Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 19

Date of Decision: 2025-01-30

IN THE MATTER OF AN OPPOSITION

Opponent: The Grizzly Paw Pub & Brewing Company Ltd.

Applicant: Screaming Toller Inc.

Application: 2,096,955 for Alpenglow Orange Vanilla Cream Ale

OVERVIEW

[1] The application for Alpenglow Orange Vanilla Cream Ale (the Mark) was filed on April 1, 2021 by Screaming Toller Inc. in association with beer, ale, lager, stout and porter. The Grizzly Paw Pub & Brewing Company Ltd. (the Opponent) opposed the application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on March 7, 2023.

[2] The Opponent raises a number of grounds of opposition including grounds based on section 16(1)(a) of the Act and non-distinctiveness primarily on the basis of confusion with the Opponent's trademark ALPENGLOW WINTER ALE and a design version of this trademark in association with beer. The Opponent also raises grounds of opposition based on confusion with a trade name, a lack of use or intention to use the

Mark and a lack of entitlement to use the Mark at the filing date pursuant to sections 16(1)(c), 38(2)(e) and 38(2)(f) of the Act respectively.

[3] The Opponent filed as its evidence the affidavits of Niall Fraser, the Owner and Founder of the Opponent, Eden Wright, a paralegal employed by the Opponent's agent, and Marianne Yulo, a corporate paralegal employed by the Opponent's agent. The Applicant filed as its evidence the affidavit of Ryan Kemp**,** its President, the Chief Executive Officer, and brew master. Both parties filed written representations.

ONUS AND LEGAL BURDEN

[4] The legal onus is on an applicant to show that the application complies with the provisions of the Act. However, there is an initial evidential burden on an 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, an applicant must satisfy the Registrar, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of the Mark [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA*, 2002 FCA 29].

MATERIAL DATES

[5] The material date for each ground of opposition is:

(a) the sections 16(1)(a) and 16(1)(c) grounds - the filing date of the application since the Applicant's date of first use was subsequent to this date [see section 16(1) of the Act, Kemp affidavit, para 3];

(b) the section 38(2)(d) ground - the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185]; and

(c) the sections 38(2)(e) and 38(2)(f) grounds - the filing date of the application as set out in these sections of the Act.

REASONS FOR DECISION

Section 16(1)(a) Non-entitlement Ground

[6] The Opponent alleges that the Mark is confusing with its use of the ALPENGLOW WINTER ALE and ALPENGLOW WINTER ALE design trademarks used in association with beer. I will concentrate my analysis on the Opponent's word mark.

[7] The Applicant submits that the Opponent is relying on its trademark application for ALPENGLOW WINTER ALE which was filed after the application for the Mark (Applicant's Written Arguments, para 8).

[8] While the Opponent references its trademark application in its section 16(1)(a) ground of opposition, it is clear that the Opponent is relying on its previous use of the trademark ALPENGLOW WINTER ALE. The ground of opposition clearly states "Section 16(1)(a): The applicant is not the person entitled to registration because the trademark applied for was confusing with a trademark previously used or made known in Canada by any other person."

[9] The following evidence detailed in the affidavit of Mr. Fraser is sufficient to meet the Opponent's evidential burden with respect to its trademark ALPENGLOW WINTER ALE:

- The Opponent attaches a picture of a can of ALPENGLOW WINTER ALE as sold to consumers in Canada featuring this trademark prominently (para 9, Exhibit B).
- The Opponent attaches invoices showing sales of cans in November-December 2018, 2019 and 2020 (Exhibit C – see, for example, Invoice Nos. B-8953, B-9020, B-9045, B-11285, B-11248, B-13537).

[10] The Applicant submits that given the very short durations of time in which the Opponent's product is sold, and the relatively small amounts of product that the Opponent has sold, it is not unreasonable to draw the inference that as of the material date the Opponent was not using its trademark on a continuous basis and the Opponent

was not intending to use the Opponent's trademark (Applicant's Written Arguments, para 22).

