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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 111

Date of Decision: 2021-05-31

IN THE MATTER OF AN OPPOSITION

People's Drug Mart (B.C.) Ltd.

Opponent

and

People Food Inc.

Applicant

1,663,349 for PEOPLE FOOD

Application

INTRODUCTION

[1] People's Drug Mart (B.C.) Ltd. (the Opponent) opposes registration of the trademark PEOPLE FOOD (the Mark) filed by People Food Inc. (the Applicant).

[2] Filed on February 10, 2014, the application is based on use of the Mark in Canada since December 2010 with pizza crust and veggie patties and proposed use with cookies, bread and pie crusts (collectively, the Goods).

[3] The Opponent alleges that (i) the application does not conform to section 30 of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Applicant is not the person entitled to registration of the Mark under section 16 of the Act, and (iii) the Mark is not distinctive. Many of the grounds of opposition are related to the Opponent's allegation that the Mark is confusing with the use and registration of its trademark PEOPLES FOOD & DRUG registered under

registration No. TMA805,689 in association with the operation of retail grocery stores, operation of retail drug stores and pharmacy services.

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

THE RECORD

[5] The application was advertised on January 3, 2018. The Opponent filed its statement of opposition on March 1, 2018. In accordance with section 70 of the Act, all references to sections of the Act pertaining to the grounds of opposition are to the Act as it read before June 17, 2019.

[6] In support of its opposition, the Opponent filed the affidavit of Diana Jureskin, a Buyer and Administrator for the Opponent. The Applicant filed the affidavit of Lorraine Pinsent, a Trademark Agent with the Applicant's agent. Both parties filed written submissions. A hearing was not held.

EVIDENTIAL BURDEN AND LEGAL ONUS

[7] While there is an initial evidential burden on an opponent; the legal burden or onus remains on an applicant, on a balance of probabilities [*John Labatt Ltd v Molson Co*, (1993), 30 CPR 3d 293 (FCTD)].

PRELIMINARY ISSUE: ADMISSIBILITY OF THE EVIDENCE OF LORRAINE PINSENT

[8] Ms. Pinsent provides the following evidence:

- a) That she has worked closely with the Applicant on the development of the PEOPLE FOOD brand;
- b) Printouts from the Applicant's website; and
- c) That Google searches indicate that the Opponent has shut down and will operate under new banners. Ms. Pinsent also attaches an article "Peoples Drug Mart shuts down", dated April 3, 2017.

[9] With respect to the evidence from the Applicant’s website, it is hearsay and there is no evidence as to why it was necessary for Ms. Pinsent to provide it. Further, while Ms. Pinsent states that she has worked closely with the Applicant on the development of this brand, I do not find that this means that she has personal knowledge of or is necessarily able to confirm the information on the Applicant’s website printouts. In these circumstances, I am not prepared to find this evidence admissible [*Gowling Lafleur Henderson LLP v Guayapi Tropical* (2012), 104 CPR (4th) 65 (TMOB) at paras 7-9]. With respect to the article “Peoples Drug Mart shuts down”, despite the hearsay nature of the evidence, I will consider it for the truth of its contents, if it falls within the material dates of the grounds of opposition. I consider it necessary for the Opponent to file this document in support of its opposition and that it is reliable, since the Applicant, being a party, had the opportunity to refute the statements therein [*Reliant Web Hostings Inc v Tensing Holding BV* 2012 CarswellNat 836 (TMOB) at para 35].

ANALYSIS

[10] I will consider the grounds of opposition beginning with the section 16 and 2 grounds of opposition.

Sections 16(3) and 2 Grounds of Opposition

[11] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because it was confusing with the trademark PEOPLES FOOD & DRUG previously used and applied-for in Canada by the Opponent (the sections 16(3)(a) and 16(3)(b) grounds of opposition). The Opponent also pleads that the Mark is not distinctive because it does not and is not adapted to distinguish the goods of the Applicant from the goods and services of the Opponent provided in association with its trademark PEOPLES FOOD & DRUG (section 2 ground of opposition).

[12] With respect to the grounds of opposition based on sections 16(3)(a) and 16(3)(b) of the Act, the material date is February 10, 2014 for the goods cookies, bread and pie crusts which were applied-for on the basis of the Applicant’s proposed use. The material date for assessing the non-distinctiveness ground is the date of opposition (March 1, 2018).

