



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 168

Date of Decision: 2021-07-30

IN THE MATTER OF AN OPPOSITION

Lost Craft Inc.

Opponent

and

**101217990 Saskatchewan Ltd. dba
Direct Brewing Company**

Applicant

1,799,450 for FIND YOUR CRAFT

Application

INTRODUCTION

[1] 101217990 Saskatchewan Ltd. dba District Brewing Company (the Applicant) has applied to register the trademark FIND YOUR CRAFT (the Mark) in association with “beer” (the Goods) based on proposed use in Canada.

[2] Lost Craft Inc. (the Opponent) has alleged prior use of the identical trademark FIND YOUR CRAFT with identical goods. The Opponent also owns an application for the trademark FIND YOUR CRAFT which was filed after the subject application, but claims an earlier date of first use in Canada.

[3] For the following reasons, I find that the application should be refused.

THE RECORD

[4] The application for the Mark was filed on September 8, 2016 under No. 1,799,450 (the Application) and was advertised for opposition purposes in the *Trademarks Journal* of June 28, 2017. On August 31, 2017, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition are based on sections 30, 16 and 2 of the Act. As 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 (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 before this date).

[5] On November 21, 2017, the Applicant filed and served a counter statement denying the grounds of opposition. Both parties submitted evidence and written representations and were represented at a hearing.

OVERVIEW OF THE EVIDENCE

[6] The evidence of record is briefly summarized below. Pertinent portions of the evidence are discussed further in the analysis of the grounds of opposition. In reaching my decision, I have considered all the evidence in the file. However, only those portions of the evidence that are directly relevant to my findings are discussed.

Opponent's evidence – Affidavit of Shehan De Silva

[7] The Opponent filed the affidavit of Shehan De Silva, sworn March 21, 2018. Mr. De Silva is the founder of the Opponent, which is headquartered in Toronto, Ontario. Mr. De Silva has been employed at the Opponent since 2015, serving as the President and CEO. Mr. De Silva was not cross-examined on his affidavit.

[8] Mr. De Silva states that the Opponent manufactures and sells craft beer and provides brewery and distillery services in Canada, and has done so since 2015. The Opponent's beers are available at the LBCO, Beer Store, and grocery locations across Ontario, as well as select bars and restaurants, such as Oliver & Bonacini and Jack Astor's, venues owned by Maple Leaf Sports & Entertainment, and Cineplex. Mr. De Silva states that in addition to Ontario, the

Opponent has sold and continues to sell its beer in Manitoba, Newfoundland, and New Brunswick.

[9] Mr. De Silva states that the Opponent uses the trademark LOST CRAFT in association with beer and apparel and has sold such goods since as early as 2015. Printouts (dated March 21, 2018) from the Opponent's website at *lostcraft.ca* and from the LCBO website are provided as exhibits. These printouts establish that the trademark LOST CRAFT prominently appears on the Opponent's beer cans, as well as on its website. The LOST CRAFT trademark is also prominently featured on the Opponent's social media, including Instagram, Twitter, and Facebook.

[10] Mr. De Silva states that the Opponent has won numerous awards for its beers and brewery and distillery services, including "Best of Show" and "Gold" for the Lagered Ale category at the Ontario Brewing Awards in 2017. The Opponent was also a finalist for "Entrepreneurial Marketer of the Year" from the Canadian Association of Marketing Professionals in 2016. Printouts of these award announcements from the *ontariobrewingawards.com* and *canadianmarketer.ca* websites are provided.

[11] Mr. De Silva states that the Opponent is also the owner of the trademark FIND YOUR CRAFT, which has been used in association with beer and brewery and distillery services since as early as October 2015. In support of this allegation of use, the Opponent provides a number of exhibits, in particular the following, which are discussed in more detail in my analysis of the grounds of opposition:

- An excerpt of a social media post dated October 21, 2015;
- Photographs of the Opponent's branded vehicles bearing the trademark FIND YOUR CRAFT along with copies of invoices dated between August 10, 2016 – July 31, 2017 for the costs of branding its vehicles with, among other marks, the FIND YOUR CRAFT trademark.
- A photograph of a jockey box (e.g., a type of cooler) used for beer sales and bearing the trademark FIND YOUR CRAFT, and;

- A copy of an invoice dated 8/12/2016 for a cooler/jockey box and a mock-up of the jockey box.

