



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 056

Date of Decision: 2022-03-24

IN THE MATTER OF AN OPPOSITION

Mehusa, Inc.

Opponent

and

Peter Reimann

Applicant

1,773,347 for KALEA

Application

OVERVIEW

[1] Peter Reimann (the Applicant) has filed application No. 1,773,347 (the Application) to register the trademark KALEA (the Mark) in association with the goods “Diaries; beers”. The Application is based on use of the Mark in Canada since at least as early as October 2015. The Applicant’s products include a beer Advent calendar with different types of beer contained in a calendar-type packaging.

[2] Mehusa, Inc. (the Opponent) has opposed the Application, alleging that the Applicant has not used the Mark in Canada since the date claimed in the Application, and alleging a likelihood of confusion with the trademark KALLEH for which the Opponent had filed an application.

[3] For the reasons that follow, the opposition is rejected.

THE RECORD

[4] The Application was filed on March 21, 2016 and was advertised for opposition purposes in the *Trademarks Journal* on April 25, 2018. On September 21, 2018, the Opponent filed a statement of opposition pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Opponent was subsequently granted leave to file an amended statement of opposition dated February 25, 2019 and a re-amended statement of opposition dated July 31, 2019.

[5] 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's re-amended statement of opposition pleads grounds of opposition based on registrability under section 12(1)(d), entitlement under sections 16(1)(a), (b) and (c), distinctiveness under section 2, and non-compliance with sections 30(b) and 30(i) of the Act.

[7] The Applicant filed a counter statement denying the grounds of opposition. Both parties filed evidence and written representations and attended a hearing.

[8] At paragraph 11 of the Opponent's written representations, and confirmed by the Opponent's counsel during the hearing, the Opponent states that it is now pursuing only the grounds of opposition under section 30(b) and section 16(1)(b) of the Act, and is only pursuing the opposition in respect of the good "beers" identified in the Application. Consequently, my understanding is that the Opponent withdraws its opposition in respect of the goods "Diaries", and withdraws its grounds of opposition under sections 2, 12(1)(d), 16(1)(a) and (c) and 30(i) in respect of "beers". I will accordingly focus my analysis on the remaining grounds of opposition under sections 30(b) and 16(1)(b) in respect of "beers".

EVIDENCE

[9] The parties' evidence is summarized below and discussed further in the analysis of the grounds of opposition.

Opponent's Evidence

[10] The Opponent filed as its evidence a certified copy of Canadian trademark application No. 1,695,549 for the trademark KALLEH. This application was filed by the Opponent on September 25, 2014 based on proposed use of the trademark in Canada.

[11] The Opponent was subsequently granted leave to file as additional evidence a certified copy of registration No. TMA1,026,989, which is the registration that issued on June 17, 2019 from application No. 1,695,549. The list of goods covered by this registration is set out in Schedule A to this decision, and includes a variety of food and beverage items. I note that the Opponent's application originally included goods described as "malt beverages" which was subsequently redefined to "alcoholic malt beverages, namely, beer [...]".

Applicant's Evidence

[12] The Applicant filed an affidavit in his own name sworn September 24, 2019 (the Reimann Affidavit) and the affidavit of D. Jill Roberts sworn September 25, 2019 (the Roberts Affidavit). Neither affiant was cross-examined.

The Reimann Affidavit

[13] The Applicant is a resident of Austria and is the owner of the corporations KALEA Osterreich GmbH and KALEA Deutschland GmbH, incorporated under the laws of Austria and Germany, respectively (these two companies are collectively referred to in the Reimann Affidavit as "Kalea"). The Applicant states that these two companies were founded in 2010 and use the Mark under license from the Applicant, by which he has control over the both the character and quality of Kalea's collections of beers sold in association with the Mark.

[14] The Applicant states that the Mark has no meaning in any language, but that the word was inspired by the German language word for Kalea's main selling item, a beer calendar. First introduced in 2010, the KALEA Beer Advent Calendar provides 24 unique beers packed in a calendar-type packaging containing a different beer for each day from December 1 to December 24.

[15] Exhibit “A” to the Reimann Affidavit is described as a representative image of a KALEA Beer Advent Calendar. The image depicts the 2018 KALEA Beer Advent Calendar sold in Canada and the Applicant states that the KALEA Beer Advent Calendar for other years is substantially similar in appearance. The Mark appears in the top right corner of the calendar package.

