



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 49

Date of Decision: 2021-03-19

IN THE MATTER OF AN OPPOSITION

Mott's LLP

Opponent

and

Comercializadora Eloro, S.A.

Applicant

1,791,690 for KERMATO

Application

INTRODUCTION

[1] Mott's LLP (the Opponent) opposes registration of the trademark KERMATO (the Mark), the subject of application No. 1,791,690 (the Application), that was filed by Comercializadora Eloro, S.A. (the Applicant).

[2] Filed on July 15, 2016, the Application is based on proposed use of the Mark in Canada in association with the following goods (the Goods):

Non-alcoholic tomato- and clam-based beverages.

[3] The Application was advertised in the *Trademarks Journal* of August 2, 2017.

[4] The Opponent alleges that (i) the Application does not conform to the requirements of section 30(e) of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Application does not conform to the requirements of section 30(i) of the Act; (iii) the Mark is not registrable pursuant to section 12(1)(d) of the Act; (iv) the Applicant is not entitled to registration of the Mark pursuant to section 16(3)(a) of the Act; and (v) the Mark is not distinctive pursuant to section 2 of the Act. The last three grounds of opposition revolve around the likelihood of confusion between the Mark and the Opponent's registered CLAMATO trademarks (the CLAMATO Registered Marks) as well as the Opponent's allowed CLAMATO trademark (collectively, the Opponent's Marks or the Opponent's CLAMATO Marks), particulars of which are attached as Schedule A to this decision.

[5] As a preliminary matter, I note that 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 as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised prior to that date).

[6] For the reasons that follow, I refuse the Application.

THE RECORD

[7] The Opponent filed its statement of opposition January 2, 2018. The Applicant filed and served its counter statement on March 5, 2018, denying the grounds of opposition.

[8] In support of its opposition, the Opponent filed the affidavit of Dane Penney, sworn July 5, 2018, together with Exhibit A, and the affidavit of Carol-Anne Gower, sworn July 3, 2018, together with Exhibits A to M.

[9] Mr. Penney is employed as a searcher with the agent for the Opponent. Mr. Penney conducted a *Google.com* search on June 6, 2018 for the term "CLAMATO KERMATO". He attaches as Exhibit A to his affidavit, website printouts for the term "CLAMATO KERMATO", as well as printouts of webpages from the first 12 search results.

[10] Ms. Gower is the Vice President and General Manager of Canada Dry Mott's Inc., a licensee in Canada of the Mark. Ms. Gower provides evidence and information regarding the use of the Opponent's Marks in Canada, including the history of such use, the distribution and sales of the Opponent's goods associated with the Opponent's Marks, and the advertising and promotion of the Opponent's goods associated with the Opponent's Marks in Canada.

[11] Neither Mr. Penney nor Ms. Gower were cross-examined on their affidavits.

[12] The Applicant elected not to file any evidence.

[13] Both parties filed written arguments and attended an oral hearing.

THE PARTIES' RESPECTIVE BURDEN OR ONUS

[14] The Applicant bears the legal onus of establishing, on a balance of probabilities that the Application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. 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 CPR (3d) 293 (FCTD) at 298].

[15] With respect to the grounds of opposition, it is the following material dates that apply:

- Sections 38(2)(a)/30 - the filing date of the application, namely, **July 15, 2016** [see *Canadian National Railway Co v Schwauss* (1991), 35 CPR (3d) 90 at 94 (TMOB) re: section 30(e); and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB) re: section 30(i)];
- Sections 38(2)(b)/12(1)(d) – the date of my decision [see *Park Avenue Furniture Corp v Wickes/Simmons Bedding Ltd* (1981), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c)/16(3)(a) – the filing date of the application, namely, **July 15, 2016** [see section 16(3) of the Act; see also *Tradition Fine Foods Ltd v Groupe Tradition`l Inc*

(2006), 51 CPR (4th) 342 (FCTD); and, *Chlorox Co v EI Du Pont de Nemours and Co* (1994), 56 CPR (3d) 567 at 569 (TMOB)]; and

- Sections 38(2)(d)/2 – the date of filing of the statement of opposition, namely, **January 2, 2018** [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* 2004 FC 1185, 34 CPR (4th) 317 (FCTD)].

