



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 262

Date of Decision: 2021-11-29

IN THE MATTER OF AN OPPOSITION

Oxygen Biological Inc.

Opponent

and

**Larosh Dermocosmetic Laboratories
Inc.**

Applicant

**1,828,768 for OXYGEN
BOTANICALS & Design
1,828,772 for O OXYGEN
BOTANICALS & Design**

Applications

INTRODUCTION

[1] Oxygen Biological Inc. (the Opponent) opposes registration of the trademarks OXYGEN BOTANICALS & Design and O OXYGEN BOTANICALS & Design, shown below, which are the subject of application Nos. 1,828,768 and 1,828,772 respectively (collectively, the Marks), filed by Larosh Dermocosmetic Laboratories Inc. (the Applicant).

App. No. 1,828,768

OXYGEN
BOTANICALS

App. No. 1,828,772



[2] Both applications (the Applications) were filed on March 22, 2017, and are based on use of the trademarks in Canada since at least as early as June 30, 2000 with a variety of personal and skin care products, cosmetics, and related goods. A complete listing of the goods associated with the Applications (which are the same in both applications) is included under Schedule A to this decision.

[3] The Applications were advertised in the *Trademarks Journal* of April 18, 2018.

[4] The oppositions in the present case are based on a single ground of opposition. Specifically, the Opponent alleges that the applications do not conform to the requirements of section 30(b) of the *Trademarks Act*, RSC 1985, c T-13 (the Act).

[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 reject the oppositions.

THE RECORD

[7] The Opponent filed its statements of opposition on September 17, 2018. The Applicant filed and served its counter statements denying the ground of opposition.

[8] In support of its oppositions, the Opponent filed the affidavit of Fay O'Brien, sworn on December 16, 2018, together with Exhibits A through E. Identical evidence was filed in both oppositions. Ms. O'Brien was not cross-examined on her affidavit.

[9] The Applicant did not file any evidence.

[10] Neither party filed written representations or requested an oral hearing.

THE PARTIES' RESPECTIVE BURDEN OR ONUS

[11] The Applicant bears the legal onus of establishing, on a balance of probabilities that the applications comply 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].

SECTION 30(B) GROUND OF OPPOSITION

[12] The Opponent has plead that the Applications do not conform to the requirements of section 30(b) of the Act since the Applicant has not used the Marks in Canada in association with the goods in the applications since the date of first use claimed, nor did the Applicant intend to use the trademarks in Canada. Further, the Opponent has plead that the Applications were not filed in compliance with section 30(b) in that the Applicant did not use the Mark(s) as a trademark in Canada pursuant to sections 2 and 4(1), namely for the purpose of distinguishing or so as to distinguish its goods and/or in the normal course of trade.

[13] The material date with respect to a ground of opposition based upon section 30(b) of the Act, is the filing date of the applications; in this case, both applications were filed on March 22, 2017 [see *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 at 296 (FCTD)].

Burden under Section 30(b)

[14] Section 30(b) of the Act requires that there be continuous use of the applied-for trademark in the normal course of trade from the date claimed to the filing date of the application [*Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD) at 262].

[15] While the legal burden is upon an applicant to show that its application complies with section 30 of the Act, there is an initial evidential burden on an opponent to establish the facts relied upon by it in support of its section 30 ground [see *Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 at 329 (TMOB); and *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)]. With respect to section 30(b) of the Act in particular, an opponent's initial burden has been characterized as light due to an opponent's limited access to information regarding use relative to the applicant. While an opponent can meet its initial burden by reference to its own evidence, its burden can in some cases be met with reference to the applicant's evidence [*Molson Canada v Anheuser-Busch Inc* 2003 FC 1287, 29 CPR (4th) 315]. In the present case, as previously indicated, the Applicant has not filed any evidence.

[16] If an opponent succeeds in discharging its initial evidential burden, the applicant must then, in response, substantiate its claim of use during the material time. However, while an opponent is entitled to rely on the applicant's evidence, if any, to meet its evidential burden, the applicant is under no obligation to evidence its claimed date of first use if this date is not first put into issue by an opponent meeting its evidential burden [see *Kingsley v Ironclad Games Corporation*, 2016 TMOB 19, at para 63].

Evidence

[17] Ms. O'Brien is an agent contracted by the agents for the Opponent.

