



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 177

Date of Decision: 2021-08-10

IN THE MATTER OF AN OPPOSITION

Avana Canada Inc.

Opponent

and

Runway Blue, LLC

Applicant

1,812,708 for AVANA

Application

INTRODUCTION

[1] Runway Blue, LLC (the Applicant) has filed application No. 1,812,708 (the Application) to register the trademark AVANA (the Mark). The Application is based on proposed use of the Mark in Canada in association with the following goods:

Glass beverage bottles, sold empty; metal beverage bottles, sold empty; sports bottles sold empty; reusable plastic water bottles sold empty; reusable stainless steel water bottles sold empty; squeeze bottles sold empty; drinking bottles for sports; thermally insulated containers for food or beverages; insulated containers for food or beverage for domestic use; thermal insulated wraps for cans to keep the contents cold or hot; insulated containers to keep food or beverages cold or hot; insulated flasks; cups, containers and bottles with agitators for mixing or blending food or drinks in the nature of shaker cups, containers and bottles sold empty; beverage glassware; drinking glasses; cups; pitchers; containers for household or kitchen use, namely, plastic, glass, or stainless steel containers for beverages or liquid foods, sold empty; water bottle and sports bottle belts

for fitness activities; plastic water bottle holders and attached carabiner clip sold as a unit; hydration packs containing a fluid reservoir, delivery tube, and mouthpiece; insulated water bottle holders in the nature of thermal insulated wrap for cans to keep the contents cold.

[2] The Application was filed on December 6, 2016 and claims priority to a corresponding application filed in the United States on June 7, 2016.

[3] The Application was advertised for opposition purposes in the *Trademarks Journal* on July 25, 2018. On December 21, 2018, Avana Canada Inc. (the Opponent) filed a statement of opposition against the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). I note that the Act was amended on June 17, 2019, and pursuant to section 70 of the Act, the grounds of opposition in this proceeding will be assessed based on the Act as it read prior to June 17, 2019.

[4] The Opponent raises grounds of opposition under sections 30(a) and (e) of the Act. The grounds of opposition are set out in paragraphs 3(a) through (c) of the statement of opposition which are reproduced in their entirety, below:

(a) pursuant to paragraph 38(2)(a), the Application does not comply with the requirements of subsection 30(a) in that the Application does not contain a statement in ordinary commercial terms of the specific goods or services in association with which the mark has been or is proposed to be used;

(b) pursuant to paragraph 38(2)(a), the Application does not comply with the requirements of subsection 30(e) in that the Applicant, as of the date of filing of the Application, had actually used the Trade-mark in Canada in association with some or all of the goods listed in the Application; and

(c) in the alternative to the ground set out in paragraph 3(b) above, pursuant to paragraph 38(2)(a), the Application does not comply with the requirements of subsection 30(e) in that the Applicant did not, as of the date of filing of the Application, intend to use the Trade-mark in association with each of the goods listed in the Application.

[5] The Applicant filed a counter statement denying the grounds of opposition.

[6] Both the Opponent and the Applicant elected not to file any evidence. Neither party filed written representations or requested a hearing.

[7] For the reasons set out below, the opposition is rejected.

ANALYSIS

[8] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the 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 Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[9] The material date for each of the grounds of opposition in this case is the Application filing date [*Delectable Publications Ltd v Famous Events Ltd*, (1989) 24 CPR (3d) 274 (TMOB); and *Canadian National Railway Co v Schwauss* (1991), 35 CPR (3d) 90 (TMOB)].

[10] With respect to the section 30(a) ground of opposition, the Opponent has not identified in its statement of opposition *which* of the goods listed in the Application allegedly do not comply with section 30(a), and consequently this ground of opposition is rejected as being insufficiently pleaded [see *K-tel International Ltd v 133064 Canada Inc* (1998), 86 CPR (3d) 122 (TMOB); and *Where Magazines International et al v Nystrom Division of Herff Jones, Inc* (2004), 42 CPR (4th) 271 (TMOB)]. In any event, the Opponent did not file any evidence or make any submissions relating to this ground, and therefore this ground of opposition is also rejected on the basis that the Opponent did not meet its initial burden.

[11] With respect to the section 30(e) ground of opposition, the Opponent has not filed any evidence to support either aspect of this ground as plead in paragraphs 3(b) and (c) of the statement of opposition. The section 30(e) ground of opposition is therefore rejected as the Opponent has not met its initial evidential burden.

DISPOSITION

[12] In view of the above, 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.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Blake, Cassels & Graydon LLP

For the Opponent

Cassan Maclean IP Agency Inc.

For the Applicant