



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 133

Date of Decision: 2022-07-15

IN THE MATTER OF AN OPPOSITION

**John Schooten & Sons Custom
Feedyard Ltd.**

Opponent

and

ESD Alliance Inc.

Applicant

1,772,899 for NIULONG & Design

Application

INTRODUCTION

[1] John Schooten & Sons Custom Feedyard Ltd. (the Opponent) opposes registration of the trademark NIULONG & Design, shown below (the Mark), which is the subject of application No. 1,772,899 (the Application), that was filed by ESD Alliance Inc. (the Applicant).



[2] The Application was filed on March 17, 2016, on the basis of proposed use in association with the following goods and services (the Goods and Services):

Goods:

Fresh and frozen whole and portioned beef carcasses sold for food. Cut and packaged beef, frozen processed beef products, namely, smoked meat, ground beef, beef jerky, beef pies, cooked and uncooked beef products. (Nice Class 25)

Services:

Wholesale distributorship services, namely, brokering, exporting, importing, selling and distributing meat products, namely, fresh and frozen whole and portioned beef carcasses sold for food, fresh and frozen cut and packaged beef products. Operation of a business dealing in meat processing for the custom preparation, manufacture and distribution to others. (Nice Class 35)

[3] The Application was advertised in the *Trademarks Journal* of August 9, 2017.

[4] The Opponent alleges that (i) the Application does not conform to the requirements of section 30(e) of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Application does not conform to the requirements of section 30(i) of the Act; and (iii) the Applicant is not the person entitled to registration pursuant to section 16(3)(a) of 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 opposition.

THE RECORD

[7] The Opponent filed its statement of opposition on October 27, 2017. The Applicant filed and served its counter statement, denying the grounds of opposition.

[8] In support of its opposition, the Opponent filed the affidavit of Shane Schooten, the President of the Opponent, sworn May 14, 2018. Mr. Schooten was cross-examined on his affidavit on October 9, 2018, and the transcript together with exhibits and responses to undertakings form part of the record.

[9] In support of its Application, the Applicant filed the affidavit of Mylo Stromsmoe, a director of the Applicant, sworn February 22, 2019. Mr. Stromsmoe was cross-examined on his affidavit on June 24, 2019, and the transcript together with exhibits and responses to undertakings form part of the record.

[10] The Opponent did not file any evidence in reply.

[11] Both parties filed written representations and made representations at a hearing.

THE EVIDENCE

[12] The present opposition appears to stem from a ‘business deal’ gone bad or a misunderstanding between the parties as to their respective roles, responsibilities, and rights surrounding the business deal. As a consequence of the failed business deal and in regard to the grounds of opposition, the Opponent is alleging that the Applicant is using the Application for the Mark as a means ‘[...] to frustrate or interfere with a business relationship involving the Opponent and third parties.’ The Applicant has a different version of events with respect to this business deal, and denies the Opponent’s allegations.

[13] I will now summarize each parties’ version of events, as per the evidence. While evidence regarding litigation between the parties concerning contractual obligations has been furnished, I will not comment on those proceedings or that evidence, as it is not relevant to my findings within this trademark proceeding.

The Opponent's Rule 41 Evidence - The Schooten Affidavit

[14] Mr. Schooten provides the following evidence:

- The Opponent has been in the cattle feeding/farming business for over 40 years;
- Around early 2014, John Schooten (father of the affiant) and Mylo Stromsmoe began exploring a business opportunity to sell Canadian beef to the Chinese market;
- This business opportunity was further explored from 2014 to 2016, where Mr. Stromsmoe travelled to China in 2015 to meet with an employee of Shanghai Niulong International Trading Co. Ltd. ("Shanghai Niulong"). Also at this time, the affiant and his father were actively pursuing this business opportunity by negotiating with slaughterhouses (Cargill) and cold storage facilities (Versa Cold), etc.;
- Discussions regarding how the proposed sales would be financed for this business opportunity occurred and it was decided that the following steps in the sale would include (in this order):
 - Cattle would be shipped from the Opponent to Cargill for slaughter
 - The beef would be cut and boxed and shipped to Versa Cold
 - The Opponent would pay Cargill
 - Frozen beef would be shipped to China
 - The Opponent would pay Versa Cold
 - Mylo Stromsmoe/Jim Edwards (one of the individuals involved with the Applicant)/John Schooten would then pay the Opponent
 - Mylo Stromsmoe/Jim Edwards/John Schooten would then be reimbursed by Shanghai Niulong.
- No contract was ever signed regarding this business opportunity/arrangement between the Applicant and the Opponent;
- The first shipment of beef under the above-described arrangement occurred around September 2016. For this shipment, the Opponent sent cattle to Cargill and paid both Cargill and Versa Cold. Mr. Schooten alleges that following payment however, Mr. Stromsmoe's bank would not provide the necessary letters of credit to finance the transaction, and that neither he nor the Applicant could support this transaction or others