[13] In order to meet its initial burden with respect to its section 16 grounds of opposition, the Opponent must show that it had used or applied-for its trademark PEOPLES FOOD & DRUGS prior to the material date. The Opponent must also show that it had not abandoned its trademark as of January 3, 2018 for section 16(3)(a) and that its application was still pending (see sections 16(4)-16(5) of the Act). In order to meet its initial burden in support of the non-distinctiveness ground of opposition, the Opponent must show that as of March 1, 2018 its trademark PEOPLES FOOD & DRUG, was known to some extent at least and its reputation in Canada was substantial, significant or sufficient [*Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

[14] The Opponent's evidence in the affidavit of Ms. Jureskin is summarized below.

- a) The Opponent is the owner of several registered trademarks. Ms. Jureskin indicates in her affidavit when the Opponent first made use of each of these trademarks with the goods and services in each of the registrations:

TMA805,689	PEOPLES FOOD & DRUG	February 2011
TMA446,668	PEOPLES BRAND	June 1995
TMA743,688	PEOPLES DRUG MART	January 2001
TMA596,779	PEOPLES DRUG MART	June 1976
TMA743,689	PEOPLES PHARMACY	January 2001
TMA500,045	PEOPLE FIRST	August 1998

In Ms. Jureskin's affidavit, she refers to PEOPLES FOOD & DRUG as the "Mark", PEOPLE FIRST as the "Additional Mark" and the remainder of the trademarks above as the "Associated Marks".

[15] At paragraphs 7-8 of Ms. Jureskin's affidavit, she explains:

- 7 [The Opponent] has provided goods and services to the general public in Canada in association with the [trademark PEOPLES FOOD & DRUG], Additional Mark and Associated Marks, including the operation of retail grocery stores, the operation of retail drug stores, and pharmacy services. [The Opponent] has generated marketing materials and publications relating to the provision of such services, whereby goods and services are provided to the general public, including pharmaceutical goods, foods and other goods and services. [The Opponent] further advertises its goods and services in third party publications in association with the [trademark PEOPLES FOOD & DRUG], Additional Mark and Associated Marks. Now produced and shown to me and marked as Exhibit C ... is a copy of examples of marketing materials and publications of [the Opponent], and third party publication advertisements, bearing the [trademark PEOPLES FOOD & DRUG], Additional Mark and Associated Marks.
- 8 [The Opponent] has been selling its products and services in Canada since at least 1976 and its 2017 revenues were approximately \$2,000,000 (Canadian dollars). Examples of the advertising and marketing expenditures of [the Opponent], relating to products and services that are provided in Canada in association with the [trademark PEOPLES FOOD & DRUG], Additional Mark and Associated Marks, are provided in the table below.

[16] With the exception of the two advertisements described below, none of Exhibits C-F features the Opponent's relied upon trademark PEOPLES FOOD & DRUG. In Exhibit C, there are two advertisements including the trademark PEOPLES FOOD & DRUG for a store located at 825 Shuswap Ave, Chase BC. I infer one of the advertisements appears in an issue of *The North Shuswap Kicker* dated after July 2015 because the article next to it includes the line "an adjoining 2.8 kilometers were updated under the first phase of the Pritchard to Hoffman's Bluff project that opened to traffic in 2015." There is no basis on which I can infer that the other advertisement appeared as of a particular date.

[17] Ms. Jureskin provides examples of product labels and packaging of products which bear the trademarks PEOPLES DRUG MART and PEOPLE FIRST (Exhibit D), signage at pharmacies including PEOPLES DRUG MART and PEOPLES PHARMACY (Exhibits E), a brochure about real estate requirements featuring pictures of and the requirements for PEOPLES DRUG MART and PEOPLES PHARMACY (Exhibit F), a supplies and signage catalogue dated November 2015 which includes the trademarks PEOPLES DRUG MART, PEOPLE FIRST, and

PEOPLES PHARMACY (Exhibit G) and printouts from the Opponent's webpage which features the trademarks PEOPLES DRUG MART and PEOPLE FIRST REWARDS (Exhibit H).

[18] This evidence is insufficient for the Opponent to meet its evidential burden with respect to these grounds of opposition for the following reasons.

- a) With respect to the section 16(3)(b) ground of opposition, the Opponent fails to meet its burden as its application for the trademark PEOPLES FOODS & DRUGS was registered and as such was not pending at the Mark's advertisement date.
- b) With respect to the section 16(3)(a) ground of opposition, while Ms. Jureskin states that the Opponent "made first use in Canada of the [trademark PEOPLES FOOD & DRUG] with the services listed in the registration therefor at least as early as February 2011", the only evidence of use for which a date can be ascertained appears to be from 2015 or after. Since the Opponent has not evidenced use of the trademark PEOPLES FOOD & DRUGS prior to the material date of February 10, 2014, the Opponent fails to meet its evidential burden of showing prior use of its trademark. As such, it is unnecessary for me to consider the issue of abandonment.
- c) With respect to the distinctiveness ground of opposition, the Opponent has only provided two advertisements including the trademark PEOPLES FOOD & DRUGS published in *The North Shuswap Kicker*. As such, the Opponent fails to meet its evidential burden as this evidence does not establish that the Opponent's trademark PEOPLES FOOD & DRUGS is known to some extent in Canada or is well known in a specific area of Canada.

