

LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 287**

**Date of Decision: 2021-12-21**

**IN THE MATTER OF AN OPPOSITION**

**Fort Garry Brewing Company LP**

**Opponent**

**and**

**True North Wine and Spirits Ltd.**

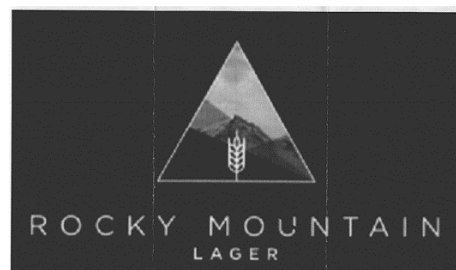
**Applicant**

**1,844,904 for ROCKY MOUNTAIN  
LAGER & DESIGN**

**Application**

OVERVIEW

[1] True North Wine and Spirits Ltd. (the Applicant) has applied to register the trademark ROCKY MOUNTAIN LAGER & DESIGN (the Mark) in association with beer. The Mark is depicted below.



[2] Fort Garry Brewing Company LP (the Opponent) opposes the application based on the Opponent's registration and use of the trademark Rocky Mountain Pilsner and Mountains Design (registration No. TMA773,627), also in association with beer.

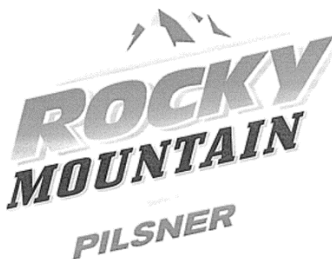
[3] For the reasons set out below, the application is refused as the Applicant has not met its burden to demonstrate that there is no likelihood of confusion between the parties' trademarks.

#### THE RECORD

[4] Application No. 1,844,904 (the Application) was filed on June 21, 2017 based on proposed use of the Mark in Canada.

[5] The Application was advertised for opposition purposes in the *Trademarks Journal* on February 27, 2019. On March 11, 2019, 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.

[6] The Opponent raises grounds of opposition based on registrability under section 12(1)(d), entitlement under section 16(3)(a), distinctiveness under section 2, and non-compliance with section 30(i) of the Act. For the grounds of opposition based on an alleged likelihood of confusion, the Opponent relies on its registration and use in Canada of the trademark Rocky Mountain Pilsner and Mountains Design (TMA773,627) depicted below:



[7] The Opponent's registration includes the following colour claim:

Colour is claimed as a feature of the trade-mark. The shadows on the mountains, the word pilsner and the letters in the word Rocky are green. The shadows on the front sides

of the mountains and the line under the mountains are grey; the shading around the letters in the word Rocky and the shading around the letters in the word Mountain are grey. The letters in the word Mountain are black.

[8] The Applicant filed a counter statement dated April 5, 2019. Both parties filed evidence and written representations. No hearing was held.

#### EVIDENCE

[9] Salient aspects of the parties' evidence are summarized below, and are further discussed in the analysis of the grounds of opposition.

#### **Opponent's Evidence**

[10] The Opponent filed as its evidence the affidavit of Orest Horechko sworn July 23, 2019 (the Horechko Affidavit). Mr. Horechko is the General Manager of the Opponent.

[11] The Opponent is located in Winnipeg, Manitoba. Mr. Horechko describes the Opponent as a microbrewery that is considered to be Manitoba's oldest microbrewery. The brewery started in 1930 and in 1961 was sold to Molson and was incorporated as Molson's Fort Garry Brewery Ltd. In 1990, Molson merged with Carling-O'Keefe and closed the facility. In 1994, the brewery was resurrected under the name Fort Garry Brewery Ltd., which later changed its name to Fort Garry Brewing Company. In 2007, Fort Garry Brewing Company merged with Russell Brewing Company Ltd. and operated as a wholly owned subsidiary. In 2016, Russell Brewing Company Ltd. sold Fort Garry Brewing Company to the Opponent. Mr. Horechko states that the brewery has been continuously brewing beer since 1930, with the exception of the above-referenced 4 year period when the brewery was closed.