in the future. As a result, neither Mr. Stromsmoe nor the Applicant had any further involvement in sales of beef to China;

- The ‘NIULONG brand’ was created by Shanghai Niulong in collaboration with John Schooten and John Baker of Baker Marketing Services International. The design was assembled by Mr. Baker and was subsequently amended, after receiving comments from Shanghai Niulong and the Opponent, with the initial work done by Baker Marketing billed to and paid for by the Opponent;
- Mr. Schooten understood incorrectly that a Chinese company could not own a Canadian trademark registration. He was aware that the Application for the Mark was filed around March 2016, but never agreed at any time that the Mark would be exclusively owned by the Applicant;
- With respect to the filing of the Application, Mr. Schooten attaches as Exhibit A to his affidavit, an email from Mr. Stromsmoe to John Baker and John Schooten dated February 1, 2016. The email, with the subject line “Chinese Logo” reads as follows:

John:

Would you be able to register the above Logo for your Chinese Partners.

They want us to register the above in Canada as well as internationally (I am assuming the one registration does both) and they will register the same in China.

If you have any questions please let me know.

Please invoice to Schooten Farms.... I will pay you directly and avoid you having to wait the time for us to get funding submitted.

Thanks

Mylo

- Mr. Schooten attests that the Opponent paid the accounts of the trademark agent that were associated with the Application at that time;
- It was always understood that the Application would be for the benefit of Shanghai Niulong and its sale of beef in China, and it was never intended or agreed that Mr. Stromsmoe or the Applicant would own, use or license trademarks associated with this venture, including the Mark;

- To the knowledge of Mr. Schooten, the Applicant has never used the Mark in association with the Goods and Services listed in the Application, and the Applicant has neither any ongoing involvement with Shanghai Niulong, nor involvement with the sale of NIULONG-branded products in any jurisdiction.

The Applicant's Rule 42 Evidence - The Stromsmoe Affidavit

[15] Mr. Stromsmoe provides the following evidence:

- The Applicant is a manufacturer, importer and exporter with experience in Chinese markets, whose business also includes exporting beef and beef products from Canada to foreign markets, including China;
- Between 2014 and 2016, Mr. Stromsmoe travelled extensively to China on behalf of the Applicant and other related companies. During those trips, he met with Mr. Zheng Hui and Terry Jiang, who, around November 30, 2015, would form Shanghai Niulong International Trading Co. Ltd. (Shanghai Niulong), with the intent to import Canadian beef and Canadian beef products into China from the Applicant;
- In the fall of 2015, the Applicant requested Baker Marketing to assist in the development of literature, branding and logo development for the project. Separate from the work that Baker Marketing was doing, the Applicant, in agreement with Shanghai Nuilong started work on a logo to be used to promote Canadian beef products on packing boxes. The resultant logo, which corresponds to the Mark, was completed around January 13, 2016;
- Mr. Stromsmoe then contacted John Baker of Baker Marketing to cease any further work. While John Baker was initially requested to provide branding and logo design options, ultimately, none of the logo designs provided by John Baker were used or pursued;
- Attached as Exhibit C to Mr. Stromsmoe's affidavit, is a copy of an email from John Baker dated November 10, 2015, attaching the four draft logo designs provided by Baker Marketing. He is unaware of any other logos provided by Baker Marketing or John Baker. None of the attached designs match the Mark;

- The Applicant and Shanghai Niulong entered into signed written agreements dated January 6, 2016, and February 23, 2016. The following is an excerpt from the January 6, 2016 agreement:

The Seller [the Applicant] hereby assumes the exclusive (and non-assignable) right to sell and make available to the Buyer [Shanghai Niulong] Angus Cattle traceable to a specific Canadian producer (the “Producer”) in cuts and packaging agreed to by both parties.

