of resemblance to the Opponent's mark in terms of appearance and idea suggested because they are both bell designs.

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

[28] While both marks are inherently distinctive marks primarily because the design of a bell has no meaning with respect to brewed beverages or related services, the Applicant's Mark is inherently stronger because of its distinctive clapper design.



[29] The evidence of Mr. Clark, officer and director of the Opponent companies, provides the following:

- In early 2012, the Opponent established a brewery and pub in the Trinity Bellwoods region of Toronto and has been brewing and selling beer from that location ever since;
- In 2016, the Opponent opened a second facility in north Toronto;
- At the date of Mr. Clark's affidavit, the Opponent was currently selling wholesale kegs and bottles across Ontario and sending bottles as far as BC and Halifax;
- The Opponent has been ranked the top brewery in Ontario for beer quality and has been named as one of the top 100 brewers in the world by a brewery quality rating site two years in a row;
- The Opponent sells its beer in bottles, including via its on site brewery retail stores and also wholesale to other establishments and each bottle bears the Bell Design mark;
- The Bell Design mark also appears on the Opponent's brewpub menu and beer sold to customers in the Opponent's brewpub is served in glasses that are branded with the Bell Design mark;
- The Opponent's website displays the Opponent's trademark and has been accessible to anyone on the Internet since the Opponent launched its business; and
- The Opponent's craft brewery has over 24,000 Instagram followers.

[30] I note that Mr. Clark also gave his opinion on the likelihood of confusion between the marks which I have disregarded as the determination of the likelihood of confusion is for the Registrar, not the affiant.

[31] The evidence of Steven Sparling, Director and President of the Applicant, may be summarized as follows:

- The Applicant is a family-run destination craft brewery located in Blyth, Ontario, which opened in 2017;
- In its first month of operation, it welcomed over 25,000 visitors to the brewery including several business conferences and two weddings;
- The Applicant started selling its product in May 2016 in cans in the LCBO and wholesale in draught form to select pubs and restaurants;
- The Applicant has been voted one of Ontario's Favorite New Craft Breweries in a poll administered by the Ontario Beverage Network;
- The Applicant has been featured in dozens of magazines, newspaper articles and blogs;
- The Applicant attends numerous festivals, fundraisers and community events in Ontario in order to promote its beer;
- The Applicant has established a presence on various social media platforms including 7,700 followers on Facebook, 1,979 followers on Twitter and 3,717 followers on Instagram; and
- As of the date of Mr. Sparling's affidavit (*i.e.* October 4, 2017), the Applicant's beer has been available at over 700 establishments in Ontario and can also be purchased at the Applicant's brewery retail store in Blyth in cans and in refillable growlers.

[32] From the evidence furnished, I am only able to conclude that the Opponent's mark has become known to a slightly greater extent in Canada than the Mark.

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

[33] The application was filed on the basis of proposed use while the Opponent's mark is based on use since at least as early as April 5, 2012, on its beverage-related goods (1) and use since at least as early as June 16, 2012, on its clothing and glassware related goods (2).

Although the Opponent's mark has purportedly been in use for a longer period of time than the Applicant's Mark, the Opponent has not filed any evidence of use of its trademark in association

with its goods, and any use shown in association with its services is limited. I therefore do not find that this factor favours either party.

*Section 6(5)(c) and (d) - nature of the goods, services, or business, and trade*

[34] The Applicant's affiant, Mr. Sparling, agrees that both the Opponent and the Applicant sell similar goods (e.g. beer and clothing) and offer similar services (e.g. brewery and restaurant services) [Sparling affidavit, para. 32]. The evidence also shows that both parties operate their craft breweries in Ontario. The parties' channels of trade therefore also overlap. Accordingly, these factors favour the Opponent.

*State of the register and state of the marketplace evidence*

[35] State of the register and marketplace evidence favours an applicant when the presence of a common element in marks causes purchasers to pay more attention to the other features of the marks, and to distinguish between them by those other features [*McDowell v Laverana GmbH & Co. KG*, 2017 FC 327 at para 42]. Inferences regarding the state of the marketplace may be drawn from such evidence only if a large number of relevant registrations are located [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA); *McDowell, supra*, at paras 41-46]. Relevant trademarks include those that (i) are registered; (ii) are for similar goods and services as the marks at issue, and (iii) include the component at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197; *Allergan Inc v Lancôme Parfums & Beauté & Cie, société en nom collectif* (2007), 64 CPR (4th) 147 (TMOB) at 169].