ANALYSIS

Section 16 Ground of Opposition

[16] The Opponent has plead that the Applicant is not entitled to registration of the Mark, because at the date of filing of the application, the Mark was confusing with the Opponent's CLAMATO Marks which had been previously used and made known in Canada by the Opponent in association with its goods.

[17] The Opponent has an initial burden of establishing that one or more of its trademarks alleged in support of this ground of opposition was used or made known prior to the date of filing of the Application, namely, July 15, 2016, and was not abandoned at the date of advertisement of the Application for the Mark (in this case, August 2, 2017) [section 16(5) of the Act].

[18] With respect to use of the Opponent's Marks, as previously indicated, the Opponent filed the affidavit of Ms. Gower.

[19] Ms. Gower states that the CLAMATO Marks have been in use in Canada by the Opponent and its predecessors and/or their licensees since at least as early as 1969. In addition to providing a chart summarizing the particulars of the Opponent's CLAMATO marks, she attaches as Exhibits A and B to her affidavit, certified copies and printouts of trademark particulars from the Canadian Intellectual Property Office website, of these marks. As Ms. Gower states, these registrations (and an allowed application) encompass beverage products comprising a mixture of tomato and clam juices and/or herb and spice mixtures that compliment tomato and clam juice beverages, as well as alcoholic beverages, namely premixed cocktails (the Opponent's Goods).

As previously indicated, particulars of the Opponent's CLAMATO Marks are detailed under Schedule A to this decision.

[20] With respect to notice of association, Ms. Gower attests that the CLAMATO Marks appear directly on labels of the Opponent's Goods sold by Canada Dry Mott's Inc. (CDM) under license from the Opponent. In support, she attaches as Exhibits D-1 and D-2 to her affidavit, sample labels from 2010 and 2011, as well as those that are in current use, all of which prominently display the CLAMATO Marks on the Opponent's Goods.

[21] Ms. Gower explains that the Opponent's Goods bearing the CLAMATO Marks are sold to bars and restaurants across Canada and to local and national retailers and wholesalers operating throughout Canada who then sell the Goods to end consumers through their stores. She provides a long list of national retailers, which include major grocery and supermarket chains, pharmacies, Canadian wholesalers, general department and convenience stores. She provides as Exhibit E-1 to her affidavit, photos from 2012 to 2016 of point of purchase displays and general department, grocery and convenience store shelves stocked with Opponent's Goods clearly bearing the CLAMATO Marks.

[22] Ms. Gower further attests that alcoholic beverages, namely, premixed cocktails bearing the CLAMATO Marks are sold through provincially regulated liquor stores such as the LCBO, SAQ, and BC Liquor Stores. She provides, as Exhibit E-2, photos of the Opponent's Goods clearly bearing the CLAMATO Marks taken in May 2018 at a Longo's grocery store and an LCBO in Toronto, respectively.

[23] In addition to the above channels, Ms. Gower attests that customers may also purchase the Opponent's Goods bearing the CLAMATO Marks from online grocery retailers. She provides a list of such websites and as well as printouts from these sites (Exhibit F), and states that these sites have been offering the Opponent's Goods bearing the CLAMATO Marks since at least as early as 2014.

[24] In terms of sales, Ms. Gower provides sales data with respect to the total volume of the Opponent's Goods sold bearing the CLAMATO Marks in Canada, for the years 2010 to 2016. The figures range from 3.5 to 4 million ("in equivalent cases").

[25] Ms. Gower attests that CDM has spent in excess of \$3.5 million annually to promote and advertise the Opponent's Goods bearing the CLAMATO Marks in Canada since 2010. Such advertising, she attests, is through traditional and non-traditional marketing channels, including, flyers, television and radio commercials, the Internet, social media and in-store campaigns. In support, she provides:

- Articles and social media posts from The Toronto Sun, Chatelaine, La Presse and Facebook promoting the Opponent's Goods bearing the CLAMATO Marks in celebration of National Caesar Day in 2016 (Exhibits G-1 and G-2);
- Press releases and articles appearing in *Media in Canada*, *Marketing* magazine and *Ad News* announcing the sponsorship of *Top Chef Canada* by CDM in 2013, in which the Opponent's Goods bearing the CLAMATO Marks were showcased on the program (Exhibit H);
- Excerpts from flyers of different grocery and retail stores in Canada, dated between 2011 and 2016 (Exhibit I-1), and 2018 (Exhibit I-2), advertising the Opponent's Goods bearing the CLAMATO Marks;
- Copies of newspaper advertisements and articles from *The Globe and Mail* and the *Toronto Star* dating between 2000 and 2017, that refer to the Opponent's Goods bearing the CLAMATO Marks;
- Screenshots and clips from television commercials for CLAMATO beverage products (Exhibit K-1 for those that aired in Canada between 2009 and 2016, and Exhibit K-2 for those that aired in Canada between 1969 and 2016);
- Screenshot captures from CDM's websites taken on June 12, 2018 (Exhibit L-1), as well as archived webpages of CDM's websites from 2005 to 2018 (Exhibit L-2), showing the CLAMATO Marks with the Opponent's Goods. Ms. Gower attests that these websites receive approximately 15,000 monthly visits, with the majority of these visits from Canada; and

- Printouts from CDM's Facebook, Twitter and Instagram pages advertising the Opponent's Goods associated with the CLAMATO Marks (Exhibit M). Ms. Gower attests that over 200,000 Facebook users have liked CDM's CLAMATO Facebook profile page, over 800 users currently follow CDM's CLAMATO Instagram account and CDM's Twitter account is followed by over 2,000 users. She further attests that between 90-95% of these subscribers or followers are Canadian.

[26] Having regard to the above, I accept that the Opponent has used the CLAMATO Marks in association with the Opponent's Goods prior to the date of filing of the Application. In particular, Ms. Gower has provided evidence showing that the CLAMATO Marks were associated with the Opponent's Goods at the time of transfer, and that there has been continuous sales of such Goods, through the normal course of trade in Canada, over a lengthy period of time predating the filing date of the Application.

[27] I now have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with one or more of the Opponent's CLAMATO Marks.

[28] I have chosen to focus on the Opponent's trademark CLAMATO, (registration No. TMA165,719), unless otherwise indicated, as I am of the view that this trademark represents the Opponent's strongest case (re: 6(5)(c) and (e)).

The test for confusion

[29] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[30] 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 criteria are not exhaustive and it is not necessary to give each one of them equal weight [see, in general, *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 1 SCR 772 (SCC) at para 54; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361].

Section 6)(5)(a) – the inherent distinctiveness and the extent to which the marks have become known

[31] The overall consideration of the section 6(5)(a) factor, involves a combination of inherent and acquired distinctiveness of the parties' marks.

[32] The Applicant submits that the Opponent's CLAMATO Mark is a blending of words that describe the constituent components of the Opponent's goods, namely, clam nectar and tomato juice. Conversely, the Applicant submits, its Mark does not suggest or describe the components of its goods; rather, the Mark as a whole would be perceived as a coined word and is therefore more inherently distinctive.

[33] Both parties' marks are coined terms, and as such, enjoy a higher degree of inherent distinctiveness than otherwise would be afforded to ordinary common dictionary words. Both parties' marks, however, pose some degree of suggestiveness of the fact that they are derived from tomatoes, with the Opponent's mark being even more so suggestive, being a contraction of the primary ingredients of its goods, namely, CLAM and TOMATO juices.

[34] In any event, the strength of a trademark may be increased by means of it becoming known in Canada through promotion or use.

[35] The Opponent submits that the Gower affidavit establishes that the Opponent's CLAMATO Marks have been in use in Canada since at least as early as 1969. Furthermore, the Opponent submits having regard to continuous use of the Opponent's CLAMATO Marks for decades and evidence of significant sales and advertising, the Opponent's CLAMATO Marks are well known, if not famous in Canada. Accordingly, the Opponent submits that the Opponent's

CLAMATO Marks enjoy a high degree of distinctiveness and should be entitled to a broad scope of protection. In contrast, the Opponent submits that the Applicant has provided no evidence that the Mark has been used in Canada.

[36] The Applicant submits that it is not possible to ascertain the extent of sales of goods related to each of the trademarks pleaded in the Opponent's statement of opposition or in association with each of the Opponent's registered CLAMATO Marks, as the Gower affidavit only provides lump sum sales figures. Accordingly, the Applicant submits, the acquired distinctiveness factor in section 6(5)(a), at best, only slightly favours the Opponent.

