



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 159

Date of Decision: 2023-09-08

IN THE MATTER OF AN OPPOSITION

Opponent: Wonder Brands Inc.

Applicant: Poppy Industries Canada Inc.

Application: 1,839,901 for DESSERT CRISPS

INTRODUCTION

[1] Wonder Brands Inc. (the Opponent) opposes registration of the trademark DESSERT CRISPS (the Mark) which is the subject of application No. 1,839,901 filed by Poppy Industries Canada Inc. (the Applicant). The application is in association with the following goods (the Goods):

(1) Vegetable-based snack foods.

(2) Cakes, crackers, biscotti, cookies, snack crackers, snack cookies, wheat-based snack foods, rice based snack foods.

[2] The Opponent's grounds of opposition are all based, at least in part, on the allegation that the Mark is clearly descriptive or deceptively misdescriptive of the Goods.

[3] For the following reasons, I refuse the application.

THE RECORD

[4] The application was filed on May 30, 2017 and was advertised for opposition purposes on July 11, 2018. On April 11, 2019, the Opponent filed a statement of opposition against the application under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). Leave to file an amended statement of opposition to reflect a change in the Opponent's name was subsequently granted. I note that the Act was amended on June 17, 2019, and because the present application was advertised prior to that date, the grounds of opposition will be assessed based on the Act as it read prior to June 17, 2019 (see section 70 of the Act). The Opponent raises grounds of opposition under sections 2, 12(1)(b), 30(e) and 30(i) of the Act.

[5] The Applicant filed a counterstatement contesting the grounds of opposition.

[6] As its evidence, the Opponent filed the affidavit of Biserka Horvat sworn December 18, 2020 (the Horvat Affidavit). This affidavit includes dictionary definitions from the website *dictionary.com* for the words "dessert" and "crisp" as well as printouts from various third-party websites describing dessert recipes, as well as websites relating to third-party food products. Ms. Horvat was not cross-examined. The Applicant did not file any evidence.

[7] Both parties filed written representations. Only the Applicant attended the hearing. I note that this matter was heard together with related oppositions to application Nos. 1839903 (CAKE THINS), 1839913 (CAKE SLIMS), and 1839911 (DESSERT THINS), given that the proceedings involved identical parties and grounds of opposition. However, as the specific evidence is different in each case, I have addressed the four matters in separate decisions.

ONUS AND MATERIAL DATES

[8] The legal onus is on the Applicant to show that the application complies with the provisions 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. Once this initial burden is met, the Applicant must satisfy the Registrar, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of the trademark [see *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)].

[9] The material dates with respect to the grounds of opposition are as follows:

- Sections 38(2)(a) and 30 of the Act – the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- Sections 38(2)(b) and 12(1)(b) – the filing date of the application [*General Housewares Corp v Fiesta Barbeques Ltd* (2003), 28 CPR (4th) 60 (FC)];
- Sections 38(2)(d) and 2 of the Act – the filing date of the statement of opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317 (FC)].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 12(1)(b) – Clearly descriptive or deceptively misdescriptive

[10] The Opponent pleads that the Mark contravenes section 12(1)(b) of the Act because it clearly describes a feature and an intrinsic characteristic of the goods, namely, that the Applicant's proposed food and bakery products are a crisp dessert or dessert-like product. In the alternative, the Opponent alleges that the Mark is deceptively misdescriptive of the goods.

[11] The purpose of the prohibition in section 12(1)(b) of the Act is to prevent any single trader from monopolizing a term that is clearly descriptive or common to the trade, thereby placing legitimate traders at a disadvantage [*Canadian Parking Equipment v Canada (Registrar of Trade Marks)*, 1990 CarswellNat 834 (FCTD)].

[12] The issue as to whether a trademark is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of

the associated goods or services. Character means a feature, trait or characteristic of the goods and services and “clearly” means “easy to understand, self-evident or plain” [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. The Mark must not be carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 40 CPR (2d) 25 (FCTD); *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 2 CPR (3d) 183 (FCTD)]. In other words, the Mark must not be considered in isolation, but rather in its full context in conjunction with the applied-for goods [*Ontario Teachers’ Pension Plan Board v Canada*, 2012 FCA 60]. Finally, one must apply common sense in making the determination about descriptiveness [*Neptune SA v Canada (Attorney General)* 2003 FCT 715].

[13] In the present case, I am satisfied that the Opponent has submitted sufficient evidence to meet its initial evidential burden. In particular, the dictionary definitions in the Horvat Affidavit are sufficient to at least put into issue whether the Mark contravenes section 12(1)(b) of the Act. Those dictionary definitions include the following:

Dessert

noun

1. cake, pie, fruit, pudding, ice cream, etc., served as the final course of a meal.
2. *British*. a serving of fresh fruit after the main course of a meal.

Crisp

adjective, crisp-er, crisp-est.