[11] There is no de minimis standard of use that an opponent must show to meet its burden under section 16 so long as the sales relied upon are in the normal course of trade [*JC Penney Co Inc v Gaberdine Clothing Co Inc*, 2001 FCT 1333 at paras 91-92] and an opponent demonstrates that its trademark has not been abandoned [section 16(3) of the Act]. Here, the sales are in the normal course of trade and the Opponent has no intention to abandon the use of its trademark as shown by the following statement of Mr. Fraser (para 11):

> I note that some of the oldest invoices say "discontinued" as a result of an internal record-keeping/inventory process that has since changed. I confirm that the display of the word "discontinued" did not at any time indicate Grizzly Paw Brewing's intention to abandon or discontinue ALPENGLOW WINTER ALE branded beer. The fact that Grizzly Paw Brewing intended to and did in fact continue to continuously produce and sell ALPENGLOW WINTER ALE branded beer is evidenced in the enclosed exhibits.

Test for confusion

[12] 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. Therefore, section 6(2) of the Act does not deal with confusion between trademarks themselves, but with the likelihood that the goods or services from one source will be perceived as being from another source.

[13] 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: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time the trademarks have been in use; (c) the nature of the goods and services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks, including in appearance or sound or in the ideas

suggested by them. 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; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54].

[14] 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 an applicant's mark, at a time when they have no more than an imperfect recollection of an 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*, *supra*, at para 20].

Inherent distinctiveness of the trademarks

[15] The Mark and the Opponent's trademark ALPENGLOW WINTER ALE have a similar degree of inherent distinctiveness as they are composed of an inherently distinctive component and a suggestive component. ALPENGLOW appears to be a coined word with no clear or obvious connection with the parties' goods. The remainder of the parties' trademarks are suggestive. In the Opponent's case, the trademark ALPENGLOW WINTER ALE, suggests when the ale is sold and/or best enjoyed. In the Applicant's case, the Mark suggests that the ale has an orange vanilla cream flavour.

Extent of use and length of time in use

[16] The Applicant had not yet commenced use as of the material date (affidavit of Ryan Kemp, para 3). The Opponent's evidence of use is minimal as its ALPENGLOW WINTER ALE is a seasonal brew and there is only limited evidence of products with the trademark ALPENGLOW WINTER ALE being sold between 2015 and 2020 (affidavit of Niall Fraser para 8, Exhibits C-D).

Nature of the goods and trade

[17] The nature of the goods and trade of the parties is the same as both parties sell their respective ale products in restaurants and liquor stores. The Applicant submits that there is no evidence that the parties' goods are sold in the same restaurants or

liquor stores (Applicant's written submissions, para 30). However, this does not result in the inference that consumers are unlikely to confuse the source of the goods.

Degree of resemblance between the trademarks

[18] The degree of resemblance is often considered to have the greatest effect on the confusion analysis [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49]. The Mark and the Opponent's trademarks are highly similar as both share the striking component ALPENGLOW. The Applicant submits that the elements "WINTER ALE" and "ORANGE VANILLA CREAM ALE" convey a much different connotation and meaning. While the Opponent's trademark does suggest a "seasonal brew" and the Mark an "orange vanilla cream" flavour, which may be different flavour profiles, both suggest the idea of an ale product sold under the brand name ALPENGLOW, since ALPENGLOW is the only inherently distinctive element of each trademark.

No evidence of actual confusion

[19] The Applicant submits that it is telling that the Opponent has not put forth any evidence that a consumer has actually confused the Applicant's products branded with the Mark as being those of the Opponent. An adverse inference concerning the likelihood of confusion may be drawn when concurrent use on the evidence is extensive and no evidence of confusion has been given by an opponent [*Christian Dior SA v Dion Neckwear Ltd* 2002 FCA 29. In the present case, however, I cannot draw an inference because there is no evidence of extensive concurrent use.

Geography

[20] As of the material date, the Opponent had only sold its seasonal brew product in communities along the corridor of the TransCanada Highway between Calgary, which include the cities or towns of Calgary, Cochrane, Canmore, and Banff (Exhibit C). The limited geographic area of the Opponent's sales does not assist the Applicant given that confusion is assessed as if the trademarks are used in the same area [Act, section 6(2)]. There cannot be a likelihood of confusion with another trademark anywhere in the country having regard to the framework of the Act and its provision for trademark registrations with a national scope of protection [*Muffin Houses Incorporated v The*

Muffin House Bakery Ltd (1985), 4 CPR (3d) 272 (TMOB); see also *Masterpiece Inc, supra* at paras 28-33].