[37] Although it is true that Ms. Gower has only provided aggregate sales figures, I disagree with the Applicant that this factor only slightly favours the Opponent. In this regard, Ms. Gower has provided many examples of sample labels and packaging which show how each of the CLAMATO Marks are displayed on the Opponent's Goods. It is immediately apparent that the term CLAMATO is overwhelmingly dominant, to such an extent, that use of the various Opponent's CLAMATO Marks, would also constitute use concurrently of the mark CLAMATO on its own. As the sales figures and advertising expenditures associated with the CLAMATO Marks are substantial, and as Ms. Gower's evidence also supports widespread distribution of the Opponent's Goods associated with the CLAMATO Marks throughout Canada, I accept that the Opponent's CLAMATO Mark, used in association with tomato and clam juice, is well-known (if not famous, as the Opponent submits) throughout Canada.

[38] Accordingly, I find this factor greatly favours the Opponent.

Section 6(5)(b) – the length of time of use

[39] The Opponent submits that the Gower affidavit establishes that the Opponent's CLAMATO Marks have been used since at least as early as 1969, and continue to be used in association with the Opponent's Goods. I note that while Ms. Gower's evidence pertaining to sales and the manner in which the CLAMATO Marks appear on the packaging dates only as far back as 2010, I accept that such use was far lengthier. Sales volumes support this inference, and Ms. Gower has provided statements of fact pertaining to the introduction of and origin of CLAMATO beverages in 1969 in Calgary, Alberta.

[40] The Applicant has not provided any evidence of use of its Mark. Accordingly, this factor also strongly favours the Opponent.

Sections 6(5)(c) and (d) - the nature of the services and business or trade

[41] The Opponent submits that the nature of the goods of the parties is the same or overlapping and the parties' channels of trade are anticipated to be the same. In the absence of evidence from the Applicant to the contrary, I agree.

[42] Consequently, this factor strongly favours the Opponent.

Section 6(5)(e) - degree of resemblance in appearance, when sounded, or in idea suggested

[43] When considering the degree of resemblance between the marks, the law is clear that the marks must be considered in their totalities; it is not the correct approach to lay the trademarks side by side and compare and observe similarities or differences among the elements or components of the marks. The Supreme Court of Canada in *Masterpiece, supra* advised that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trademark that is particularly striking or unique.

[44] The Applicant submits that in the present case, the appearance of the Mark is distinct from the Opponent's CLAMATO Marks. In particular, the Applicant notes that:

- a) The Mark is significantly more inherently distinctive than any of the Opponent's CLAMATO Marks;
- b) The first portions of the Mark and the CLAMATO Marks are entirely different; and
- c) The CLAMATO Marks as used are quite distinct from the Mark.

[45] The Applicant submits that the first portion of the Mark is striking and distinctive, unlike the CLAMATO Marks. Further, the first portions of the Mark and the CLAMATO Marks have different visual appearances and differ in sound. The Applicant submits that the only similarity between the parties' marks is the "-MATO" portion, which is likely to be perceived as a reference to the goods being tomato-based beverages and not as a distinctive portion of the Opponent's CLAMATO Marks.

[46] The Applicant submits that the Mark and the Opponent's CLAMATO Marks also suggest substantially different ideas. The Applicant submits that the Opponent's own evidence shows that the CLAMATO Marks suggest, if not, describe, the components of the Opponent's Goods and consumers are likely to perceive it as such. On the other hand, the Applicant submits, the Mark does not suggest any ideas; the term KERM does not suggest or describe any of the components of the Applicant's goods.

[47] The Opponent submits that the Mark is substantially similar to the Opponent's CLAMATO Marks, both visually and when sounded. I agree that there is a fair degree of resemblance, especially since they share the same suffix. While the prefixes are different, both marks still start with a hard C/K and are roughly the same length visually and when sounded.