[12] The Opponent owns a pending application for the trademark FIND YOUR CRAFT in association with beer. This application claims use in Canada since as early as October 21, 2015, and was filed on March 13, 2017.

[13] Mr. De Silva states that the Opponent has spent over \$200,000 since inception on advertising and marketing of its beer, brewery and distillery services in association with LOST CRAFT and FIND YOUR CRAFT, and that it has also had “significant sales of such goods and services”.

[14] Mr. De Silva states that the Opponent has gained exposure in the media, and includes copies of four articles which discuss or reference the Opponent’s business, including a blog entry dated October 28, 2016 entitled “How we grew Lost Craft’s Instagram by 10K followers in one summer”.

Applicant’s evidence – Affidavit of Joe van Heerden

[15] The Applicant filed the affidavit of Joe van Heerden, sworn July 19, 2018. Mr. van Heerden is the General Manager of the Applicant, and has held this position since July 2016. Mr. van Heerden was cross-examined on his affidavit and his transcript forms part of the record.

[16] Mr. van Heerden states that the Applicant is a Regina-based brewery which commenced brewery operations in September 2013. The Applicant brews a wide range of premium and craft beers and lagers, which are distributed to beer and liquor stores in Saskatchewan. The Applicant’s goods are also available for purchase at licensed establishments such as restaurants, bars, and taverns in the province who have obtained a commercial liquor permit through the Saskatchewan Liquor and Gaming Authority. The goods are sold under the house brand DISTRICT BREWING.

[17] Mr. van Heerden explains that in August 2016, the Applicant began the process of brainstorming and developing a new tagline to be used in conjunction with its house brand DISTRICT BREWING, to be primarily associated with the brewery services and goods sold by

the Applicant. At the time of development of the Mark, Mr. van Heerden was not familiar with the details of the Opponent's business, nor did the Applicant have knowledge of the alleged prior use of "find your craft" as a trademark in Canada, by the Opponent in association with beer or brewery services, prior to the date of filing of the subject Application with the Canadian Intellectual Property Office.

[18] Mr. van Heerden states that on or around December 2016, the Applicant formally launched its use of the Mark in association with the Goods in Canada, and attaches as exhibits representative pictures of beer cans and growlers bearing the Mark. Mr. van Heerden also provides information relating to the promotion of the Applicant and its Goods through various marketing campaigns, its website, and social media pages, including Facebook, Twitter, and Instagram.

[19] Mr. van Heerden states that no instances of confusion with the goods or services of any other company or trademarks have been brought to his attention or the attention of the Applicant, and that he is not aware that any such instances of confusion have occurred.

EVIDENTIAL BURDEN AND LEGAL ONUS

[20] Before considering the grounds of opposition, I will review the requirements of (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.

[21] With respect to (i) above, there is, in accordance with the usual rules of evidence, an evidential burden on an opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Limited v The Molson Companies Limited*, 1990, 30 CPR (3d) 293 at 298 (FCTD)]. The presence of 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 in the statement of opposition (for those allegations for which an opponent has met its evidential burden). The presence of a legal onus on an applicant means that if a determinate conclusion cannot be

reached once all the evidence is in, on a balance of probabilities standard, then the issue must be decided against an applicant.

ANALYSIS OF THE GROUNDS OF OPPOSITION

Grounds of opposition under sections 30(e) and 30(i)

[22] The grounds of opposition pleaded under section 30 of the Act, namely 30(e) and 30(i), were withdrawn by the Opponent at the hearing.

Ground of opposition under section 16(3)(a)

[23] In its statement of opposition, the Opponent alleges that the Applicant is not the person entitled to registration of the Mark in that as of the filing date of the Application, the Mark was confusing with the Opponent's trademark FIND YOUR CRAFT that had been previously used in Canada and continues to be used in Canada by the Opponent, in association with beer. However, a review of the De Silva affidavit, along with the Opponent's written and oral submissions on this ground, make it clear that the Opponent was not just relying on the goods "beer" but also the services "brewery services". Moreover, it is apparent from the Applicant's written and oral submissions that the Applicant understood the section 16(3)(a) ground to include allegations of confusion with the Opponent's trademark FIND YOUR CRAFT in association with brewery services provided by the latter. Thus, it would appear that the Applicant is aware of the case it has to meet. In these circumstances, I will address the non-entitlement ground in view of the Opponent's pleadings considered in conjunction with the evidence filed [see *AstraZeneca AB v Novopharm Ltd* (2001), 2001 FCA 296 for authority to consider a ground of opposition in view of evidence filed].