[12] Mr. Horechko states that as part of the 2016 transaction, trademarks previously owned by Fort Garry Brewing Company and trademarks created while operating under Russell Breweries Inc. were assigned back to the Opponent. Exhibit "B" to his affidavit is a printout of the Canadian Intellectual Property Office website relating to registration No. TMA773,627 showing the original registrant as Russell Brewing Company Ltd. (having an address in Surrey, British Columbia) and the current owner of the registration as the Opponent.

[13] Mr. Horechko describes that on January 29, 2009, the Opponent's predecessor Russell Brewing Company Ltd. filed application No. 1,426,038 to register the trademark Rocky Mountain Pilsner and Mountains Design, depicted in paragraph 6 of this decision, above (this trademark is described in the Horechko Affidavit as the ROCKY MOUNTAIN PILSNER & Design trademark). This trademark was registered on August 4, 2010 under registration No. TMA773,627. A certified copy of this registration is included as Exhibit "D" to the Horechko Affidavit.

[14] Mr. Horechko states that ROCKY MOUNTAIN PILSNER & Design beer was first sold by Russell Brewing Company Ltd. in 2009, and has been continuously sold since then. Exhibit "E" to the Horechko Affidavit is a photograph of a can of the beer bearing the ROCKY MOUNTAIN PILSNER & Design trademark. Exhibit "G" includes printed "sell sheets" from 2011 to 2013 promoting the beer and bearing the trademark. Exhibit "F" is a picture of a neck tag used on beer kegs that was created in 2010. The neck tag bears the mark ROCKY MOUNTAIN PILSNER, but not the precise design trademark that is the subject of TMA773,627.

[15] Exhibit "H" is an article entitled "Canadian Brewing Awards 2009 Results" indicating that the Bronze Medal for Best North American Style Lager in 2009 was awarded to "Rocky Mountain Pilsner, Russell Brewing (BC)".

[16] Mr. Horechko states that ROCKY MOUNTAIN PILSNER & Design beer is distributed in Manitoba and Saskatchewan and will be distributed in Alberta in the fall of 2019. He states that the beer is sold in liquor stores, restaurants and bars. Exhibit "I" to his affidavit are copies of Purchase Orders by Manitoba Liquor & Lotteries for the beer from October 2017 to May 2019. Exhibit "J" are copies of Purchase Orders by Saskatchewan Liquor and Gaming Authority from 2018. In the purchase orders the beer is identified as ROCKY MOUNTAIN PILSNER.

[17] Mr. Horechko states that "Pilsners" are a type of lager beer that originated from the Czech Republic.

## **Applicant's Evidence**

[18] The Applicant filed the affidavit of Troy Kamphuis-Finnigan sworn October 15, 2019 (the Kamphuis-Finnigan Affidavit). Mr. Kamphuis-Finnigan is the President of the Applicant. He states that “[i]n January 2016, I opened a brewery called Rapid Ascent Brewing Company in Calgary, Alberta and have been brewing Rocky Mountain Lager in my brewery using local ingredients.”

[19] I note that the affidavit does not describe what, if any, connection exists between the Applicant and Rapid Ascent Brewing Company, other than it is apparent that Mr. Kamphuis-Finnigan is involved in both entities.

[20] Mr. Kamphuis-Finnigan states that in or about 2017, he started the development of the can design for Rocky Mountain Lager, a copy of which is included as Exhibit “A” to his affidavit. The can design included as Exhibit “A” bears the Mark and the name Rapid Ascent Brewing Company. He states that the Rocky Mountain Lager brand has been promoted/advertised and is now widely recognized within the Province of Alberta. Attached as Exhibit “B” to the affidavit is a document described as the listing for advertising in Sobeys/Safeway flyers. Exhibit “C” are copies of invoices from 2019 showing the purchase of local malts and hops by Rapid Ascent Brewing Company.

[21] At paragraph 9 of his affidavit, with respect to the Rocky Mountain Lager, Mr. Kamphuis-Finnigan states that “We only sell this particular brand in Alberta. We have no intention of selling this brand with this trademark in Manitoba.” Exhibit “E” to the Kamphuis-Finnigan Affidavit is described as partial lists of sales throughout Alberta beginning in May 2018. In Exhibit “E”, the “Supplier” is identified as “Rapid Ascent”, and the purchasers appear to be primarily liquor stores, as well as some hotels and at least one restaurant.