[36] Where there is a large number of trademarks consisting of or incorporating the same term or feature on the Register, the inference drawn is that at least some are likely in use in the marketplace. It then follows that consumers would likely already be accustomed to seeing and distinguishing between them, such that small differences would suffice to enable them to do so. For this reason, such marks are sometimes said to be entitled to a narrower scope of protection.

[37] In this case, the Applicant has introduced state of the register evidence by way of the affidavit of Ms. Docherty, a litigation paralegal employed by the Applicant's agent. Ms. Docherty was asked to conduct internet searches and a search of *www.trademarknow.com* (a

web-based trademark management platform which obtains data from the Canadian Intellectual Property Office) to determine if there were any registered trademarks in connection with the term “BELL” or the design of a bell for use in association with various alcoholic beverages and restaurant services.

[38] While there are some BELL marks on the register, including SCHOOLHOUSE BREWERY and Bell Design (TMA886,917), most of the results located by Ms. Docherty are not relevant since they are pending or not based on use, do not include the design of a bell in a material way (*e.g.* BELLAVISTA), are for unrelated goods or services (*e.g.* MISSION and Bell Design for tortillas and tortilla chips), or contain additional material such that they evoke ideas different from that of the Applicant’s or the Opponent’s trademarks (*e.g.* TACO BELL and Bell design).

[39] Ms. Docherty also conducted various Google searches for the word BELL or the design of a bell in association with alcohol, beer, brewery, wine and restaurants. I consider this evidence to also be of a limited significance for the following reasons. First, most of the marks located in the search are not as similar as the marks in issue and contain additional material such that they evoke different ideas, *e.g.* Thai Golden Bell Restaurant or Bell City Brewing and Telephone Design. Second, there is no evidence that Canadians have viewed the websites located [*Candrug Health Solutions Inc v Thorkelson* (2007), 2007 FC 411] or that any of these trademarks or trade names have acquired any reputation in the Canadian marketplace. Third, some of the websites are for businesses in the United States, *e.g.* [www.bellwine.com](http://www.bellwine.com), located in Yountville California and [www.bellsbeer.com](http://www.bellsbeer.com) located in Kalamazoo, Michigan.

[40] Ms. Docherty also conducted a search on the LCBO website for alcoholic beverages and restaurant services provided with the term BELL or the design of a bell. Of the eleven products shown, there are two different sized bottles for Bell’s Original Scotch Whiskey, three BELL CITY and Telephone Design products including a cream ale, an IPA and a wheat ale, and six bottles of wine including Domaine Belle Cuvee Louse Belle Crozes-Hermitage, Belle Glos Las Alturas Vineyard Pinot Noir, Belle Glos Oeil de Perdrix Pinot Noir Blanc Rose, Belle Glos Dairyman Vineyard Pinot Noir, Peter Michael Belle Cote Chardonnay, and La Belle Angele Colombard Sauvignon Blanc VdFrance. Again, I do not find this evidence of much relevance as

none of the products shown display the design of a bell as opposed to the word “belle”. Further, in my view, the word “belle” when used in association with wines evokes the French meaning of the word “belle” which is beautiful. Finally, while Ms. Docherty’s results included three brewed beverages sold by the same third party, as noted earlier, the Bell City and Design mark is a design with a telephone as opposed to a more traditional bell as those of the parties in this case.

[41] In view of the above, I do not find the evidence of Ms. Docherty sufficient to conclude that a bell design is widely used in the alcoholic beverages and restaurant industry such that the average Canadian consumer is accustomed to distinguishing these marks. I therefore do not find the Applicant’s state of the register and state of the marketplace evidence to assist the Applicant in any meaningful way.

*Evidence of actual confusion*

[42] It is not necessary for an opponent to evidence confusion in order to find that there is a likelihood of confusion, but an absence of confusion despite an overlap of the parties’ goods and channels of trade may result in a negative inference being drawn about an opponent’s case [see *Monsport Inc v Vetements de Sport Bonnie* (1978) Ltee (1988), 22 CPR (3d) 356 (FCTD); *Mercedes-Benz AG v Autostock Inc* (1996), 69 CPR (3d) 518 (TMOB)].

[43] In this case, Mr. Clark deposes that the Applicant’s beer has already been confused for the Opponent’s beer. In this regard, he states the following at paragraphs 30 and 31 of his affidavit:

30. ...I attach as Exhibit L a copy of a screenshot of a Twitter exchange. The first person, @Brewtrippers, comments that he is drinking one of our beers – called “jutsu”. Another person replied “I’m drinking one too. Love this one...”, copying us (@bellwoodsbeer), but what he posts is a picture of a Blyth beer.