The Opponent meets its initial evidential burden

[24] To meet its evidential burden, the Opponent must show that it had used the trademark FIND YOUR CRAFT in Canada prior to September 8, 2016 [section 16(3)(a) of the Act]. Further, the Opponent must show that it had not abandoned its trademark at the date of advertisement of the Application for the Mark, namely June 28, 2017 [section 16(5) of the Act].

Sections 4(1) and 4(2) of the Act explain what is required in order for a trademark to have been used in association with goods and services:

4 (1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[25] At the hearing, the following evidence was flagged by the Opponent as establishing its prior use in Canada. As a result, I will begin by analyzing this evidence.

Instagram social media post dated October 21, 2015

[26] Exhibit G to the De Silva affidavit is described as a copy of a social media post of October 21, 2015 showing the use of the Opponent’s trademark FIND YOUR CRAFT for the promotion of the Opponent’s beer and brewery and distillery services. This Instagram post is reproduced below:



[27] The Opponent takes the position that this post is the “genesis” of the Opponent’s use of the FIND YOUR CRAFT brand, and constitutes direct evidence of advertising of this trademark

in association with brewery services. More specifically, the post associates FIND YOUR CRAFT with the beer tap (bearing the Opponent's LOST CRAFT logo) in the photograph, and that links the trademark with the brewery services that are being provided.

[28] In the post, the Opponent's trademark is in the form of a hashtag, preceded by a hash sign (#). While there is nothing that prevents a hashtag from being a trademark, for this to occur, the hashtag must function as a trademark. I do not find that "#findyourcraft" as it appears in the post constitutes trademark use since it is not treated any differently than any of the other hashtags in the text, such as "#torontobeer" and "#comingsoon", and gives no indication that it holds any trademark significance. Accordingly, even though #findyourcraft appears in an advertisement for the Opponent's brewery services, it has not been used as a trademark in association with these services. Rather, it functions solely as a hashtag as it would simply be recognized as part of a grouping of phrases relating to beer and the brewing industry generally.

[29] I also find the post fails to establish trademark use in association with beer since the post does not demonstrate that #findyourcraft is marked on the Opponent's beer packaging or is in some other way associated with the goods such that the requisite notice of association at the time of transfer is made.

[30] Accordingly, the Opponent's Instagram post fails to establish prior use of FIND YOUR CRAFT, as a trademark, in association with beer or brewery services.

Branded vehicles

[31] Mr. De Silva states that the trademark FIND YOUR CRAFT is also featured on all of the Opponent's branded vehicles to promote and advertise beer, as well as the Opponent's brewery and distillery services. Mr. De Silva states that the FIND YOUR CRAFT trademark has been featured on the Opponent's branded vehicles since as early as August 2016.

[32] Exhibit I is described as photos and markups of the Opponent's branded vehicles showing the use of the trademark FIND YOUR CRAFT for the promotion of beer and brewery and distillery services. I note that the exhibit includes undated photographs of a van, from three different angles, displaying the trademark FIND YOUR CRAFT near the roof, above the front

windshield. The van is also branded with the Opponent's trademark LOST CRAFT, as well as the phrase "Brewed in Toronto".

[33] Exhibit J contains copies of invoices issued to the Opponent for the cost of branding the Opponent's vehicles. In particular:

- Invoice #72011 is dated August 10, 2016 – the invoice is for a Sprinter Van 2500 Vehicle Wrap. I note that while the invoice is broken down to indicate "roll print" in specific areas of the van, the trademarks to be applied in these areas is not specified. The invoice indicates a pick-up date of "8/8" and the Opponent also provides a copy of the receipt showing payment.
- A number of later-dated invoices are also included. These invoices are more specific in that they identify the branding to be applied to various areas of the vehicle, for example the trademarks "FIND YOUR CRAFT" and "LOST CRAFT": invoice #77506 (dated January 23, 2017, for Renegade Decals); invoice #77960 (dated June 2, 2017, for Sprinter 3500 Cargo Van); invoice #80933 (dated April 28, 2017, for Renegade Decals); and invoice #84130 (dated July 31, 2017, for Jeep Cherokee Decals).