[16] The Applicant states that Kalea sells its products bearing the Mark to importers and distributors of beer products in Canada, which in turn resell the products to beer retailers in Canada for final sales to consumers. Specific distributors in various regions across Canada are identified. The Applicant states that Kalea has been selling its beer products in Canada in this manner since at least 2012. Exhibit “E” to the Reimann Affidavit is described as an example of a purchase order from 2012 for Kalea products from a former Canadian distributor. The purchase order in Exhibit “E” is dated April 27, 2012 and identifies the product as “Kalea Calendar” in the body of the purchase order. The Applicant states that Kalea products have been available and sold in Canada continuously since 2012.

[17] The Reimann Affidavit also includes examples of online advertising displaying the Mark.

The Roberts Affidavit

[18] Ms. Roberts identifies herself as a graduate of the Law Clerk Program at Cambrian College in Sudbury, Ontario. Her affidavit includes printouts of the results of various internet searches for the word “Kalleh” as well as searches of the Canadian Intellectual Property Office Trademarks Database. To briefly summarize, I did not find the contents of the Roberts Affidavit to assist the Applicant in any way or meaningfully speak to any of the issues in play in this proceeding. I will not discuss this affidavit any further.

ONUS

[19] 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 OF THE GROUNDS OF OPPOSITION

Section 30(b) Ground of Opposition

[20] The material date for the section 30(b) ground of opposition is the filing date of the Application, namely, March 21, 2016 [see *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at para 16]. The Application claims that the Mark has been used in Canada “since at least as early as October 2015”. The Opponent alleges that the Applicant has not used the Mark prior to the claimed date of October 2015 or continuously since then, until the March 21, 2016 filing date.

[21] With a ground of opposition based on section 30(b) of the Act, it is well established that if the date of use claimed in the application is earlier than the applicant’s actual date of first use of the trademark in Canada, the section 30(b) ground of opposition is successful [see *Scenic Holidays (Vancouver) Ltd v Royal Scenic Holidays Ltd*, 2010 TMOB 63].

[22] An opponent’s initial burden under section 30(b) is light [*Tune Masters v Mr P’s Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB) at 89] and can be met by reference not only to the opponent’s evidence but also to the applicant’s evidence [*Labatt Brewing Co v Molson Breweries, A Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 230]. However, an opponent may only successfully rely upon the applicant’s evidence to meet its initial burden if the opponent shows that the applicant’s evidence puts into issue the claim set forth in the application [*Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 at paras 30-38 (*Bacardi*)].

[23] In the present case, at pages 6 through 14 of its written representations, the Opponent advances numerous arguments as to why the Applicant’s evidence does not sufficiently demonstrate use (or continuous use) of the Mark by the Applicant since at least as early as October 2015. I will endeavour to address those arguments, below. However, in my view, the section 30(b) ground can be rejected based on the threshold issue that the Opponent has not met its initial evidential burden.

[24] Recall that the Opponent did not file any evidence which calls the claimed date of use into question. Since the Opponent did not file evidence on this issue, it is important to note that the Applicant was not obliged to submit any evidence to substantiate its claimed date of use. Put another way, if the Applicant had filed no evidence at all in this case, the Applicant would succeed on the section 30(b) ground since the Opponent would have no evidence by which to meet its initial evidential burden [by way of example, see *Value Village Stores Ltd v Value Village Market (1990) Ltd* (1997), 83 CPR (3d) 521 (TMOB) at paras 7-9]. Merely pleading a section 30(b) ground is not sufficient for an opponent to meet its initial evidential burden. Of course, applicants in opposition proceedings may have other reasons beyond section 30(b) for filing evidence of use of their trademarks (*e.g.* such evidence may speak to the issue of a likelihood of confusion). In those cases where an opponent seeks to rely solely on an applicant's evidence in order to meet its initial evidential burden for the section 30(b) ground, the question becomes whether the applicant's evidence contains facts which are clearly inconsistent with the claimed date of use or otherwise cause the trier of fact to doubt that claimed date. Admissions obtained on cross-examination on an applicant's evidence, which call into question the claimed date of use, are another means by which an opponent can meet its initial evidential burden under section 30(b).

