

Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 96

Date of Decision: 2024-05-23

IN THE MATTER OF AN OPPOSITION

Opponent: Grace Foods Limited

Applicant: Sichuan Yuanda Group Fushun County Meile Food Co.,Ltd.

Application: 1940756 for MEI LE & Design

INTRODUCTION

[1] This is an opposition brought by Grace Foods Limited (the Opponent) in respect of application number 1940756 filed by Sichuan Yuanda Group Fushun County Meile Food Co.,Ltd. (the Applicant) for the trademark MEI LE & design (the Mark) depicted below:



[2] The Mark is associated with various food products, including seasonings, condiments, beverages and snacks. A full list of the goods contained in the application for the Mark (the Goods) is attached as Schedule A.

[3] For the reasons set out below, I reject the opposition.

THE RECORD

[4] The application for the Mark was filed on January 15, 2019 and was published in the *Trademarks Journal* for opposition purposes on July 6, 2022.

[5] On January 6, 2023, the Opponent filed a statement of opposition in respect of the application for the Mark under section 38 of the *Trademarks Act*, c T 13 as amended June 17, 2019 (the Act). The Opponent bases the opposition on sections 12(1)(d) (not registrable based on confusion with previously registered trademarks), section 16(1)(a) (non-entitlement based on previously used trademarks in Canada), and section 2 (non-distinctiveness).

[6] All of the grounds of opposition are rooted in an allegation of confusion with the Opponent's registered trademarks depicted below (the MILI Marks), details of which are attached in Schedule B:



[7] The Applicant filed a counterstatement denying all grounds of opposition.

[8] Both parties filed evidence. No cross-examinations were conducted.

[9] Neither party filed written representations and no oral hearing was held.

OVERVIEW OF THE EVIDENCE

The Opponent's Evidence

[10] In support of its opposition, the Opponent filed certified copies of the registrations for the MILI Marks.

The Applicant's Evidence

[11] In support of its application, the Applicant filed the affidavit of Wang Li (the Li Affidavit), legal representative of the Applicant since July 2021.

[12] The Li Affidavit contains, *inter alia*, the following statements and exhibits:

- A brief history of the Applicant, which specializes in the production of different condiments, mainly based on a spicy sauce, and the Applicant's business [para 2].
- The Applicant has used the Mark in Canada since at least as early 2019 and distributes its Goods in Canada through a network of Chinese trading companies (the "Trading Cos") which then sell the products to other third-party retailers or directly to Canadian consumers [paras 4 and 5].
- Invoices for sales of Goods in 2019 from the Applicant to a Chinese Trading Co and a subsequent invoice from the Trading Co to Canadian distributors (the "Distributors"), along with photographs of a sample of the Goods referred to in the invoices, are attached as Exhibits 2 and 3 [para 6]. The Mark is depicted on the Goods in

- the photograph with both French and English appearing on the label along with an indication of the applicable Distributor [para 6].
- Approximate annual sales of Goods bearing the Mark in Canada for the years 2019 through to 2023 (partial) in terms of number of bottles of Goods sold are provided [para 8].
 - The Mark is composed of two stylized Chinese characters depicted in a circle [para 10]. Many Chinese characters have one or more pronunciations and meanings. Attached as Exhibit 4 is a printout from an online Chinese-English dictionary showing the pronunciations and translations of the two Chinese characters contained in the Mark. Additional dictionary definitions for the Chinese characters in the Mark are attached as Exhibits 6 and 7 [paras 10 and 11].
 - The Chinese characters in the MILI Marks are depicted using the Traditional Chinese writing system, which is used mainly by Chinese speakers in Hong Kong, Taiwan and Macau. Many Mandarin and Cantonese speakers who live in other countries also use the Traditional Chinese writing system [para 12].
 - The Chinese characters in the Mark are depicted using the Simplified Chinese writing system, used by Mandarin and Cantonese speakers living in Mainland China, Malaysia and Singapore [para 14].

EVIDENTIAL BURDEN AND LEGAL ONUS

[13] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053 (FC)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient admissible evidence from

which it could reasonably be concluded that the facts alleged to support that issue exist [*John Labatt* at 298].

[14] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on an Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against it.

ASSESSMENT OF THE GROUNDS OF OPPOSITION

Sections 38(2)(b) and 12(1)(d) – Registrability

[15] The Opponent pleads that the Mark is not registrable as it is confusing with the Opponent's registered MILI Marks.

[16] The relevant date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corp v Wickers/Simmons Bedding Ltd*, (1991), 37 CPR (3d) 413 (FCA)].