## ONUS

[22] 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].

#### ANALYSIS

#### **Section 12(1)(d) Ground of Opposition**

[23] The material date for the section 12(1)(d) ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[24] I have exercised my discretion to check the register and confirm that registration TMA773,627 remains extant and the Opponent is the owner of that registration [see *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden for this ground. The legal burden is therefore on the Applicant to demonstrate on a balance of probabilities that there is no likelihood of confusion.

#### Test for confusion

[25] The test for confusion is set out in section 6(2) of the Act which provides 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, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: 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.

[26] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at

para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 at para 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.

[27] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

*The inherent distinctiveness of the trademarks and the extent to which they have become known*

[28] The Opponent's trademark has a low degree of inherent distinctiveness. The dominant element of the Opponent's trademark is the term "ROCKY MOUNTAIN", which is suggestive of a geographic location. The trademark also includes the descriptive word "PILSNER", which is defined in the *Canadian Oxford Dictionary, 2nd Ed.* as "a pale lager beer with a strong flavour of hops." [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29 which provides that the Registrar can take judicial notice of dictionary definitions]. The Opponent's trademark also includes a mountain design element, though I do not consider that design element to lend much inherent distinctiveness to the mark.

[29] I note that the Applicant in its counter statement and written representations argues that the Opponent's registered trademark is invalid on the basis that it deceptively misdescribes that the Opponent's beer comes from the Rocky Mountains when the Opponent is in fact located in Manitoba. However, the Opponent's registration is presumed valid, and in the context of an opposition proceeding under section 38 of the Act, the Registrar does not have the jurisdiction to expunge or otherwise declare an opponent's registration invalid [see *La Céleste Levure Inc v Seleccion de Torres, SL*, 2012 TMOB 196, 105 CPR (4th) 186 at para 19; see also *Magill v Taco Bell Corp* (1990), 31 CPR (3d) 221 (TMOB) at para 22].

[30] With respect to the Applicant's Mark, in my view, it has a slightly higher degree of inherent distinctiveness than the Opponent's trademark, given that the design element in the Mark is larger and more detailed than that in the Opponent's trademark. However, I still consider

the Mark to have a rather low degree of inherent distinctiveness, given the dominant element “ROCKY MOUNTAIN” and the descriptive word “LAGER” (the above-referenced dictionary defines “lager” as “a kind of beer, effervescent and light in colour and body.”).

[31] With respect to the extent to which the trademarks have become known, the evidence indicates that the Opponent’s trademark has been used by the Opponent and its predecessor since 2009, and the Opponent has provided evidence of numerous purchase orders for its product bearing the trademark from 2017 to 2019. Consequently, I am satisfied that the Opponent’s trademark has become known to some extent in association with beer. The Applicant’s Mark has likely also become known to some extent. The Applicant’s evidence indicates that use of the Mark commenced in May 2018 and the Applicant provided a partial list of sales of the product in Alberta since that time.

[32] As noted in my discussion of the Applicant’s evidence, above, there is an ambiguity in that evidence as to what entity is using the Mark, namely, the Applicant or Rapid Ascent Brewing Company. However, in my view, it is not necessary to resolve that issue in order to resolve the present opposition.

[33] On balance, given the greater inherent distinctiveness of the Mark, I consider this factor to favour the Applicant, but only slightly.

*The length of time the trademarks have been in use*

[34] The Opponent’s evidence indicates that the Opponent’s trademark has been in continuous use since 2009. Use of the Applicant’s Mark commenced in 2018. Consequently, this factor favours the Opponent.

*The nature of the goods, services or business; and the nature of the trade*

[35] Both parties sell beer and thus the nature of the goods are identical. The nature of the trade also appears to be identical as both parties sell to liquor stores and restaurants.