[25] In the present case, there is nothing in the Applicant's evidence that is clearly inconsistent or otherwise calls into question the claimed date of use of "since at least as early as October 2015". The Applicant's evidence indicates that KALEA beer products have been sold in Canada continuously since 2012 and the Applicant has provided a Canadian purchase order for multiple units of a "Kalea Calendar" from 2012. In this regard, I note that an applicant is free to claim in its application a date of first use which is *later* than the actual date of first use [see *Marineland Inc v Marine Wonderland & Animal Park Ltd* (1974), 16 CPR (2d) 97 (FC)]. While the Opponent argues that the purchase order alone is insufficient to demonstrate use of the Mark, the issue for the purposes of the Opponent's initial evidential burden is whether the purchase order is clearly inconsistent with the claimed date of use - which it is not. The Applicant's evidence also includes a "representative image of a KALEA Beer Advent Calendar" from 2018 which bears the Mark, along with the statement that "the KALEA Beer Advent Calendar for other years is substantially similar in appearance". While this example of the calendar from 2018 obviously post-dates the material date, the affidavit explains that this example is representative

of other years. In short, there is nothing in the Reimann Affidavit that causes me to question the claimed date of use in the Application. To the extent that the Opponent believed that the Reimann Affidavit was misleading or misrepresentative of the use of the Mark (or the continuity of that use), the Opponent had the opportunity to cross-examine Mr. Reimann and chose not to do so.

[26] While there are circumstances in which an applicant's own evidence (even in the absence of cross-examination) necessarily calls the claimed date of use into question [for example, see *911979 Alberta Ltd v Hero Nutritionals, Inc*, 2014 TMOB 72, 122 CPR (4th) 256], for the reasons set out above, the present opposition is not such a case.

[27] With respect to the Opponent's other arguments, it argues that the manner in which the word "KALEA" is depicted on the beer Advent calendar in Exhibit "A" to the Reimann Affidavit does not constitute use of the Mark, because the term appears as part of a design mark which also includes the word "Original". I do not agree with the Opponent on this point. In my view, the depiction of the term "KALEA" in Exhibit "A" constitutes use of the Mark, as the term sufficiently stands out from the simple design elements and the descriptive word "Original" which appears on a different line in a smaller font [see *Nightingale Interloc v Prodesign* (1984), 2 CPR (3d) 535 (TMOB)].

[28] In addition, the Opponent argues that the Applicant's evidence does not include documentary evidence of sales such as invoices, shipping documents, and sales figures to demonstrate continuous use of the Mark in Canada since at least as early as October 2015. I reject these arguments because they presume that the Opponent has already met its initial evidential burden on the section 30(b) ground, which it has not. The Applicant was under no obligation to produce such evidence in a circumstance where the Opponent had not filed any evidence speaking to the section 30(b) ground, and the Applicant's evidence was not clearly inconsistent with the claimed date of use.

[29] In its written representations and at the hearing, the Opponent also relied heavily on the Federal Court decision in *Bacardi, supra*, wherein a section 30(b) ground of opposition succeeded due to lack of continuous use of the trademark since the claimed date of first use. The

Opponent argues that *Bacardi* supports the position that it has met its initial evidential burden in this case. In particular, at paragraph 52 of *Bacardi*, the Federal Court states as follows:

It is reasonable for the Registrar to draw an adverse inference from so little evidence of use and conclude that the evidentiary burden with respect to use has been met by Bacardi on that basis (see: *Labatt Brewing Co. v. Molson Breweries, A Partnership*, [1996] F.C.J. No. 729 (Fed. T.D.) at para 38).

[30] However, I do not consider the facts of *Bacardi* to be comparable to the facts of the present case. In *Bacardi*, there was clear and direct evidence from the applicant that its use of the trademark was not continuous. In discussing the evidence before the Registrar in that case, the Court stated as follows at paragraph 53:

Further, Cuervo's own legal representative (Mr. Avina) indirectly explained the reason for there being so little evidence of use of the design mark during the material time. In his affidavit from 2009, Mr. Avina advised the court that sales of CASTILLO rum into Canada were halted in 1999, and did not occur again for the better part of a decade (2009 Avina Affidavit, at paras 4-6). This admitted moratorium on sales in Canada of rum bearing the word mark (CASTILLO) beginning in 1999, combined with no evidence of use of the design mark (RON CASTILLO LABEL Design) post-1999, supports the Registrar's reasonable conclusion that Bacardi had dispensed with its evidentiary burden.

[31] The Federal Court continued at paragraph 54 by stating:

Moreover, the evidence relied upon by the registrar - Marcas's "clear admission against interest" (at para 30) that it halted sales of CASTILLO rum from 1999 to 2008 - is "clearly inconsistent" with continuous use from 1998 to 2003. Indeed, it strains credulity to think of a record more inconsistent with continuous use than an admission by the applicant of that very point.