[19] While the Opponent's evidence may have been sufficient to meet its evidential burden with respect to the trademarks PEOPLES DRUG MART, PEOPLE FIRST or PEOPLES PHARMACY, its failure to plead these trademarks in its statement of opposition means that it cannot rely on them. I appreciate that, once evidence is filed, the Registrar must take it into account when interpreting the pleadings [*Novopharm Ltd v AstraZeneca AB*, 2002 FCA 387].

This is not a case, however, where a broad, ambiguous or open-ended pleading is clarified by an opponent's evidence. The scope and meaning of the pleadings are clear on their face: the allegation is that the Mark is confusing with the PEOPLES FOOD & DRUG trademark of the Opponent. This is confirmed by the Opponent in its written submissions (paras 17-18) where it submits:

17	The Opponent states that the Application, PEOPLE FOOD, is confusingly similar to the Opponent's mark, PEOPLES FOOD & DRUG.
18	The legal onus is on the Applicant to show that there would be no reasonable likelihood of confusion between the Application, PEOPLE FOOD and the Opponent's mark, PEOPLES FOOD & DRUG.

[20] I do not find that the use of the trademarks PEOPLE FIRST, PEOPLES DRUG MART or PEOPLES PHARMACY constitutes use of the trademark PEOPLES FOOD & DRUG. I do not find that the trademark PEOPLES FOOD & DRUG remains recognizable and is used in such way as it has not lost its identity [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA)]. The trademark PEOPLES FOOD & DRUG consists of two dominant elements PEOPLES and FOOD & DRUG and while the more distinctive element PEOPLES is preserved in the trademarks PEOPLES DRUG MART, PEOPLE FIRST, and PEOPLES PHARMACY, the second dominant feature is not [*Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)]. Furthermore, I do not find that the trademark PEOPLES FOOD & DRUG "per se" would be perceived by the public as being used [*Nightingale Interloc Ltd. v Prodesign Ltd.* (1984), 2 CPR (3d) 535 (TMOB)]. By analogy, see *Riches, McKenzie & Herbert v Rosita's Fine Foods (1985) Ltd.* (1997), 82 CPR (3d) 237 (TMOB) where the Registrar found that the use of ROSITA'S was not use of the ROSITA'S FINE FOODS trademark and *Gowling Lafleur Henderson LLP v Padcon Ltd.*, 2014 TMOB 125 where the Registrar found that use of OUTRIGGER was not use of THE OUTRIGGER STEAKHOUSE AND BAR trademark.

[21] For the above reasons, I reject the entitlement grounds of opposition based on sections 16(3)(a) and 16(3)(b) of the Act and the distinctiveness ground of opposition.

Section 30(b) Ground of Opposition

[22] There is an evidential burden on the Opponent in respect of its section 30(b) ground of opposition alleging that the Mark has not been in continuous use in Canada since the date claimed, December 2010, in association with pizza crust and veggie patties. As no evidence to support its allegation was submitted by the Opponent, nor any submissions were made as to how the Applicant's evidence could suffice to meet the Opponent's evidential burden, the section 30(b) ground is rejected.

Section 30(e) Ground of Opposition

[23] There is an evidential burden on the Opponent in respect of its section 30(e) ground of opposition alleging that the Applicant did not intend to use the Mark with cookies, bread, and pie crusts. As no evidence to support its allegation was submitted by the Opponent, nor any submissions were made as to how the Applicant's evidence could suffice to meet the Opponent's evidential burden, the section 30(e) ground is rejected.

Section 30(i) Ground of Opposition

[24] The Opponent alleges that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada. Where an applicant has provided the statement required by section 30(i) in its application, a ground of opposition based upon this section should only succeed in exceptional cases such as where there is evidence of bad faith on the part of an applicant [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. The Applicant has provided the necessary statement and the Opponent has not filed any evidence to demonstrate that this is an exceptional case. Furthermore, the mere knowledge of the existence of an opponent's trademarks does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use a mark at the time that it filed its application [*Woot, Inc v Woot Restaurants Inc Les Restaurants Woot Inc*, 2012 TMOB 197 at para 10]. Accordingly, this ground of opposition is rejected.

DISPOSITION

[25] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Natalie de Paulsen
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

No hearing held.

AGENTS OF RECORD

Miller Thomson LLP

FOR THE OPPONENT

MLT Aikins LLP

FOR THE APPLICANT