- With respect to the February 23, 2016 signed agreement, Shanghai Niulong (the Buyer) appointed the Applicant (the “Seller”) as Exclusive Agent to source Angus cattle expressly for Shanghai Niulong and the Applicant has the exclusive right to appoint a third party to act on the Applicant’s behalf as follows (excerpt below from signed agreement):

Whereas the Buyer is willing to purchase and the Exclusive Agent is willing to source Angus cattle, it is agreed that the Buyer appoints ESD Alliance Inc. as its Exclusive Agent to source Angus cattle expressly for the Buyer and any party associated with the Buyer.

The Buyer and the Exclusive Agent agree that the Exclusive Agent has the exclusive and assignable right to appoint a third party to act on the Exclusive Agent’s behalf to fulfill any and all obligations to the Buyer with respect to this Exclusive Agreement.

- When the Applicant contracted with Shanghai Niulong, to have the exclusive right to source Angus cattle to Shanghai Niulong, the Opponent was aware of and did not object to this arrangement;
- It was agreed between the Applicant and the Opponent, that the Applicant would source initial shipments to Shanghai Niulong from the Opponent and the first two such shipments occurred between June 2016 and October 2016;
- The Applicant’s role and involvement in the first two exportations included the following:
 - coordinating with contracting with Shanghai Niulong;
 - sourcing the specific Canadian beef and beef products from the Opponent;

- developing the NIULONG & DESIGN brand and logo and providing the NIULONG & DESIGN logo markings for packaging;
 - assisting with shipping invoices and transportation, cold storage; and
 - facilitating payment transfer.
- Mr. Stromsmoe disagrees with Mr. Schooten’s statement that “neither Mr. Stromsmoe nor ESD (the Applicant) could financially support or participate in the transactions”. The Applicant was ready, willing, and able to arrange for financing, and the Applicant did not receive the required assistance and cooperation from the Opponent and the Opponent’s financial institution. Further, the Opponent was imposing unacceptable conditions on the Applicant by refusing to give the Applicant title to the goods which, in his experience, is standard International Trade Finance practice and standard Line of Credit procedures;
 - It is Mr. Stromsmoe’s belief that shortly after the second shipment of beef, the Opponent began selling Canadian Angus Cattle directly to Shanghai Niulong, despite the contractual obligations and agreements between the Applicant and the Opponent;
 - Shanghai Niulong agreed to the Applicant’s filing as the registered owner, which accords with the parties’ agreement that the Applicant holds exclusive rights to sell and make available to Shanghai Niulong, Canadian Angus cattle;
 - At the time of filing, it was also the Applicant’s intention to pursue sales and distribution of Canadian beef in the domestic market to Chinese restaurants, grocery stores, and markets within Canada under the NIULONG & Design trademark brand;
 - Mr. Stromsmoe attaches as Exhibit F to his affidavit, an invoice dated April 11, 2016, from Anissimoff & Associates to the Applicant for the professional services rendered in connection with the filing of the Application. He further attaches as Exhibit E, a copy of the Applicant’s check remittance in this regard.

ANALYSIS

Non-compliance Grounds of Opposition

[16] The section 30(e) and 30(i) grounds set forth by the Opponent are related and overlap.

[17] The material date to assess these two grounds of opposition is the date the Application was filed, that is March 17, 2016 [see *Canadian National Railway Co v Schwauss* (1991), 35 CPR (3d) 90 (TMOB); and *Tower Conference Management Co v Canadian Exhibition Management Inc*, (1990) 28 CPR (3d) 428 at 432 (TMOB)].