[32] In the present case, the Applicant's evidence indicates that it has continuously used the Mark in Canada since 2012, and unlike the circumstances in *Bacardi*, I have no evidence of record to call that into question.

[33] Taking the above into account, I find that the Opponent has not met its initial evidential burden for the section 30(b) ground of opposition, and therefore that ground is rejected.

Section 16(1)(b) Ground of Opposition

[34] The Opponent pleads that the Applicant is not entitled to register the Mark because it is confusing with the trademark KALLEH that is the subject of application No. 1,695,549 which was filed by the Opponent on September 25, 2014. As noted above, application No. 1,695,549 matured to registration No. TMA1,026,989 on June 17, 2019. However, since the Opponent's application was still pending on the date of advertisement of the Applicant's Application, the Opponent is free to rely on its application for the purposes of section 16(1)(b).

[35] The material date for the section 16(1)(b) ground of opposition is the date of first use of the Mark in Canada by the Applicant [see *Datascope of Canada Ltd v Datascope Corp* (1998), 81 CPR (3d) 420 (FC) at para 31]. As noted above, the Applicant's evidence indicates that it has been using the Mark continuously in Canada since 2012. The Opponent did not cross-examine that evidence or file any evidence to the contrary. As the Opponent's application was filed subsequently on September 25, 2014, the Opponent has not met its initial evidential burden for the section 16(1)(b) ground and it can be rejected on that basis.

[36] However, in the event that I am wrong in the above assessment, I will proceed with the confusion analysis as though the Opponent had met its initial evidential burden. I note that the Opponent would have met its initial evidential burden for the section 16(1)(b) ground of opposition if the material date was taken to be either the claimed date of use in the Application (October 2015) or the Application filing date (March 21, 2016).

Test for confusion

[37] 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.

[38] 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.

[39] 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

[40] Both parties' trademarks are inherently distinctive. Neither the Opponent's trademark KALLEH nor the Applicant's Mark have any dictionary meaning in English or French, and the Applicant's evidence is that the Mark is a coined term.

[41] The Applicant argued that the Opponent's trademark lacks inherent distinctiveness because the Opponent's application states that KALLEH means "cows' teats" in Farsi. However, I have no evidence before me as to how many Canadian consumers would understand the word to have that meaning, and in any event there is no connection between that definition and beer. The Opponent argued that the Mark has a lower level of inherent distinctiveness because it is similar to the English and French words "calendar/calendrier". However, I disagree with the Opponent on this point. Given the stark differences in composition and sound, I see no reasonable basis to think that an English or French speaking consumer that sees the term "KALEA" would understand that as a descriptive reference to "calendar" or "calendrier". Ultimately, I consider both parties' trademarks to be inherently distinctive, as they would likely

be perceived as either coined terms or terms that otherwise have no meaning in English or French.

[42] With respect to the extent to which the parties' trademarks have become known, I have no evidence of any use of the Opponent's trademark, and therefore I conclude that it is not known at all in Canada. There is some evidence of the Applicant's use of its Mark; however, there is no evidence to quantify the scope of that use (*e.g.* sales figures) and therefore I cannot conclude that the Mark is known to any meaningful extent in Canada.

The length of time the trademarks have been in use

[43] There is no evidence of use of the Opponent's trademark. The evidence indicates that the Applicant has used the Mark in Canada since 2012. Therefore, this factor favours the Applicant.

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

[44] The Opponent's goods include beer, as does the Application. Consequently, there is overlap between the parties' goods and I have no evidence to suggest that the likely channels of trade would be different. This factor favours the Opponent.

Degree of resemblance

[45] As noted above, the degree of resemblance is often the most significant factor in the confusion analysis. When considering the degree of resemblance, it is preferable to first consider whether there is an aspect of the trademark that is "particularly striking or unique" [*Masterpiece, supra*, at paragraph 64]. In this case, both parties' trademarks are single words that are inherently distinctive, and so the striking or unique elements are the words "KALLEH" and "KALEA" respectively.

[46] With regard to the ideas conveyed, as neither party's trademark conveys a particular meaning in English or French, there is no resemblance between the trademarks with respect to ideas conveyed.

[47] With respect to appearance, there is a certain degree of resemblance as the two words both begin with the three letters "KAL" and are of similar length.