[36] The Applicant notes in its written representations that the two parties generally operate in different provinces – the Applicant in Alberta and the Opponent in Manitoba. However, the



confusion analysis under section 6(2) of the Act must consider the circumstances if the two trademarks were to be used in the same geographic area [*Masterpiece, supra*, at paras 28-30].

[37] Overall, this factor favours the Opponent.

*Degree of resemblance*

[38] In considering the degree of resemblance, it is preferable to determine whether there is an aspect of each trademark that is “particularly striking or unique” [*Masterpiece, supra*, at para 64]. In my view, the striking aspect of both parties’ trademarks is the term “ROCKY MOUNTAIN”. While this term has a low degree of inherent distinctiveness, it is nevertheless the most prominent element of both parties’ trademarks. There is therefore a reasonably high degree of resemblance between the trademarks, particularly when sounded and in the idea conveyed.

[39] With respect to appearance, the specific mountain designs depicted in the trademarks are different, with the Mark including an ear of grain design and triangular border that are absent from the Opponent’s trademark. However, both trademarks have a similar overall configuration, with the term “ROCKY MOUNTAIN” placed between a mountain design above, and a term descriptive of beer below.

[40] On balance, this factor favours the Opponent.

*Surrounding circumstances – state of the Register*

[41] On page 2 of the Applicant’s written representations, the Applicant states that “a search on the Canadian Intellectual Property (CIPO) website regarding the words ROCKY MOUNTAIN indicates that 182 applications have been filed for these 2 words or for trademarks of which the 2 words ROCKY MOUNTAIN are distinctive elements.” The particulars of these applications are not identified in the Applicant’s written representations. More importantly, the Applicant in this case did not file any state of the Register evidence, nor did the Applicant seek leave to file state of the Register evidence as part of its written representations. It is well established that the Registrar will not take judicial notice of the state of the Register in order to assist an applicant in such a manner [see *Molson Breweries v John Labatt Ltd (Labatt Brewing Co Ltd)* (1999), 3 CPR (4th) 543 (TMOB) at para 9]. In short, there is no state of the Register

evidence of record in this case for me to consider, and therefore this factor does not assist the Applicant.

#### Conclusion regarding the section 12(1)(d) ground

[42] Taking the above factors into account, and in particular given the degree of resemblance between the trademarks and the overlap in the goods and trade, in my view, the Applicant has not satisfied its legal burden of demonstrating no likelihood of confusion. Therefore, the section 12(1)(d) ground of opposition is successful.

#### **Section 2 Ground of Opposition**

[43] The material date for the section 2 ground of opposition is the filing date of the opposition, namely, March 11, 2019 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

[44] In order to meet its evidential burden with respect to the section 2 ground, the Opponent had to show that its trademark had a substantial, significant or sufficient reputation in Canada in association with the relevant goods as of the material date [see *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 at para 34]. I am satisfied that the Opponent has met its initial evidential burden for the section 2 ground. The evidence indicates that the Opponent's trademark has been in continuous use since 2009. While the Opponent's evidence does not include yearly sales figures, the evidence does include numerous purchase orders for hundreds of units of the Opponent's ROCKY MOUNTAIN PILSNER beer in Manitoba and Saskatchewan during the 2017-2018 period as well as examples of the display of the Opponent's trademark on advertising dating back to 2011.

[45] The legal burden then shifts to the Applicant to demonstrate that its Mark is distinctive in Canada. In considering whether a trademark is distinctive, one may consider whether it is likely to cause confusion with another party's trademark [see *Bensusan Restaurant Corp v Blue Note Restaurant Inc* (2000), 10 CPR (4th) 550 (TMOB) at para 30]. For essentially identical reasons to the analysis of confusion discussed above for the section 12(1)(d) ground of opposition, I

conclude that the Applicant has not satisfied its legal burden under section 2. Therefore, the section 2 ground of opposition also succeeds.

### **Remaining Grounds of Opposition**

[46] Since I have found in the Opponent's favour with respect to the section 12(1)(d) and section 2 grounds of opposition, I do not consider it necessary to address the remaining grounds.

### DISPOSITION

[47] 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.

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Timothy Stevenson  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

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For the Opponent

William R. Stemp (Stemp & Company)

For the Applicant