[34] When considered altogether, the uncontradicted statement of Mr. De Silva, coupled with photographs of a van clearly advertising the FIND YOUR CRAFT trademark and the invoice dating back to August 10, 2016, for vehicle branding services, is sufficient for me to find that the Opponent has established use of the FIND YOUR CRAFT trademark in association with brewery services. I make this finding notwithstanding that the August 2016 invoice does not specify the trademarks being applied to the van. In doing so, I have considered that just because that invoice does not identify the FIND YOUR CRAFT trademark (or any other trademark) as being applied, does not necessarily lead me to the conclusion that it was not.

[35] At the hearing, counsel for the Applicant argued there is no evidence that any of the Opponent's branded vehicles were ever on the road. However, I find it reasonable to conclude that the Opponent would have started driving the van, thus advertising its brewery services, once it was available in August 2016. Certainly, there is nothing in the evidence to suggest otherwise.

I would add that the lack of detail from the Opponent as to the location and frequency of routes the vehicle was driven goes to the distinctiveness of the Opponent's trademark.

[36] Accordingly, I find this evidence sufficient to establish use by the Opponent of the trademark FIND YOUR CRAFT in association with brewery services prior to the material date of September 8, 2016. Further, there is nothing to indicate abandonment by the Opponent of this trademark as of June 28, 2017.

[37] I do not find this evidence sufficient to establish use by the Opponent of the trademark FIND YOUR CRAFT in association with beer as there is no evidence that the mark would have been associated with the Opponent's goods at the time of transfer such that the requisite notice of association would have been made.

Jockey box/cooler

[38] Mr. De Silva states that the Opponent advertises and promotes its FIND YOUR CRAFT trademark by featuring it prominently on jockey boxes/coolers that are used for beer sales. Included as Exhibit M is a photograph of the side profile of a jockey box branded with the following:

@LOSTCRAFTBEER
#FINDYOURCRAFT

[39] Mr. De Silva states that customers at festivals and shows and other events come to buy beer, and the Opponent pours the beer from jockey boxes bearing the FIND YOUR CRAFT trademark. Mr. De Silva states that the Opponent has used such beer jockey boxes bearing the FIND YOUR CRAFT trademark since as early as 2016.

[40] A copy of an invoice for a cooler dated "8/12/2016" is attached as Exhibit N, and was identified by Mr. Silva as being dated December 8, 2016. However, at the hearing, counsel for the Opponent indicated that the date of the invoice should have instead been identified as August 12, 2016. I note that this earlier date would appear to correspond with the Opponent's VISA payment date of August 8, 2016 (8/8/16). Exhibit N also contains a mock-up of a cooler which looks the same as the side profile of the jockey box/cooler shown at Exhibit M.

[41] The Opponent takes the position that the branding on the jockey box constitutes use of the trademark FIND YOUR CRAFT since the jockey box effectively serves as packaging for beer that is provided to customers “in the field” or at outdoor venues. I agree that in this instance, #FINDYOURCRAFT does not function strictly as a hashtag, but rather as a trademark. I also find that addition of the “#” before the trademark and the removals of spaces between the constituent words to be a minor deviation of the trademark FIND YOUR CRAFT which allows it to remain recognizable [*Canada (Registrar of Trade Marks) v Cie internationale pour l’informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA); *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)]. Accordingly, as it appears on the jockey box, FIND YOUR CRAFT does appear as a trademark, more specifically, a secondary trademark underneath the house brand LOST CRAFT. However, in the absence of details of any festival, show, or other event prior to September 8, 2016, at which the Opponent would have used the jockey box in association with the sale of its beer, I am unable to conclude that this evidence establishes use of the Opponent’s trademark in accordance with section 4(1) of the Act prior to the material date.

[42] In reaching this conclusion, I acknowledge Mr. De Silva’s statement that the Opponent has constantly attended, since 2016, trade shows and beer festivals in Ontario such as the Roundhouse Beer Festival and Toronto Festival of Beer in order to promote and sell its beers and apparel with the trademark LOST CRAFT and other trademarks, such as FIND YOUR CRAFT. However, as it is not clear from the evidence when in 2016 these events occurred, I am not prepared to assume that they occurred prior to the material date of September 8, 2016.

Conclusion regarding the Opponent’s evidential burden

[43] While the Opponent could have provided more fulsome details pertaining to its use of the FIND YOUR CRAFT trademark and sales information for the Opponent’s goods and services, consideration of the De Silva affidavit as a whole permits me to find that the Opponent displayed the trademark on advertising for the Opponent’s brewery services in August 2016, and that the Opponent was offering and prepared to perform those services in Canada at that time. Further, there is nothing in the evidence to suggest that the Opponent had abandoned its trademark as of

June 28, 2017. Accordingly, I find that the Opponent has shown the requisite use (albeit minimal) allowing it to meet its burden under this ground.