[48] Moreover, the Opponent submits, the suffix "MATO" has been recognized by the Registrar as being a "unique and distinctive feature" of the Opponent's Mark [citing *Cadbury Schweppes Inc v Najm* (1991), 41 CPR (3d) 122 (TMOB) at 126]. In *Cadbury Schweppes*, the applicant applied to register the mark SLIMATO Design with "vegetable juice". The Opponent's predecessor, Cadbury Schweppes, opposed on the basis of confusion. When considering the degree of resemblance between the SLIMATO Design and the CLAMATO trademark, Hearing Officer Herzig stated:

There is a noticeable degree of resemblance aurally (although less so visually and in ideas suggested) between the applied-for mark SLIMATO and the Opponent's mark CLAMATO owing to the emphasis placed on the second and third syllables of the parties' marks. In the instant case, the applicant has incorporated into its proposed mark a unique and distinctive feature of the opponent's mark namely the suffix "mato".

[49] Having regard to the aforementioned, I find this factor favours the Opponent.

Additional Surrounding Circumstances – Manner of Actual Use in the Marketplace

[50] The Applicant submits that the Opponent's evidence demonstrates that the Opponent does not use the word CLAMATO in association with its goods in isolation, but displays it in conjunction with its house brand MOTT'S; thus, mitigating the likelihood of confusion [citing *Advance Magazine v Banff Lake Louise Tourism*, 2018 FC 108 at 53; and *JINX v JINXD Yoga Essentials* (2016), 142 CPR (4th) 475 at 14 (TMOB) re: relevance of use in the marketplace].

The Applicant submits that the average consumer upon viewing its Mark, in the absence of the Opponent's house mark MOTT'S, would not associate the Mark with the Opponent or be confused as to the source of goods sold under the Mark.

[51] I disagree with the Applicant. As previously indicated, the term CLAMATO is overwhelmingly dominant in all instances. Moreover, both parties' marks (including KERMATO as used in Mexico, per Penney affidavit) are presented in rather plain, ordinary font styles, with nothing serving to minimize confusion between the marks whatsoever. Despite the appearance of "Mott's" on the Opponent's Goods, it is diminutive relative to CLAMATO, and as such, may even be overlooked as a matter of first impression and imperfect recollection. Furthermore, the Application for the Mark, is for a word mark; such that, the scope of protection that would be afforded if registered, would include the use of specialized font/embellishment of letters that could be similar to the Opponent's Marks.

Additional Surrounding Circumstances – Confusion in the Marketplace

[52] The Opponent submits that it has often been said that an opponent need not prove instances of confusion; the burden is on an applicant to demonstrate the absence of likelihood of confusion [citing *adidas AG v Globe International Nominees Pty Ltd* (2014), 21 CPR (4th) 243 (TMOB) aff'd (2015) 130 CPR (4th) 97 (FC); and *Retail Royalty Co v Hawke & Co Outfitters LLC* (2011) 94 CPR (4th) 323 (TMOB), aff'd (2012), 108 CPR (4th) 358 (FC)]. Where it is shown, proof of actual confusion over a long period of time is a very weighty factor that must be considered as part of the surrounding circumstances pursuant to subsection 6(5) of the Act [citing *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA) at para 34; *Mattel, supra* at para 55].

[53] The Opponent submits that the Penney affidavit includes various printouts from the Internet that date back to 2003 where "KERMATO" has been regarded as "a cheap of Clamato" or a "Clamato knockoff produced by Nestle Mexico for sale in Mexico". (Penney affidavit, Exhibit A). Further, in some instances, Canadian travelers to the Caribbean have stated in discussion forums that "Kermato Juice" is "Clamato in English" and "clamato juice... seems to be called in Mex, kermato juice". Another traveler has stated that "They call it Kermato in Cuba. It's there [sic] version of Clamato but it's nothing like it".

[54] The Applicant submits that most, if not all of Mr. Penny's affidavit is inadmissible hearsay.

[55] Counsel for the Opponent replied at the oral hearing that Mr. Penney's affidavit is not being relied upon to prove any fact that is described by someone who has posted something – e.g. – someone says they travelled to Cuba. Rather, the evidence is intended to show depictions of the Applicant's product in other countries.

[56] I need not discuss this surrounding circumstance any further however, as I find it unnecessary to consider in order to reach my conclusion.

Conclusion

[57] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection.

[58] In the present case, I have found that each of the section 6(5) factors favour the Opponent, including a strong degree of acquired distinctiveness and a fair degree of resemblance between the parties' marks. Having regard to the above, I find that the balance of probabilities with respect to confusion between the parties' marks strongly favours the Opponent. Therefore, the Applicant has failed to establish, on a balance of probabilities, that the Mark is not confusing with the Opponent's CLAMATO mark.