[48] With respect to sound, the Opponent argues that there is a high degree of resemblance. There appears to be no dispute between the parties that the Opponent's trademark will be sounded in two syllables as "KAL-LEH". With respect to the Mark, the Opponent argues that it could also be sounded in two syllables with the "EA" component of the Mark being pronounced in the same manner as the English words "flea" or "pea", such that the Mark as a whole would be pronounced as "KA-LEE". The Opponent therefore argues that the trademarks will be similar when sounded.

[49] Despite able submissions by the Opponent's counsel on this point, I find myself unable to agree that the Mark is likely to be sounded in two syllables as "KA-LEE". Given the structure of the Mark as a whole, in my view, the "EA" component of the Mark is likely to be sounded in the same manner as in words with a similar structure such as "area", "idea" or "cornea" (I note that I was not presented with any evidence or argument that the Mark would be sounded differently by an English, French or bilingual speaker). That is to say, I agree with the Applicant that the Mark is likely to be sounded in three syllables as "KA-LEE-A". With this in mind, I do not consider the parties' trademarks to bear a high degree of resemblance when sounded.

[50] In view of the above, on balance, I consider the degree of resemblance factor to slightly favour the Applicant.

Conclusion regarding the Section 16(1)(b) ground

[51] Having considered all of the surrounding circumstances, I conclude that the Applicant has satisfied its legal burden to show that there is no reasonable likelihood of confusion between the parties' trademarks. Notwithstanding the apparent overlap in the goods, and taking into account that both parties' trademarks are inherently distinctive, I do not consider the degree of resemblance between the trademarks to be sufficiently high as to give rise to a likelihood of confusion. Therefore, the section 16(1)(b) ground of opposition is rejected.

[52] As noted above, the Opponent indicated that it was no longer pursuing the grounds of opposition under sections 2, 12(1)(d), 16(1)(a) and (c) and section 30(i). In any event, it should be apparent from the analysis above that I would have rejected the section 2, 12(1)(d), 16(1)(a) and (c) grounds of opposition based on the same assessment of the issue of confusion as for

section 16(1)(b), despite the different material dates. I would also have rejected the section 2 and section 16(1)(a) and (c) grounds on the basis that the Opponent did not meet its initial evidential burden, since the Opponent filed no evidence of use or making known of its trademark, or use of its trade name. Similarly, I would have rejected the section 30(i) grounds as the Opponent did not file any evidence to meet its initial evidential burden for that ground.

DISPOSITION

[53] 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

SCHEDULE A

Registration No. TMA1,026,989 (KALLEH)

Goods:

(1) Meat, fish, poultry and game; meat extracts; preserved, frozen, dried and cooked fruits and vegetables, jellies, jams, compotes, eggs, milk and milk products excluding ice cream, ice milk, and frozen yogurt, edible oils and fats

(2) Rice, tapioca and sago, edible ices, sugar, honey, treacle, yeast, baking-powder, salt, mustard, vinegar, spices, relish, pickle relish, pickled ginger

(3) Grains and agricultural grains for planting; Horticultural and forestry products, namely agricultural seeds, apple tree seeds, crop seeds, edible seeds, flax seeds, flower seeds, fruit seeds, roasted and ground sesame seeds, seeds for flowers, seeds for fruit, seeds for vegetables, seeds for horticultural purposes, sowing seeds, sunflower seeds; Horticultural and forestry products, namely live young plants and live flowers not included in other classes, fresh fruits and vegetables, natural plants and flowers; Foodstuffs for animals namely animal feed, animal feed, animal feed supplements and animal feed additives, pet food, pet treats, edible chewing products for animals, namely bones, sticks, chew toys; malt for brewing and distilling

(4) Mineral and aerated waters, other non-alcoholic beverages, namely beverages with tea, fruit or beer flavoring; carbonated beverages namely carbonated soft drinks, carbonated water; non-alcoholic malt beverages, namely non-alcoholic beer, non-alcoholic ale, non-alcoholic lager, non-alcoholic stout; alcoholic malt beverages, namely, beer, ale, lager, stout, malt liquor, malt-based coolers; brewed malt alcoholic cocktails; fruit beverages and fruit juices, syrups for making beverages; other preparations for making beverages, namely, fruit drinks

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

HEARING DATE 2021-11-29

APPEARANCES

Daniel Drapeau	For the Opponent
Jaimie M. Bordman	For the Applicant

AGENTS OF RECORD

DrapeauLex Inc.	For the Opponent
Moffat & Co.	For the Applicant