[44] As I am satisfied that the Opponent has met its evidential burden under this ground of opposition, I must now determine whether the Applicant has met its onus of proving no reasonable likelihood of confusion on a balance of probabilities.

Confusion analysis

[45] 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. In making such an assessment, I must consider all the relevant surrounding circumstances, including those listed in section 6(5): the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[46] The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 (SCC) at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at paragraph 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[47] Importantly, section 6(2) does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source. In the instant case, the question posed by section 6(2) is whether purchasers of the Applicant's Goods, provided under the trademark FIND YOUR CRAFT, would believe that those Goods were being provided by the Opponent, or that the Applicant was authorized or licensed by the Opponent who offers brewery services under the trademark FIND YOUR CRAFT.

[48] In the present case, and in the absence of significant representations on this issue from the parties, I do not consider it necessary to engage in a lengthy confusion analysis. The parties' trademarks are identical in appearance, sound, and idea suggested. Both of the parties' marks share the same degree of inherent distinctiveness, being somewhat suggestive of the character of the Applicant's beer and the Opponent's brewery services.

[49] Regarding the extent known and length of time in use, this factor does not significantly favour either party. While the Opponent is the earlier user of the trademark (August 2016), its use is minimal, preceding the material date by only one month. Mr. De Silva's affidavit lacks details on the frequency and/or locations travelled by the van bearing the Opponent's trademark, which makes it difficult to assess the extent of consumer exposure. In addition, the sales associated with the Opponent's brewery services is not provided as of the material date or at any other time, and are instead only identified as "significant", which is of limited assistance. With respect to the evidence of the Applicant's use in Mr. van Heerden's affidavit, none of this had occurred by the material date.

[50] With respect to the nature of the goods and services, there is clear overlap between the Opponent's brewery services and the Applicant's beer. The evidence suggests that the parties' goods and services travel through similar channels of trade, namely liquor stores and select bars and restaurants, though the parties currently appear to operate in different provinces. The parties also share the same target clientele, namely customers with an interest in craft beer.

[51] As an additional surrounding circumstance, the Applicant's evidence is that no instances of confusion with the goods or services of any other company or trademarks have been brought to the attention of Mr. van Heerden or the attention of the Applicant, and Mr. van Heerden is not aware that any such instances of confusion have occurred. However, the parties appear to operate in different provinces. Further, both parties have evidenced use of the FIND YOUR CRAFT trademark in conjunction with their respective house brands, which are prominently featured. The presence of the house brands as used may explain the lack of actual confusion [see *Gurwitch Products, LLC v Groupe Marcelle Inc*, 2014 TMOB 22]. In any event, the evidence of coexistence without confusion post-dates the material date for the section 16(3)(a) ground of opposition. In view of the above, I do not consider this circumstance to assist the Applicant.

[52] Considering all of the surrounding circumstances, in particular that the parties' marks are identical, and that there is significant overlap in the nature of the parties' goods and services, I find that the Applicant has not satisfied its onus of establishing on a balance of probabilities that there is no reasonable likelihood of confusion as between the Mark and the Opponent's FIND YOUR CRAFT trademark. Accordingly, this ground of opposition is successful.

Ground of opposition under section 2

[53] The Opponent has pleaded that the Mark is not distinctive of the Applicant's Goods in that the Mark does not distinguish, nor was it adapted to distinguish, the Applicant Goods from the goods of others, including those of the Opponent, at least in light of the Opponent's previous use of the Opponent's trademark FIND YOUR CRAFT in association with the Opponent's goods.

[54] The material date to assess this ground of opposition is the filing date of the statement of opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)]. In this case, a statement of opposition meeting the requirements of section 38(3)(a) of the Act was filed on August 31, 2017. A statement of opposition had been previously filed earlier that month by the Opponent but was not made of record by the Registrar as it did not meet these requirements.