31. It is telling that not only does the picture bear the Blyth cowbell logo and not ours, but it explicitly states Blyth’s corporate name, and still this consumer was confused that it was a Bellwoods beer.

[44] Hearsay issues aside, I am not prepared to give much weight to this evidence as all it comprises is one purported instance of confusion. As stated in *WIC TV Amalco Inc v ITV Technologies, Inc*, 2005 FCA 96, 38 CPR (4th) 481 (FCA) at para 47: “While it is true that the

Court can draw an adverse inference from the absence of evidence of actual confusion in certain cases, it does not follow that a single instance of confusion is conclusive.”

*No instances of confusion*

[45] On the other hand, the Applicant submits that it is not aware of any instances of confusion between the marks. In this regard, Mr. Sparling, states the following: “I am not aware of any instances in which consumers were actually confused by the Cowbell Mark and the Bellwood Marks. I have also canvassed my management team at Cowbell and none of them are aware of any instances of actual confusion either” [para. 36].

[46] An adverse inference concerning the likelihood of confusion may be drawn when concurrent use on the evidence is extensive and no evidence of confusion has been given by the opponent [*Christian Dior, SA v Dion Neckwear Ltd*, 2002 FCA 29]. However, in the present case, I cannot draw such an inference because there is no evidence of extensive concurrent use.

*San Miguel Brewing International Limited v Molson Canada 2005*

[47] In its written argument, the Applicant submitted that because the facts in the present case are similar to those that were in *San Miguel Brewing International Limited v Molson Canada 2005*, 2013 FC 156, if I were to reject the Mark on the basis that it is confusing with the Opponent’s mark, the Opponent could potentially be given a monopoly over all bell marks in relation to beer.

[48] In *San Miguel*, the Court assessed the likelihood of confusion between the trademark RED HORSE & Design and the trademark BLACK HORSE, both of which were associated with “ale”. In doing so, the Court took into account that the relevant consumer (*i.e.* the beer consumer) is sensitive to the names of beers and to what they know and like, and that the confusion test is premised on that consumer – not on what might be a legal fiction of the non-beer drinking life partner who is asked to pick up beer [at para. 33]. The Court in *San Miguel* referred to the earlier decision in *Carling O’Keefe Breweries of Canada Ltd v Anheuser-Busch* (1982) 68 CPR (2d) 1 (FCTD) at 20-21, in which the Court observed that regular beer drinkers will have considerable loyalty to their favourite brand. The Court ended up concluding that one look at the

parties' labels was sufficient to dispel any notion of confusion between RED HORSE (with just a horse's head) and BLACK HORSE (with a horse in profile) [at para. 34].

[49] I agree with the Applicant that the present case is similar to the decision in *San Miguel* in that both cases considered the likelihood of confusion between design marks for beer. In the present case, however, there are other goods and services at issue in addition to beer, including brewery and restaurant services. More importantly though, the present case differs from the decision in *San Miguel* because in that case there was sufficient state of the register evidence, as well as marketplace evidence (provincial liquor store listings and sworn statements from an affiant) relating to "horse" marks, some of which consisted of a color or other descriptor in combination with the word "horse", not unlike the parties' trademarks. In the present case, there is no evidence that consumers are used to distinguishing between bell design marks similar to those of the parties for beer or any of the other goods or services at issue.

#### Conclusion on the likelihood of confusion

[50] I am mindful of the Court's comments in *San Miguel*. However, having considered all of the surrounding circumstances in the present case, I arrive at the conclusion that the probability of confusion between the marks at issue is evenly balanced between a finding of confusion and of no confusion. As the legal burden is on the Applicant to establish, on a balance of probabilities, that the Mark was not confusing with the Opponent's trademark, the section 12(1)(d) ground of opposition succeeds.

[51] I have come to this conclusion because despite their differences, I have found the parties' marks share a fair degree of similarity in appearance and in ideas suggested, owing to the most striking and dominant portions of the parties' marks, that of a bell. In particular, I find that the specific differences between the bell designs are not the type of differences a consumer, even the beer consumer who is sensitive to the names of beers and to what they know and like, would likely distinguish the trademarks on. Further, there is no evidence that other traders are using trademarks with bell designs as their dominant component in the marketplace. Thus, while the average beer-drinking Canadian may well be sensitive to the names of beers and to what they know and like, there is no evidence that such consumers are accustomed to seeing and having to distinguish between trademarks containing bell designs.