Conclusion on likelihood of confusion

[21] Having considered all of the surrounding circumstances, I find that the Applicant has not satisfied its legal burden to show, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's trademark ALPENGLOW WINTER ALE. I reach this conclusion, for the reasons above, and in particular, due to the degree of resemblance in appearance, sound and idea suggested and the significant overlap in the nature of the goods and trade of the parties'. The section 16(1)(a) ground of opposition therefore succeeds.

Section 16(1)(c) Ground of Opposition

[22] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark as it is confusingly similar with the Opponent's trade name ALPENGLOW WINTER ALE. The Opponent's evidence is insufficient to meet its initial evidential burden as its evidence does not show that it was using ALPENGLOW WINTER ALE as the name it is carrying on business under. Rather, the evidence shows that ALPENGLOW WINTER ALE is being used as a trademark. As such, this ground of opposition is rejected.

Distinctiveness

[23] In order to meet its evidential burden, the Opponent must show that as of the filing of the statement of opposition that its ALPENGLOW WINTER ALE trademark had become sufficiently known to negate the distinctiveness of the Mark [*Bojangles' International, LLC v Bojangles Café Ltd* 2006 FC 657 at paras 33-34]. When an opponent's reputation is restricted to a specific area of Canada, an opponent's evidential burden may be satisfied if its trademark is well known in that area [*Bojangles, supra*]. The evidence before me, however, does not allow me to conclude that the Opponent's trademark was well known in a specific area of Canada. In the absence of more specific information regarding how many consumers are aware of the Opponent's trademark whether through purchase of the Opponent's ALPENGLOW WINTER ALE

beer or its promotion, I cannot conclude that the Opponent's trademark is well known in a specific area of Canada. As such, this ground of opposition is rejected.

Section 38(2)(e) Ground of Opposition

[24] The Opponent alleges that as of the filing date of the application, the Applicant was not using and did not intend to use the Marks in Canada in association with the Goods, in contravention of section 38(2)(e) of the Act. The Opponent filed no evidence to support this ground, nor does the Applicant's evidence support this ground. The section 38(2)(e) ground of opposition is therefore rejected.

Section 38(2)(f) Ground of Opposition

[25] The Opponent alleges that, as of the filing date of the application, the Applicant was not entitled to use the Mark because such use would constitute statutory passing off under section 7(b) of the Act, and under the common law. With respect to an opponent's initial evidential burden, the Opponent must establish a *prima facie* case for passing off before the legal onus shifts to the Applicant [see, for example, *Kentwood Floors Inc v Kentwood Homes Ltd*, 2022 TMOB 204 at para 63].

[26] Section 7(b) of the Act is a statutory codification of the common law action for passing off; a party may resort to this section if it possesses a valid and enforceable trademark, whether registered or unregistered [*Kirkbi AG v Ritvik Holdings Inc.,* 2003 FCA 297, aff'd 2005 SCC 65]. The required elements of a passing off action are (i) the existence of goodwill; (ii) deception of the public due to a misrepresentation; and (iii) actual or potential damage [see *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120]. Therefore, to meet its initial burden under a ground of opposition pleading section 7(b) of the Act, an opponent must provide sufficient evidence to support the existence of these three elements.

[27] I find that the Opponent's evidence falls short of demonstrating a sufficient level of consumer exposure to the Opponent's Mark in Canada to establish the existence of goodwill as required to support an action for passing off. As discussed above, the

evidence of the Opponent's use is minimal at best. As such, this ground of opposition is rejected.

DISPOSITION

[28] In view of all of the foregoing, 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.

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Natalie de Paulsen
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

No hearing held.

AGENTS OF RECORD

For the Opponent: FIELD LLP

For the Applicant: J. JAY HAUGEN (d.b.a. HIP LAW)