Test for Confusion

[17] An opponent's initial burden is met with respect to a section 12(1)(d) ground of opposition if the registrations relied upon remain in good standing as of the date of the opposition decision. In the present case, the Opponent is relying on two registered trademarks, namely the MILI Marks. I have exercised my discretion to check the register and confirm that the registrations for the MILI Marks remain extant [see *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I therefore find that the Opponent has satisfied its evidential burden for this ground. I must now assess whether the Applicant has met its legal burden.

[18] In determining whether trademarks are confusing, all the surrounding circumstances should be considered, 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, including in appearance or sound or the ideas suggested by them. These criteria are not exhaustive, and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54; *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401]. 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.

[19] 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 they have no more than an imperfect recollection of the opponent's trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot*, para 20].

Inherent Distinctiveness and Extent Known

[20] I consider both the Mark and the MILI Marks to be inherently distinctive. For their part, the MILI Marks contain the apparently coined word "mili" contained in a design that resembles a dwelling with a peaked roof, underscored by three Chinese characters, all of which combine to give the MILI Marks a fairly high level of inherent distinctiveness. For its part, the Mark consists of a circular design containing Chinese characters in what

appears to be a somewhat fanciful manner to fit within the confines of the circle design. Overall, I am of the view that neither party is favoured in respect of inherent distinctiveness.

[21] With respect to the extent to which the Mark is known, the Applicant has provided evidence of sales of Goods in Canada bearing the Mark for the years 2019 through to partial sales for 2023 [Li Affidavit, para 8]. As there is no evidence of use of the MILI Marks of record, the Applicant is favoured in respect of the extent known.

[22] Overall, I find this factor favours the Applicant slightly.

Length of Time in Use

[23] The Applicant has provided evidence of use of the Mark in Canada from 2019 to 2023. As no cross-examination was conducted on the Li Affidavit, the statements contained therein are uncontested.

[24] The Opponent has filed no evidence of use of the MILI Marks in Canada. And while the mere existence of registrations for the MILI Marks can raise an inference of *de minimus* use, this alone is insufficient to give rise to an inference of significant and continuous use of the marks [see *Entre Computer Centers, Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB)].

[25] Accordingly, this factor favours the Applicant.

Nature of the Goods, Business and Nature of the Trade

[26] The goods associated with the Mark and the MILI Marks all fall under the general category of food, however, there is minimal direct overlap given that the majority of the Opponent's goods are fruits and vegetables (canned, dehydrated and fresh), grains, noodles and rice, while the majority of the Applicant's Goods are condiments, spices, seasonings and sauces.

Nonetheless, there is clearly some relation between the goods of the parties and arguably a direct overlap between the Opponent's "sauces, namely, hot sauces and oriental sauces" in registration TMA534202 and the Applicant's "pepper sauces" and "soya sauces".

[27] Given the similarities between the goods of the parties, including some direct overlap, and considering there is no evidence of record from which it could be concluded that the businesses and trades of the parties differ, this factor favours the Opponent.

Degree of Resemblance

[28] When considering the degree of resemblance, the trademarks at issue must be considered in their entirety as a matter of first impression. They must not be carefully analyzed and dissected into their component parts [*Wool Bureau of Canada Ltd v Registrar of Trade Marks* (1978), 40 CPR (2d) 25 (FCTD)]. That being said, the preferable approach is to consider whether there is an aspect of each trademark that is particularly striking or unique [*Masterpiece*, para 64].

[29] The Opponent's MILI Marks both consist of the word "Mili" in a stylized font, encased in a design that resembles a dwelling with a peaked roof, underscored by three Chinese characters. I consider the MILI Marks in their entirety to be the most unique aspect of these trademarks, more specifically the combination of the coined word "Mili", the Chinese characters with the peaked roof dwelling design.

[30] With respect to the Mark, I consider the most striking or unique aspect to be the cramped formation of two Chinese characters encased in a circle. Accordingly, I do not consider the trademarks at issue to share the same or even similar unique elements.

[31] Overall, the MILI Marks and the Mark bear very little visual resemblance. Even though the two Chinese characters in the Mark may be similar to, or the same as, two of the three Chinese characters in the MILI Marks, the overall differences in stylization and orientation of the arguably shared Chinese characters are striking and, in my view, the average Canadian consumer in a hurry with imperfect recollection would not make the connection between the Chinese characters in the MILI Marks and those in the Mark.