Section 30(e) Ground

[18] The Opponent pleads that the Application does not comply with section 30(e) of the Act as follows:

The Mark does not comply with section 30(e). One of the principals of the applicant is Mylo Stromsmoe. In about late 2015, Mr. Stromsmoe entered into discussions with the Opponent to develop a business arrangement that would supply Canadian beef to the Chinese market. Under the proposed arrangement, the role of the Applicant was limited to logistical support. At the time the Application was filed and today, the Applicant was not capable of selling the goods or providing the services listed in the Application. Under the proposed business arrangement, the Applicant would not have the authority to license others to sell goods or provide services in association with any trademark. It was never contemplated that either Mr. Stromsmoe or the Applicant would own, use or license trademarks associated with the venture, including the Opposed Mark. The Applicant and the Opponent are no longer involved in business dealings together, particularly the export of beef to China. The Applicant does not have, and never had, a legitimate business interest in the Opposed Mark. The Application was filed and maintained for a collateral purpose, namely to frustrate or interfere with a business relationship involving the Opponent and third parties. As such, the Applicant never intended to use, and is incapable of using, the Opposed Mark in Canada, either by itself or through a controlled licensee.

[19] With a ground of opposition under section 30(e) of the Act, it has been recognized that an opponent's initial evidential burden is relatively light, given that the requisite facts to support such a ground are often uniquely within the knowledge of an applicant [see *Molson Canada v Anheuser-Busch Inc*, 2003 FC 1287, 29 CPR (4th) 315 at paras 56-57].

[20] In the present case, the Application contains a statement that the Applicant by itself and/or through a licensee intends to use the applied-for trademark in Canada. Therefore, the Application formally complies with section 30(e) of the Act. The issue therefore becomes whether or not the Applicant has substantially complied with section 30(e); that is, is the Applicant's statement that it intended to use the Mark true? [*Home Quarters Warehouse, Inc v Home Depot USA, Inc*, 1997 CarswellNat 2870 (TMOB) at para 7; *Jacobs Suchard Ltd v Trebor Bassett Ltd*, 1996 CarswellNat 3039 (TMOB) at para 7].

[21] The Opponent submits that the essential issue in this opposition is whether the Applicant had a genuine intention to own and use the Mark in Canada when it filed the Application in March 2016. The Opponent submits that the evidence supports one conclusion: it was not feasible for the Applicant to use the Mark in Canada, and the Applicant did not have a *bona fide* intention to do so at the time the Application was filed.

[22] To expand, the Opponent submits that the Applicant could not have intended to use the Mark at the time the Application was filed in association with the Goods and Services – it was neither in the cattle business nor in the beef distribution business, it had no beef to sell, and did not plan to receive beef for distribution to others.

[23] Additionally, the Opponent submits that there was no direct use of the Mark by the Applicant when the Application was filed, as the Applicant never had title to the beef and could not have applied any trademarks to it “at the time of transfer of the property” (re: Stromsmoe cross-examination, question 286).

[24] Further, the Opponent submits, that as of the application date, the Applicant could not have intended to license the Mark, as pursuant to section 50 of the Act, any valid license requires that the licensor assert direct or indirect control over the character and quality of the services. The Opponent submits that the Applicant never had the ability to assert such control.

[25] Lastly, the Opponent submits that any assertions made in Mr. Stromsmoe's affidavit that the Applicant had an intention to pursue sales and distribution of Canadian beef in the domestic market under the Mark cannot be accepted. In this regard, the Opponent submits that there is no evidence of an intention to use the Mark outside of the commercial relationship with Shanghai

Niulong. The Opponent submits that, at best, Mr. Stromsmoe described Canadian sales as a “possibility” (re: Stromsmoe cross-examination, questions 268-278), which is insufficient to demonstrate a genuine intention to use the Mark in Canada as of March 2016, absent further evidentiary support. While acknowledging the material date under a ground of opposition based on section 30(e) is the filing date, the Opponent attempts to draw on the Applicant’s alleged current activities, or more particularly the lack thereof, with respect to use of the Mark. In this regard, the Opponent submits that in the years that have passed since the filing of the Application, there is no indication that the Applicant has made any use of the Mark in association with any goods or services. This, the Opponent submits, is evidence that if the Applicant had a genuine interest in using the Mark in 2016, it would have done so long before now.

