



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 097

Date of Decision: 2023-06-06

IN THE MATTER OF AN OPPOSITION

Opponent: The Grape Grinder (Pty) Limited

Applicant: Moosehead Breweries Limited

Application: 1,907,892 for MOOSE

OVERVIEW

[1] Moosehead Breweries Limited (the Applicant) has applied to register the trademark MOOSE (the Mark) in association with the goods “alcoholic fruit beverages”. The Grape Grinder (Pty) Limited (the Opponent) opposes registration of this trademark alleging that the application does not contain a statement in ordinary commercial terms and that it was filed in bad faith. The Opponent also alleges that, at the filing date, the Applicant had not been using the Mark since the date of first use claimed, and that it did not propose to use the Mark in Canada, in association with alcoholic fruit beverages.

[2] As the grounds of opposition are improperly pleaded or the Opponent’s initial evidentiary burden not met, the opposition is rejected.

THE RECORD

[3] Application No. 1,907,892 (the Application) was filed on July 5, 2018, based on use in Canada since April 30, 2014. The Application was advertised for opposition in the *Trademarks Journal* of February 19, 2020.

[4] On August 19, 2020, 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). The Act was amended June 17, 2019. As the Application was advertised after this date it is the Act, as amended, that applies [section 69.1 of the Act].

[5] The Opponent raises grounds of opposition based on non-compliance with sections 38(2)(a), 38(2) (a.1) and 38(2)(e) of the Act. The Applicant filed a counter statement denying all grounds of opposition. Both parties filed evidence which is discussed below. Neither affiant was cross-examined. Only the Applicant filed written representations and a hearing was not held.

ONUS

[6] The legal onus is on the Applicant to show, on a balance of probabilities, that the Application complies with the provisions of the Act and registration should be granted. 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 Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA* (2002), 20 CPR (4th) 155 (FCA)].

MATERIAL DATE

[7] The material date for assessing each of the grounds of opposition in this case is the Application filing date, namely, July 5, 2018 [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB); *Skinny Nutritional Corp v Bio-Synergy Ltd*, 2012 TMOB 186, 105 CPR (4th) 206 at para 7].

OVERVIEW OF THE EVIDENCE

Opponent's Evidence

[8] The Opponent filed the affidavit of Dulce Campos, sworn on May 21, 2021. Ms. Campos is a trademark researcher employed by the Opponent's trademark agent [para 1]. Ms. Campos conducted searches of various websites and provides printouts of the results. More particularly, she visited the Applicant's Moosehead Breweries Limited website and associated social media sites. She also visited a local store to purchase MOOSE branded fruit based alcoholic beverages. The results of her searches are discussed in greater detail below, as part of the analysis of the case.

Applicant's Evidence

[9] The Applicant relies on the affidavit of Patrick Oland, Chief Financial Officer of the Applicant. Mr. Oland describes his company, incorporated in 1928, as the oldest privately owned independent brewery in Canada. The Applicant has "brewed, bottled and packaged beer" in Canada under a variety of MOOSE trademarks since approximately 1931 [paras 1 and 2].

[10] Mr. Oland describes what he terms, a family of trademarks including MOOSE, HEAD OF MOOSE Design, MOOSEHEAD and THE MOOSE IS LOOSE, which he says have become known internationally through advertising, editorial comment and through the popularity of the products and novelty items sold in Canada [para 3]. He further explains that beginning in the late 1980s the company began using MOOSE LIGHT on its labelling because the wording customers used when ordering MOOSEHEAD lager or MOOSEHEAD LIGHT was "MOOSE" and "MOOSE LIGHT" [para 4].

[11] Mr. Oland states that in 2009 the Applicant launched its first alcoholic fruit beverage, using their MOOSE trademark on its MOOSE LIGHT LIME beverage [para 5]. The product is described as beer made with 100% natural lime-flavour [Exhibit A]. This was followed by MOOSE LIGHT BLACKBERRY in 2010 [para 6]. Documentary support in the form of a copy of an article, which he explains is taken from the *Canadian Beer News*, is provided [Exhibit B]. While he states the article is dated June 22, 2021, the article itself bears a date of June 22, 2010. The contents of the article, including a

description of a new flavour to follow MOOSEHEAD LIGHT LIME, are consistent with Mr. Oland's description of the evolution of these products beginning in 2009. Thus, I conclude the reference to 2021 rather than 2010 was an oversight. Mr. Oland confirms the contents of the article accurately describe the product releases.