[32] With respect to the idea suggested, the only similar idea suggested by the trademarks at issue is that they are both suggestive of products associated with China or products of Chinese origin. However, in my view, the overall idea suggested by the Mark is that of a seal, mark, or possibly a coin of Chinese origin. In contrast, the MILI Marks are suggestive of a home, dwelling or possibly a restaurant. The mere fact that the trademarks of the parties contain similar or even the same Chinese characters, albeit in different stylized forms, is insufficient to conclude that the overall idea suggested by the trademarks is the same, similar or even associated.

[33] Finally, with respect to sound, I am of the view that the average Canadian consumer would consider the MILI Marks to have the sound "milly" based on the Latin/Roman alphabet letters in the MILI Marks.

[34] With respect to the Mark, while the Applicant provided in the application for the Mark that the Chinese characters transliterate to MEI and LE, and translate as "beautiful" and "happy" respectively, I have not been provided with any evidence as to whether the average consumer for either of the parties' goods can read or understand Chinese characters. Accordingly, there is no evidence upon which it can be concluded that an average consumer would associate any particular sound with the Mark and

therefore no basis to conclude that the Mark and the MILI Marks would have the same or similar sounds.

[35] Overall, I am of the view that the Mark and the MILI Marks are notably more different than they are similar in all of appearance, idea suggested, and sound. This factor, therefore, favours the Applicant.

Conclusion

[36] Having regard to the foregoing, I find that the balance of probabilities with respect to the issue of confusion weighs in favour of the Applicant. I make this finding recognizing that the Mark contains the same or similar Chinese characters as the MILI Marks and that the goods of the parties are similar and, in some cases, overlapping. However, given the overall differences in resemblance between the MILI Marks and the Mark, I am of the view that these trademarks are more different than they are similar and that the Applicant has met its legal burden in establishing that there is no reasonable likelihood of confusion as to the source of the Applicant's Goods being the Opponent based on the MILI Marks.

[37] Accordingly, this ground of opposition is rejected.

Remaining Grounds of Opposition

[38] The two remaining grounds of opposition raised by the Opponent (namely, that the Applicant is not entitled to registration of the Mark under section 16(1)(a) of the Act as it was confusing with the MILI Marks previously used or made known in Canada, and that the Mark is not distinctive of the Applicant under section 2 of the Act in that it does not distinguish the Goods from those of the Opponent associated with the MILI Marks) both require the Opponent to meet an initial evidential burden of use or making known of the MILI Marks in Canada.

[39] More specifically, while an opponent's evidential burden under section 16(1)(a) can be met by evidencing use or making known of its trademarks in Canada, to meet its evidential burden under section 2, an Opponent must show that its trademark had "a substantial, significant or sufficient reputation in Canada in association with its goods or services to negate the distinctiveness of the applied-for trademark" [*Bojangles' International, LLC v Bojangles Café Ltd*, 2004 CanLII 71764, 40 CPR (4th) 553, affirmed 2006 FC 657, 48 CPR (4th) 427 (FCTD)].

[40] As there is no evidence of use or making known of the MILI Marks in Canada of record, the Opponent fails to meet its initial burden for both of these remaining grounds. Accordingly, these grounds of opposition are dismissed.

DISPOSITION

[41] 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.

Leigh Walters
Member
Trademarks Opposition Board
Canadian Intellectual Property Office



SCHEDULE A

The Applicant's Goods

CI 30 (1) Star aniseed; Seasonings; Spices; Soya bean paste condiment; Chili seasonings; Pepper sauce; Pepper powder; Chow-chow (condiment); Relishes; Vinegar; Soya sauce; Coffee-based beverages; Tea; Sugar; Molasses for food; Cereal-based snack food; Jiaozi [stuffed dumplings]; Cereal-based bars; Noodles; Popcorn; Soya flour; Starch for food; Ice cream; Cooking salt; Yeast; Food seasonings; Meat tenderizers for household purposes.

SCHEDULE B

The Opponent's Registered MILI Marks

Trademark	Registration No.	Goods
	TMA534202	(1) Canned food products, namely, fruits and vegetables; grains; fruits; vegetables; and dehydrated foods, namely, dried vegetables and dried dehydrated fruits; rice; rice cakes; noodles; rice-based snack foods; sauces, namely, hot sauces, and oriental sauces; coconut milk.
	TMA389823	(1) Canned food products, namely, fruits and vegetables; dehydrated foods namely dried vegetables and dried dehydrated fruits. (2) Grains. (3) Fruits; vegetables.

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Opponent: CPST Intellectual Property Inc.

For the Applicant: Neomark Ltd.