[18] Ms. O'Brien attests that on November 11, 2018, she conducted a Google search for the company "Larosh Dermocosmetic Laboratories Inc.", which revealed the company website to be "larosh-dermocosmetics.com". She attests that she then conducted a WHOIS search for *www.larosh-dermocosmetics.com*, which showed that this domain name was registered on

November 22, 2014 to Larosh Dermocosmetic Laboratories Inc. with a street address of “Unit #1, 11 Canadian Road, Scarborough, ON, M1R 5G1, Canada.” The results of both the Google search and WHOIS search are attached as Exhibits B and C to her affidavit.

[19] Ms. O’Brien states that the “Brands” section of the website at Exhibit C, displayed the trademark O OXYGEN BOTANICALS (app. No. 1,828,772), but did not provide any information at the time of her search as to when the Marks were introduced into the Canadian marketplace.

[20] Ms. O’Brien then attests that also on November 11, 2018, she conducted a search of the Internet archive Wayback Machine for the website at Exhibit C (*www.larosh-dermocosmetics.com*), the results of which she attaches as Exhibit D to her affidavit. She explains that the Wayback Machine indicated that the site had been saved nine times between December 26, 2015 and April 14, 2018, but that there was no captured data for the year 2000. She states that the first snapshot through the Wayback Machine was on December 26, 2015, which was a single page stating “Larosh is getting a makeover”, without any appearance of the Marks. She explains that this single page was shown as snapshots for January 25, 2016, April 7, 2016, May 11, 2016, July 2, 2016, and January 7, 2018, and that there were no snapshots for 2017.

[21] Lastly, she attaches as Exhibit E to her affidavit, a snapshot from the Wayback Machine for March 29, 2018, for the website *www.larosh-dermocosmetics.com*, wherein the O OXYGEN BOTANICALS & Design mark (app. No. 1,828,772) appears under “Brands”. She concludes her affidavit by stating that she did not conduct any additional searches of the Wayback Machine as they would be beyond the material date related to the ground of opposition in these proceedings.

Analysis and Conclusion

[22] While the evidence may cast doubt as to whether the Applicant used the Marks since the date of first use claimed in the applications, I note that the claim of use of the Marks in the Applications read as follows:

Used in Canada

Since at least as early as 2000-06-30

The applicant or the applicant's predecessor(s) in title (CMI Cosmetic Manufacturers Inc.) has/have used the trade-mark in association with the goods.

Thus, the Applicant may rely on the use of the trademark applied-for by a predecessor-in-title, as that entity has been identified in the application [see *ServiceMaster Co v 385 MKE Ltd*, 2015 TMOB 188].

[23] All of the Opponent's evidence with respect to its allegations under section 30(b), relate to an attempt to demonstrate non-compliance by the Applicant. However, the Applicant has clearly named a predecessor-in-title in the applications for the Marks, and the Opponent has not led any evidence whatsoever regarding use or non-use of the Marks by the Applicant's predecessor-in-title CMI Cosmetic Manufacturers Inc. Furthermore, as previously indicated, the Opponent did not present any arguments in support of its allegations set out in this ground of opposition. Thus, although the Opponent's burden under a ground of opposition based upon section 30(b) of the Act is less onerous, I find the Opponent has failed to raise sufficient doubt as to the veracity of the Applicant's claimed date of first use. Moreover, there is no evidence to support or cast doubt that the Marks were not used as trademarks in Canada pursuant to sections 2 and 4(1) [namely for the purpose of distinguishing or so as to distinguish its goods and/or in the normal course of trade, per the allegations in the statement of opposition].

[24] The section 30(b) grounds of opposition are therefore dismissed for the Opponent's failure to meet its initial evidential burden.

DISPOSITION

[25] Having regard to the aforementioned, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the oppositions pursuant to section 38(12) of the Act.

Kathryn Barnett
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Goods (application Nos. 1,828,768 and 1,828,772)

- (1) Skin care products, namely, face creams, hand creams, toners, cleansers, moisturizers, sun block, and skin treatment serums and collagen supplements; shampoos, conditioners and hair forming lotions; cosmetics, namely foundation, blush, lipstick, eyeliner, bronzing powders, nail polish and nail polish remover; oxygen machines for application of oxygen to the epidermis.

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

No hearing held

AGENTS OF RECORD

O'Brien TM Services Inc. (Chantal St. Denis)

For the Opponent

Miller Thomson LLP (David J. Schnurr)

For the Applicant