[55] Accordingly, to meet its evidential burden under this ground of opposition, the Opponent must demonstrate that its FIND YOUR CRAFT trademark was sufficiently known on August 31, 2017 to negate the distinctiveness of the Mark [*Motel 6, Inc v No. 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International, LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]. More particularly, the Opponent must show that its mark was known in Canada to some extent, having a "substantial, significant or sufficient" reputation to negate distinctiveness, or else "well known in a specific area of Canada" [*Bojangles, supra*, at para 33]. In this regard, the Opponent's evidence is not restricted to the sale of goods or services in Canada. It may also be based on evidence of knowledge or reputation of an opponent's trademark including that spread by means of word of mouth or newspaper and magazine articles [*Motel 6, Inc v No 6 Motel Ltd, supra*, at 58-59].

The Opponent fails to meet its initial evidential burden

[56] In its written argument, the Opponent submits that as of the material date, it had a sufficient reputation in Canada in association with its goods so as to negate any distinctiveness that the Applicant may have acquired during its more limited time in the market. The Opponent submits that it was using the FIND YOUR CRAFT trademark on the Opponent's branded vehicles and on jockey boxes prior to the Applicant entering the market with its mark. The Opponent further notes that it has spent over \$200,000 building out its brand and the distinctiveness of its FIND YOUR CRAFT trademark. At the hearing, counsel for the Opponent submitted that the evidence establishes that the Opponent's trademark had sufficient reputation in Ontario as of August 2017 so as to negate any distinctiveness of the Applicant's trademark.

[57] From my review of the evidence, I am prepared to accept that the Opponent has demonstrated that the FIND YOUR CRAFT trademark had become known to some extent at least in Ontario as of the material date of August 31, 2017. However, I am not satisfied that the Opponent's evidence demonstrates that the Opponent's FIND YOUR CRAFT trademark had a reputation that was "substantial, significant or sufficient" in Canada to negate the distinctiveness of the Applicant's Mark or, alternatively, that the Opponent's trademark was well known in Ontario [per *Bojangles, supra*]. In so finding, I note the following:

- While the Opponent's trademark appeared on a jockey box in August 2016, the Opponent has not provided sufficiently detailed information setting out where it was subsequently employed. The De Silva affidavit simply references two beer festivals (with no indication of the dates of these events and attendance numbers).
- While the De Silva affidavit establishes that the Opponent's trademark has appeared on its branded vehicles since August 2016, details relating to the frequency of their use or their degree of exposure to the public up until the material date of August 31, 2017 are lacking. For instance, information on the particular areas where the vehicles were driven, for example, downtown Toronto or the GTA, routes, or visits to high density areas or venues are not provided.

- I have not considered Mr. De Silva’s evidence relating to the use of chalkboards bearing the trademarks LOST CRAFT and FIND YOUR CRAFT since June 2017 at “marketing and promotional events” given that the Opponent has not provided any photographic evidence of these chalkboards but rather has only provided mock-ups.
- Extracts of the Opponent’s website show extensive use of the Opponent’s LOST CRAFT trademark and logo, and the awards cited by the Opponent also refer to LOST CRAFT brewery. However, there is no reference to FIND YOUR CRAFT in these materials.
- Mr. De Silva states that the Opponent has gained exposure in the media and includes four articles dating between October 28, 2016 and July 6, 2017. None of these articles include reference to FIND YOUR CRAFT.
- The Opponent emphasizes its use of social media, including Instagram, Twitter and Facebook, to promote the Opponent’s goods and services. The De Silva affidavit includes as Exhibit D sample print-outs from the Opponent’s Instagram, Twitter and Facebook social media pages. Notwithstanding that most of the printouts feature undated content or content falling outside the material date, it is significant that these media references prominently and principally feature the Opponent’s LOST CRAFT trademark and logo, as this suggests that any corresponding reputation would be for these trademarks.
- The Opponent indicates that it has spent over \$200,000 since inception on advertising and marketing of its beer, brewery and distillery services in association with LOST CRAFT and FIND YOUR CRAFT. However, this figure does not indicate the amount attributable to the promotion of the FIND YOUR CRAFT trademark specifically. The marketing materials attached to the De Silva affidavit suggest that the Opponent’s focus is its house brand, namely LOST CRAFT, and it is reasonable to assume that the advertising expenditures would correspond accordingly.

[58] Accordingly, this ground of opposition is rejected.

DISPOSITION

[59] In view of the above, 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.

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2021-03-17

APPEARANCES

Michal Kasprowicz

FOR THE OPPONENT

Lorraine Pinsent

FOR THE APPLICANT

AGENT(S) OF RECORD

DLA Piper (Canada) LLP

FOR THE OPPONENT

MLT Aikins LLP

FOR THE APPLICANT