[26] The Applicant, on the other hand, submits that it clearly had an intention to use the Mark as of the filing date in Canada and has invested years in developing the Mark and business in China. The Applicant submits that any allegations made by Mr. Schooten regarding the Applicant being unable to financially support or participate in the transactions involving the exportation of beef are unsupported. Moreover, the Applicant submits that these unsupported allegations relate to a period of time well after the filing date of the Application, and therefore, should have no bearing or relevance to the Applicant’s entitlement of *bona fide* intention to use the Mark. In any event, the Applicant submits that the Opponent’s position on this matter appears to be contradicted by the unanswered correspondence from the Applicant regarding financing proposals, put to Mr. Schooten on cross-examination [per Schooten cross-examination pages 71-84, undertakings 14-23, all taken under advisement, and Exhibit 2].

[27] Further to this, the Applicant submits that section 30(e) of the Act does not require the Applicant to manufacture the products in the applied-for goods; it is acceptable for another party to manufacture a product on behalf of an applicant [citing *Cerverceria Modelo, S.A. de C.V. v. Marcon*, 2008 CarswellNat 3399].

[28] The Applicant submits that the evidence establishes that at the time of filing the Application, the Application both formally and substantially complied with the requirements of section 30(e), as it intended to use the Mark in Canada but had not yet begun to do so. While the

Applicant is not required to show use, the Applicant submits that its intention to commence use in Canada materialized subsequent to filing the Application when it commenced sales by exporting beef and beef products to China in association with the Mark.

[29] I agree with the Applicant that there is no evidence of record to suggest that the Applicant did not intend to use the Mark as of the Application filing date. Any allegations made by the Opponent with respect to the Applicant's capabilities to pursue the domestic market are irrelevant. Nonetheless, I would add that the evidence supports an intent to use the Mark in Canada through export in accordance with section 4(3) of the Act. Furthermore, the Opponent's submissions regarding licensing and an alleged inability of the Applicant to have control over the character and quality of the goods pursuant to section 50 of the Act are also inconsequential. Mr. Stromsmoe has attested that title in the beef was in dispute between the Applicant and the Opponent, and in accordance with the Applicant's contracts with Shanghai Niulong, the Applicant appears to be in a position to exert some level of control over the goods. For example, the agreements stipulate that sales of beef by the Applicant to Shanghai Niulong will be "*in cuts and packaging agreed to by both parties*" and that the Applicant has "*the exclusive and assignable right to appoint a third party to act on [it's] behalf to fulfill any and all obligations to the [Shanghai Niulong] with respect to this Exclusive Agreement*". There is nothing in the evidence that contradicts this conclusion.

[30] Consequently, I find that the Opponent has failed to meet its burden under section 30(e) of the Act.

Section 30(i) Ground

[31] The Opponent pleads that the Application does not comply with section 30(i) of the Act, in that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Goods and Services, as for the reasons as set out in the section 30(e) ground of opposition.

[32] Similar to section 30(e) of the Act, with a ground of opposition under section 30(i) of the Act, an applicant is only required to declare itself satisfied that it is entitled to use its trademark in Canada in association with the goods and services described in the application. Accordingly,

where, as here, the required statement is included in the application, an opponent may only rely on section 30(i) in specific cases, such as where bad faith or fraud on the part of the applicant is alleged, or where federal legislation arguably prevents registration of the mark [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB); and *Interprovincial Lottery Corp v Western Gaming Systems Inc* (2002), 25 CPR (4th) 572 (TMOB)].

[33] With respect to allegations of bad faith, examples where an opponent has met its evidential burden under section 30(i) include where an opponent has alleged and evidenced that the application is in violation of the terms of a license agreement, distribution agreement, or joint venture [see, for example, *Super Seer Corp v 546401 Ontario Ltd* (2000), 6 CPR (4th) 560 (TMOB); *Lifestyles Improvement Centers, LLP v Chorney*, 2007 CanLII 80905 (TMOB); *AFD China Intellectual Property Law Office v AFD China Intellectual Property Law (USA) Office, Inc*, 2017 TMOB 30 at para 34; *Iltas, SpA v Eurolegno Distribution Inc*, 2014 TMOB 272 at paras 10-18; *High-Tech Medical Imaging Inc v Hitek Medical Imaging Inc*, 2018 TMOB 46].

[34] The Opponent submits that neither the Opponent, nor the other entities involved in the proposed transactions, intended or agreed that the Applicant would exclusively own any trademark rights associated with the sale of Canadian beef in China. The Opponent alleges that the Applicant has filed the Application in bad faith, so that the Applicant effectively has to be used as a middleman in any such business transactions.