[52] The question that must be asked in this case is whether the ordinary consumer somewhat in a hurry who sees the Mark when they have no more than an imperfect recollection of the Opponent's Bell Design trademark, would, as a matter of first impression, and without pause to give the matter any detailed consideration or scrutiny, be likely to believe that the goods and services associated with the Mark originates from the same source as those of the Opponent [see *Veuve Clicquot Ponsardin, supra*]. Based upon the evidence which is before me and having considered all of the relevant surrounding circumstances in this case, I consider it likely that they would.

### **Non-entitlement – Section 16(3)(a)**

[53] The Opponent also pleads that the Applicant is not the person entitled to registration pursuant to section 16(3)(a) on the basis that the Mark is confusing with its Bell Design trademarks previously used and made known in Canada by the Opponent.

[54] In order to meet its initial burden under section 16(3)(a) of the Act, the Opponent must show that one or more of the trademarks alleged in support of its ground of opposition based on section 16(3)(a) of the Act were used or made known in Canada prior to the date of filing of the application for the Mark (November 19, 2015) and had not been abandoned at the date of advertisement of the application for the Mark (October 12, 2016) [section 16(5) of the Act].

[55] I am satisfied from the evidence furnished that the Opponent's marks have become known to some extent in Canada prior to the filing date of the Applicant's application. I therefore accept that the Opponent has met its initial burden.

[56] The difference in material dates between this ground and the section 12(1)(d) ground are not significant. My findings under the ground of opposition based on section 12(1)(d) are therefore equally applicable here with the result that this ground is also successful.

### **Non-distinctive - Section 2**

[57] Under this ground the Opponent pleads that the Mark does not distinguish nor is adapted to distinguish the goods and services of the Applicant from those of others, including the



Opponent, in light of the Opponent's prior use, filing and registration of its Bell Design trademarks.

[58] There is an initial burden on the Opponent to establish that, as of December 12, 2016, the filing date of the opposition, at least one of its trademarks were known to such an extent that they could negate the distinctiveness of the Mark. The Opponent will have met its burden if at least one of its trademarks is known in Canada to some extent and its reputation is substantial, significant or sufficient or, in the alternative, that it is well known in a part of Canada [*Bojangles' International, LLC v Bojangles Café Ltd* (2006), 2006 FC 657 (CanLII), 48 CPR (4th) 427 (FC) at paras 33-34].

[59] The Opponent chose not to provide any sales figures or documentary evidence to substantiate the Opponent's use of its Bell Design trademarks prior to December 12, 2016. It is therefore difficult to assess, from the evidence furnished, the extent to which the Opponent's marks have become known. In the absence of evidence showing that the reputation of at least one of the Opponent's trademarks was "substantial, significant or sufficient" per *Bojangles*, the Opponent has not met its initial burden. Therefore, this ground of opposition is dismissed.



#### DISPOSITION

[60] In view of the above, and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

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Cindy R. Folz  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

SCHEDULE A – THE OPPONENT’S REGISTERED MARKS

<b>Registered Mark</b>	<b>Goods/Services</b>
<p>Registration No. TMA878,789</p> <p>Bell Design</p> 	<p>Goods</p> <p>(1) Fermented beverages, namely beers; alcoholic brewery beverages</p> <p>(2) Clothing, namely T-shirts and sweatshirts; bags, namely tote bags; posters; glassware, namely pint glasses and beer tulip glasses</p> <p>Services</p> <p>(1) Operation of a brewery; brewery services; wholesale sales of alcoholic brewery beverages; wholesale sales of alcoholic beverages; operation of a brewpub</p> <p>(2) Retail sales of alcoholic brewery beverages; retail sales of alcoholic beverages</p>
<p>Registration No. TMA859,184</p> <p>Bellwoods Brewery and Bell Design</p> 	<p>Goods</p> <p>(1) Fermented beverages, namely beers, ciders and meads; alcoholic brewery beverages; clothing, namely T-shirts and sweatshirts; posters; stickers; and glassware.</p> <p>Services</p> <p>(1) Operation of a brewery; brewery services.</p> <p>(2) Retail and wholesale sales of alcoholic brewery beverages; retail and wholesale sales of alcoholic beverages; retail and wholesale sales of fermented beverages, namely beers, ciders and meads.</p> <p>(3) Operation of a brewpub.</p>

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE** 2021-01-28

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