[59] Therefore, the ground of opposition based on section 16(3)(a) of the Act is successful.

Section 12(1)(d) Ground of Opposition

[60] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if one or more of the registrations relied upon are in good standing. The Registrar has the discretion to check the register in order to confirm the existence of any registrations relied upon by an opponent [see *Quaker Oats of Canada Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)].

[61] I have once again chosen to focus on the Opponent's registration for CLAMATO, registration No. TMA165,719, as this registration represents the Opponent's strongest case (re: 6(5)(e)).

[62] I have exercised the Registrar's discretion to confirm that the Opponent's CLAMATO registration No. TMA165,719 is in good standing as of today's date, which, as previously indicated, is the material date for assessing a section 12(1)(d) ground of opposition [per *Park Avenue Furniture Corp, supra*]. The Opponent has therefore satisfied its evidential burden.

[63] The difference in material date does not affect my findings under this ground, and consequently my conclusions regarding confusion between the Mark and the Opponent's CLAMATO Mark are substantially the same. I would add that I would also be inclined to find confusion between the Mark and the Opponent's other registered CLAMATO Marks, in view of the prominent display of the term CLAMATO, and overlap in the parties' respective goods and probable channels of trade.

[64] Consequently, the ground of opposition based on section 12(1)(d) is also successful.

Section 2 Ground of Opposition

[65] The Opponent relies on the evidence described in the section 16 confusion ground to show that the CLAMATO Marks were well known and distinctive as of the material date, namely, January 2, 2018, as the CLAMATO Marks had been used since at least as early as 1969 in association with the goods in Canada, nearly 50 years prior to the date of opposition, and having become known worldwide. The Opponent notes that between 2010 and 2016, Canadians consumed 3.5 to 4 million cases of CLAMATO beverages annually, and the Opponent has invested and significantly advertised and promoted goods bearing the CLAMATO Marks through various advertising channels, dating back to 1969, where the CLAMATO Marks prominently appeared in television commercials, grocery flyers, newspaper ads, magazine articles and online.

[66] The Opponent submits, and I agree, that it has thereby met its initial evidentiary burden in respect of the distinctiveness ground of opposition. Further, the Opponent submits and I also concur, that the Applicant has failed to meet its burden, as it has not adduced any evidence to

show that the Mark has been adapted to distinguish the Applicant's goods from those associated with the CLAMATO Marks. In this regard, once again, the difference in material date does not affect my findings under this ground, and consequently my conclusions regarding confusion between the Mark and the Opponent's CLAMATO Mark are substantially the same.

[67] Accordingly, the ground of opposition based on section 2 of the Act is also successful.

Remaining Grounds of Opposition

[68] As I have found in favour of the Opponent with respect to multiple grounds of opposition sufficient to dispose of this opposition proceeding, I will refrain from addressing the remaining grounds of opposition.

DISPOSITION

[69] In view of the foregoing, 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.

Kathryn Barnett
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

The Opponent is the owner of the following trademark registrations for beverage products comprising a mixture of tomato and clam juices and/or herb and spice mixtures that compliment tomato and clam juice beverages, as well as an allowed application for CLAMATO with alcoholic beverages, namely premixed cocktails:

<u>Trademark</u>	<u>Registration/application No.</u>	<u>Goods</u>
CLAMATO	TMA165,719	(1) Mixture of tomato juice and clam juice. (2) Herb and spice mixtures
CLAMATO	App. No. 1,821,977	(1) Alcoholic beverages, namely premixed cocktails.
MOTT'S CLAMATO LE TOUT GARNI	TMA614,137	(1) Beverage products comprising a mixture of tomato juice and clam juice, herbs and spices.
MOTT'S CLAMATO THE WORKS	TMA582,822	(1) Beverage products comprising a mixture of tomato juice and clam juice, herbs and spices.
MOTT'S CLAMATO LE WORKS	TMA582,823	(1) Beverage products comprising a mixture of tomato juice and clam juice, herbs and spices.
CLAMATO RED EYE	TMA725,042	(1) Alcoholic beverages, namely premixed cocktails.
CLAMATO RIMMER	TMA478,464	(1) Herb and spice mixtures.

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

HEARING DATE 2020-11-09

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