[35] The Opponent submits that there is a clear divide in the evidence as to the parties' understanding and intentions relating to the ownership of the Mark at the time the Application was filed. The Opponent contends that there was never an agreement that the Applicant would exclusively own the Mark. The Opponent submits that Mr. Schooten's evidence was that there was never an intent for the Opponent, the Applicant or any individuals involved in the project to sell NIULONG products or offer services in Canada in association with the Mark (Schooten affidavit, para 16). The Opponent submits that as for why the Applicant is recorded as the owner of the NIULONG application, Mr. Schooten explained that there was a misunderstanding in early 2016 as to whether a Chinese company could own a Canadian trademark registration (Schooten affidavit, para 19). Further to this, Mr. Schooten testified that it was understood that the application for the Mark would be for the benefit of Niulong International and its sale of beef

in China and that it was never intended or agreed that Mr. Stromsmoe would own, use or license trademarks associated with this venture, including the Mark.

[36] The Opponent relies on the February 1, 2016 email (Schooten affidavit, Exhibit A), wherein it submits that Mr. Stromsmoe asked John Baker to “register the above logo for our Chinese partners”. The Opponent submits that this is the best evidence that, at the time the Application was filed, there was no intention that the Applicant would exclusively own or control the Mark.

[37] Further to this, the Opponent submits that the Applicant has not produced any contemporaneous documents that support its assertion that it would be the sole owner of the Mark, or that it would independently be using the Mark in Canada. Indeed, the Opponent appears to be requesting a negative inference be drawn in this respect, as it points out that on cross-examination, Mr. Stromsmoe stated that a purported agreement with Shanghai Niulong as to the Applicant’s ownership of the disputed trademark was communicated “for sure by email”; yet, no emails were produced [per Stromsmoe cross examination, page 65, question 235].

[38] Additionally, the Opponent submits that there is a conflict between Mr. Stromsmoe’s affidavit evidence and the contract between the Applicant and Shanghai Niulong that was attached as Schedule A to the Applicant’s answers to undertakings [to produce a copy of the January 6, 2016 agreement between the Applicant and Shanghai Niulong referred to in paragraph 11 of the Stromsmoe affidavit]. The Opponent points to the following from the noted contract, under the heading “Proprietary Rights”, which states:

Use of Company Logo. The Seller and the Buyer agree to create, own jointly, and register in Canada and Internationally a Trade Marked logo for the Product.

[39] The Opponent submits that a Canadian trademark application/registration cannot be owned jointly by two persons, and in this respect, the contract terms were incapable of being fulfilled in Canada. The Opponent submits that this contract then appears to contradict Mr. Stromsmoe’s assertion that there was an agreement or understanding between the Applicant and Shanghai Niulong that the Applicant would be the sole owner of the Canadian NIULONG trademark.

[40] With respect to the January 6, 2016 and February 23, 2016 agreements between the Applicant and Shanghai Niulong (Stromsmoe affidavit, paras 12 and 13), the Opponent submits that the Applicant has conflated contractual and trademark rights. In this regard, the Opponent submits that the agreements only support an assertion that the Applicant claims entitlement to exclusive supply rights, not trademark rights.

[41] Lastly, the Opponent is requesting adverse inferences be drawn from the Stromsmoe cross-examination, in that Mr. Stromsmoe refused to answer a series of ‘relevant and proper questions address to any related trademark rights in China’. It is the Opponent’s submission that if it was shown that ownership of those rights were held by Shanghai Niulong, that the Applicant’s position would be undermined. Additionally, the Opponent is requesting an adverse inference be drawn from the Applicant’s refusal to provide an unredacted version of the invoice from Anissimoff & Associates, filed as Exhibit D to Mr. Stromsmoe’s affidavit. The Opponent submits that an adverse inference must be drawn, specifically that the description of services in the invoice would not support the Applicant’s position.

[42] The Applicant submits that the Opponent’s position appears to be that neither the Applicant, nor the Opponent, are the proper owner of the Mark in Canada. The Applicant submits that Mr. Schooten instead, holds a personal belief that a third party should be the proper owner of the Mark, and the Opponent has not led any credible evidence to support this claim. In contrast, the Applicant submits that its evidence clearly establishes the Applicant’s entitlement to the Mark as well as the Applicant’s *bona fide* good faith intention to use the Mark in Canada.