(especially of food) hard but easily breakable; brittle: *crisp toast*.

(especially of food) firm and fresh; not soft or wilted: *a crisp leaf of lettuce*.

[...]

noun

Cooking, a dessert of fruit, as apples or apricots, baked with a crunchy mixture, usually of breadcrumbs, chopped nutmeats, butter, and brown sugar.

[14] The Opponent's position with respect to section 12(1)(b) is essentially twofold. First, the Opponent argues that Mark in association with food, snack and bakery products clearly describes a feature and an intrinsic characteristic of the goods, namely that they are a crisp dessert or dessert-like product. Second, the Opponent argues that its evidence demonstrates that third parties use the term "dessert crisp(s)" to describe certain food products, such that this terminology is common and apt to be used by traders in the field.

[15] With respect to the first point, the Applicant contends that the Mark is a fanciful expression that, given its unusual grammatical construction, is capable of conveying multiple different meanings, and thus cannot be considered clearly descriptive. Second, with respect to the marketplace evidence, the Applicant argues that it discloses not descriptive use of certain terms, but rather evidence of various third-party "crisp(s)" formative trademarks.

[16] On balance, I favour the Opponent's position with respect to section 12(1)(b) of the Act, and I find that the Applicant has not met its legal burden to demonstrate that the Mark is not clearly descriptive. The dictionary definitions included in the Opponent's evidence indicate that the word "crisp" describes a particular type of food product, namely, a dessert comprised of fruit, baked with a crunchy mixture, usually of breadcrumbs, chopped nutmeats, butter, and brown sugar. This dictionary evidence is buttressed by the Opponent's evidence of various recipes in the English language for "Apple Crisp", "Strawberry and Apricot Crisp with Pine-Nut Crumble", and indeed an English language recipe book titled "Dessert Crisp Recipes". The fact that some of these third-party references in the Opponent's evidence may be from outside of Canada does not render them irrelevant under section 12(1)(b) of the Act. With this ground of opposition, the issue is not whether the term has been used in a clearly descriptive manner in Canada, but whether the term is clearly descriptive *in the English or French language* [see *Canadian Inovatech Inc v Burnbrae Farms Ltd* (2003), 31 CPR (4th) 151

(TMOB) at para 13; *Guess? Inc v Slide Sportswear Inc* (2005), 44 CPR (4th) 380 (TMOB)].

[17] Based on the above evidence, I am satisfied that “DESSERT CRISPS” is an expression which is apt to describe a dessert or dessert-like product, and that it should be available to other traders to use to describe their food products. For example, based on the evidence of record, it is not difficult to envision a scenario in which a trader in baked goods wishes to identify its selection of “Dessert Crisps” available to be sold, whether apple crisp, apricot crisp, berry crisp or some similar variant or product. In this regard, I agree with the Opponent that the Mark constitutes an easy to understand and plain description of the nature of the product. Consequently, I conclude that the Mark is clearly descriptive pursuant to section 12(1)(b) and that ground of opposition succeeds. As I have found that the Mark is clearly descriptive, it is not necessary to consider whether it is deceptively misdescriptive.

Section 2 Ground of Opposition

[18] With this ground opposition, the Opponent alleges that the Mark is not distinctive within the meaning of section 2 of the Act because it is a generic term that clearly describes and/or deceptively misdescribes the goods. Under section 2 of the Act, “distinctive” describes a trademark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them.

[19] It has repeatedly been held that a trademark which is found to be clearly descriptive or deceptively misdescriptive under section 12(1)(b) is necessarily not distinctive under section 2 of the Act [see *Canadian Council of Professional Engineers v APA - The Engineered Wood Assn* (2000), 7 CPR (4th) 239 (FC) at para 49; see also *Unilever Canada Inc v Superior Quality Foods, Inc* (2007), 62 CPR (4th) 75 (TMOB) at para 24]. As I have found in the Opponent’s favour under section 12(1)(b) that the Mark is clearly descriptive (and there is no reason that finding should change as of the date of the statement of opposition), the Opponent has met its initial evidential burden for the section 2 ground, and I conclude that the Mark is not inherently adapted to distinguish

the Goods of the Applicant from similar goods of others. Further, the Applicant has not submitted any evidence to suggest that the Mark had acquired distinctiveness in Canada by the material date via use or advertising. Consequently, the Applicant has not satisfied its legal burden to demonstrate that the Mark is distinctive under section 2 of the Act, and the section 2 ground of opposition is successful.

Remaining Grounds of Opposition

[20] As I have found in the Opponent's favour with respect to the grounds of opposition under sections 12(1)(b) and 2, it is not necessary to address the remaining grounds.

DISPOSITION

[21] 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.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2023-05-08

APPEARANCES

For the Opponent: No one appearing

For the Applicant: Catherine Bergeron

AGENTS OF RECORD

For the Opponent: Torys LLP

For the Applicant: Robic