[12] Mr. Oland goes on to state the Applicant packaged its first "MOOSE LIGHT RADLER (grapefruit) alcoholic beverage" at the end of April 2014. He explains that the Applicant chose to utilize the MOOSE trademark when branding the radler product and includes depictions of original bottles and packaging [para 7 and Exhibit C]. He further states that MOOSE LIGHT LEMONADE RADLER followed in 2015 and MOOSE LIGHT RASPBERRY RADLER in 2016. He provides news articles relating to these launches with images of the MOOSE packaging used by the Applicant [para 8 and Exhibit D]. Additionally, he explains that while packaging and labelling changes, the MOOSE trademark is always featured on the Applicant's radler products and provides additional samples of packaging used from "2014 to present" [para 9 and Exhibit E].

[13] Mr. Oland states that the Applicant's radler beverages comprise 15% real fruit juice and 4% alcohol by volume [para 10]. He provides a printout taken from the Canadian Intellectual Property Office *Goods and Services Manual* which identifies alcoholic fruit beverages [para 11 and Exhibit F] as a listed term for class 33 goods.

[14] Mr. Oland provides a sales order, for 48 six-packs of the Applicant's radler products, dated April 25, 2014 [para 12 and Exhibit G].

[15] Mr. Oland lists, and provides details of, several of the Applicant's registered trademarks containing or comprising the term MOOSE [para 13 and Exhibit H]. He states that these marks have been in continuous use for "a number of years". He further states that owing to use, advertising and marketing since 1931, MOOSE used with alcoholic beverages/beer has become synonymous with the Applicant and is commonly used by the public when referring to the Applicant's products. He states that the trademark MOOSE has been used extensively since the mid-1980's on beer and since 2009 on alcoholic fruit beverages [para 14].

ANALYSIS

Section 30(2)(a) Ground is Rejected

[16] The Opponent alleges that because “alcoholic fruit beverage” is not an ordinary commercial term, the Application does not conform to section 30(2)(a) of the Act which requires a statement in ordinary commercial terms of the goods in association with which the trademark is used or proposed to be used.

[17] In the absence of representations from the Opponent, and because none of the Opponent’s evidence appears to be directed towards this ground, I find the Opponent has failed to meet its evidential burden and reject this ground of opposition.

[18] Had the Opponent met its initial evidential burden, I would nonetheless have rejected this ground, finding the statement “alcoholic fruit beverages” meets the requirements of section 30(2)(a). As noted by the Applicant, its beverages contain both alcohol and fruit [written representations, para 17 (referencing paragraph 10 of the Oland affidavit)]. Additionally, Mr. Oland’s evidence shows the phrase is listed as acceptable in the Canadian Intellectual Property Office *Goods and Services Manual* [see para 11, Exhibit F].

Section 38(2)(a.1) Ground is Improperly Pleaded

[19] The Opponent alleges under section 38(2)(a.1) of the Act that the Application was filed in bad faith because it does not conform with section 30(2)(e)(*sic*), because the filing basis information, required at that time, is incorrect and the Applicant did not use the Mark since the date of first use claimed in the Application, namely, since at least as early as April 30, 2014.

[20] Under the Act as it read prior to June 17, 2019 (the Old Act), applications were often based on either use in Canada since at least as early as a specified date, or “proposed use” of the trademark in Canada. These bases could be challenged through grounds of opposition available under section 30(b) or 30(e) of the Old Act, respectively. However, applications advertised after June 17, 2019, need not specify whether there is prior use or proposed use of the trademark, and nothing prevents an applicant from now

simply deleting such claims made prior to the coming into force of the new Act [see section 35 of the *Trademarks Regulations* and the Canadian Intellectual Property Office Practice Notice entitled *Practice Notice on the Amendment and Deletion of Use, Proposed Use, and Use and Registration Abroad Claims*].

[21] I note section 30(2)(e) pleaded by the Opponent does not exist under either the Act or the Old Act. It is possible the Opponent intended to refer to section 38(2)(e), although this section is relied upon as a separate ground that will be discussed below. Another possibility is that the Opponent intended to reference former section 30(b), which under the Old Act required an Applicant to state the date from which the trademark had been used in Canada. This would be more consistent with the wording in the Statement of Opposition:

In particular, the application does not conform with subsection 30(2)(e) because the filing basis information that was required at the time of filing the application is incorrect. The applicant did not use the trademark in Canada since the date of first use claimed, namely since April 30, 2014.

[22] However, while filing basis information was required at the time of filing, the Application was advertised after June 17, 2019, and it is the Act as amended that governs this opposition as noted above. There is no requirement for the Applicant to have identified a date of first use, indeed it need only have used or proposed to use the Mark in Canada in association with the specified goods. This ground of opposition is improperly pleaded because it alleges bad faith based on a violation of section 30(2)(e), which is a section that does not exist, and because contrary to the pleadings, there is no requirement for the Applicant to specify a date of first use. In addition, I note the Opponent has not filed written representations that might shed light on what is intended by this allegation. Similarly, the Opponent's evidence does not clarify the meaning of the allegation. For these reasons, the ground is rejected.