[43] The Applicant submits that what is clear from the evidence is that: (i) the Applicant’s designer created the logo design at issue; (ii) the Applicant was the driving force behind a business endeavour to export Canadian beef to China in association with the Mark; (iii) the Applicant secured contracts as the exclusive distributor of Canadian beef to Shanghai Niulong in China; and (iv) that Shanghai Niulong agreed to the Applicant’s filing as registered owner of the Application.

[44] The Applicant submits that it is notable that the Opponent did not file any evidence from any other witnesses including from the Shanghai Niulong, which the Opponent may be suggesting is the proper owner of the Mark.

[45] With respect to the creation of the Mark, the Applicant submits that Mr. Schooten's accounting of such has been contradicted by the Applicant's evidence, as well as by evidence presented to Mr. Schooten on cross-examination. In this respect, the Applicant points to an email chain presented to Mr. Schooten on cross-examination, that Mr. Schooten had been copied on, where the Applicant terminated John Baker's branding work and advised they were proceeding with a logo designed by the Applicant's designer (Exhibit 3 of Schooten cross-examination). Additionally, with reference to the cross-examination of Mr. Schooten, the Applicant points to Exhibits C and D, which include the branding/logo designs created by John Baker that were ultimately not used. Further to this, the Applicant submits that in written responses to questions taken under advisement during cross examination, the Opponent advised that Mr. Schooten's statements relating to the creation of the logo were based on his "recollection" as opposed to specific documents, and that Mr. Schooten has been unable to locate copies of any documents relating to the creation of a logo by John Baker or of the Opponent's input.

[46] On the other hand, the Applicant submits that it has provided evidence that the Mark was designed by the Applicant's designer with copyright being owned by Edward Holdings Ltd. (a company related to the Applicant), and is licensed to the Applicant. As such, the Applicant submits, the Opponent's evidence on this issue cannot stand.

[47] The Applicant further submits that trademarks are national and that it is not an unusual practice for trademarks to be owned by different entities in different jurisdictions. The Applicant submits that trademarks are use-based rights in Canada, and as such, the foreign importer in the present case, would not be 'using the Mark' in Canada.

[48] The Applicant submits that its ownership of the Mark also accords with the agreement that it holds exclusive rights to sell and make available to Shanghai Niulong, Canadian Angus cattle.

[49] Thus, the Applicant submits that the Opponent has failed to meet its initial evidence burden to provide evidence of bad faith on behalf of the Applicant, and therefore, this ground of opposition must fail.

[50] In the present case, I see nothing in the evidence to support the Opponent's allegation that the Applicant has acted in bad faith. There is no evidence that the Applicant has violated any terms of a license agreement, distribution agreement, or joint venture, and the filing of the Application by the Applicant is not contrary to any agreement in evidence. The email relied upon by the Opponent to support its position that the Mark was always intended to be for the benefit of Shanghai Niulong is not contradictory to this finding. When considering the evidence as a whole, and that this was a business deal involving multiple parties, and in concert with the agreements in evidence between the Applicant and Shanghai Niulong, there is nothing to indicate that trademark rights were not agreed upon by the parties to be shared in different jurisdictions by the parties.

[51] Consequently, having regard to the aforementioned, the ground of opposition based on section 30(i) of the Act is also dismissed.

Non-entitlement Ground of Opposition

[52] The Opponent pleads that for the reasons set out under the ground of opposition based on section 30(e) of the Act, and pursuant to section 38(2)(c) of the Act, that the Applicant is not the person entitled to registration.

[53] As pleaded, this does not appear to constitute a proper ground of opposition. A ground of opposition based on non-entitlement under section 16 of the Act, necessarily involves an allegation of confusion of the Mark with a previously used, made known, or applied-for trademark, or a previously used tradename. In the present case, no such allegation has been made.

[54] Accordingly, the ground of opposition based on non-entitlement is dismissed.

DISPOSITION

[55] In view of the foregoing, 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.

Kathryn Barnett
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2021-11-02

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