[23] To the extent that the Opponent's allegations are that the Applicant's failure to have used the Mark in Canada since the claimed date of first use means the Application was filed in bad faith, I note the Opponent has not made any such representations. I accept the Applicant's argument [written representations, para 20] that the evidence of

record does not support an allegation of bad faith. Therefore, even if the ground had been properly pleaded, I would have rejected it on this basis.

Section 38(2)(e) Ground

[24] The Opponent has pleaded that the Applicant has not used, or did not propose to use, the Mark at the filing date of the Application. However, when substantiating the ground, the Opponent alleges as follows:

The Applicant, at the filing date of the application in Canada, determined without taking into account subsection 34(1), was not using the mark since the date claimed, namely since at least as early as April 30, 2014, and did not propose to use the trademark in Canada in association with the goods specified in the application;

The Opponent appears to therefore attempt to rely on a ground of opposition, previously available, under section 30(b) of the Old Act, but no longer available.

[25] Jurisprudence arising out of the Old Act, clearly supports the possibility of successful opposition when an applicant cannot prove use of the trademark since the specified date of first use [for example, *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 at paras 30-38]. However, as noted above, since the Mark was advertised after June 17, 2019, it is the Act as amended that applies and this ground is no longer available to the Opponent. As such, the Opponent's allegation that the Mark was not in use as of the filing date does not comprise a valid ground of opposition because the ground also refers to the claimed date of first use, rather than just the filing date. I therefore find this ground to have been improperly pleaded.

[26] Furthermore, even if the Opponent had alleged that the Applicant did not use, and that it did not propose to use the Mark as of the date of filing, the Opponent is required to plead material facts demonstrative of that lack of use or intention to use the Mark in association with the claimed goods. In the present case, there is no allegation by the Opponent as to how or why the applicant was either not using or proposing to use the trademark as of the Application filing date.

[27] I note that evidence may be taken into consideration when assessing the sufficiency of pleadings to determine whether a party knows the case to be met and

under some circumstances evidence may cure deficient pleadings [*Novopharm Ltd. v Astra AB*, 2002 FCA 387 at para 8]. However, in this case, both the Applicant's and the Opponent's evidence, discussed in greater detail below, suggests the Mark was in use at the time the Application was filed. The evidence therefore enhances the irregularity of the pleading, rather than help facilitate understanding.

[28] I also note the Applicant has responded to this ground by filing evidence and making submissions involving use of the Mark since the date of first use claimed [for example, written representations, para 27]. The Applicant did not raise the issue of sufficiency of the pleading. The Applicant also did not argue that the ground was deficient. The Applicant instead appears to have focused on proving its use of the Mark as of the date of first use claimed. This too supports the conclusion that the Applicant did not understand the case against it and was therefore unable to properly reply to the ground as pleaded.

[29] However, even if the ground had been properly pleaded and the Opponent had met its initial burden, this ground would not have succeeded as I would have found that the Applicant had used the Mark as of the filing date. More particularly, I note that Mr. Oland attests to, and provides documentary support for, use of the Mark since April 30, 2014 [paras 7 and 12 and Exhibit G], in association with the Applicant's radler beverages which comprise fruit juices and beer [para 7 and Exhibit D]. The Mark appears alone on several examples of packaging in evidence [Exhibit E materials comprising packaging for the watermelon, grapefruit, raspberry and strawberry lemonade flavoured radler products, with the Mark appearing above the wording "fiercely independent"]. The Mark is also used in conjunction with the descriptive term LIGHT [Exhibit E materials comprising mix pack of radler]. Since the Opponent did not cross-examine Mr. Oland or raise the issue of evidentiary deficiencies through written representations, I conclude that the Applicant was using the Mark in Canada in association with alcoholic fruit beverages at the date of filing, and while not material, also at the date of first use claimed.

[30] Additionally, I note the Opponent's own evidence of the Applicant's social media posts relating to the radler products in 2014 and 2015 [Campos affidavit, paras 4 and 5 and Exhibits 2 and 3] is consistent use of the Mark as of the date of filing. I find the Opponent's evidence corroborates, rather than refutes, a conclusion that the Mark was in use as of the filing date of July 5, 2018, and that such use was in association with alcoholic fruit beverages.

[31] In summary, this ground is improperly pleaded and even if I were to construe the Opponent's allegations as claiming there was no prior or proposed use as of the date of filing, the Opponent did not meet its initial burden. Even if the burden had been met, I would have found the Applicant was using the Mark as of the filing date..

DISPOSITION

[32] In light 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.

Coleen Morrison
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Opponent: Accupro Trademark Services LLP

For the Applicant: McDermid Turnbull & Associates