



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 117

Date of Decision: 2025-05-28

IN THE MATTER OF AN OPPOSITION

Opponent: Mosaiq Inc.

Applicant: Hop Breeding Company, L.L.C.

Application: 1,907,399 for MOSAIC

INTRODUCTION

[1] Hop Breeding Company, L.L.C. (the Applicant) has applied to register the trademark MOSAIC (the Mark).

[2] The Mark is applied for in association with the following goods (the Applicant's Goods):

Goods (Nice class & Statement)

32 (1) Hop extracts for manufacturing beer, Processed hops for use in making beer.

[3] Mosaiq, Inc. (the Opponent) opposes registration of the Mark. The opposition is based primarily on allegations that the Mark is confusing with its trade name and eight

trademarks registered by the Opponent in association with the goods and services set out below (collectively, the Opponent's Marks).

Trademark	Reg. No.	Goods and Services
MOSAIQ	TMA524,413	SERVICES: Wholesale of alcoholic beverages and the promotion of such beverages by means of live presentations in stores, bars and restaurants, and by means of advertising and marketing in print, electronic, audio and audiovisual media.
ST. LEGER	TMA912,709	GOODS: Alcoholic beverages, namely Whisky.
CHEMINAUD	TMA120,475	GOODS: Distilled alcoholic beverages
MAXI-DRY	TMA169,065	GOODS: Boissons alcooliques distillées.
MINUIT	TMA618,671	GOODS: Alcoholic beverages, namely, liqueurs, vodka, gin, whiskey, scotch, brandy, ready-mixed alcoholic cocktails and coffee liqueurs.
BLACKPOOL	TMA950,893	GOODS: Alcoholic beverages, namely spiced rum.
LEMON HART	TMA603,122	GOODS: Rum.
VINS BULLES ET PLAISIRS	TMA1,038,329	GOODS: (1) Alcoholic beverages, namely beer (2) Alcoholic beverages, namely wines and sparkling wines, and ready-to-drink alcoholic beverages, namely wine-based drinks, rum-based beverages, brandy cocktails, gin cocktails, vodka cocktails, alcoholic cocktails, alcoholic coolers, alcoholic cordials, alcoholic fruit beverages, alcoholic malt-based coolers, and alcoholic punches.

[4] For the reasons that follow, the opposition is rejected.

THE RECORD

[5] The application was filed on June 28, 2018. The application was advertised for opposition purposes in the *Trademarks Journal* on September 29, 2021. On November 29, 2021, the Opponent opposed the application by filing a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). An amended statement of opposition was filed on November 22, 2022. I note that the Act was

amended on June 17, 2019. As the application in this case was advertised after June 17, 2019, the Act as amended applies (see section 69.1 of the Act).

[6] The grounds of opposition are summarized below:

- Contrary to sections 38(2)(b) and 12(1)(d) of the Act, the Mark is not registrable because, as of the filing date of the application, the Mark was confusing with the Opponent's Marks that have been registered.
- Contrary to sections 38(2)(c) and 16(1)(a) of the Act, the Applicant is not the person entitled to registration of the Mark in Canada because, at the time of the filing date of the application, the Mark was confusing with the Opponent's trademark MOSAIQ, registration No. TMA524,413 (the MOSAIQ Mark) that had been previously used in Canada.
- Contrary to sections 38(2)(c) and 16(1)(c) of the Act, the Applicant is not the person entitled to registration of the Mark in Canada because, at the time of the filing date of the application, the Mark was confusing with the trade names Mosaiq, Mosaiq Inc., and Mosaiq Wine and Spirits Inc., used in association with the services of wholesale of alcoholic beverages and the promotion of such beverages by means of live presentations in stores, bars and restaurants, and by means of advertising in print, electronic, audio and audiovisual media; promotion and sale of beers and other alcoholic beverages; and development of alcoholic beverages, including beer-based beverages.
- Contrary to sections 38(2)(d) and 2 of the Act, the Mark is not distinctive of the Applicant's Goods as it does not distinguish those goods from the services of the Opponent provided in association with the MOSAIQ Mark.

[7] On January 31, 2022, the Applicant served and filed a counter statement. Both parties filed evidence, which is discussed below. The Opponent's affiant was cross-examined on his statutory declaration. Both parties filed written representations; no oral hearing was held.

EVIDENCE

Opponent's Evidence

[8] As its evidence in this proceeding, the Opponent filed the statutory declaration of Michael Szczepaniuk, Managing Director and Vice-President of the Opponent, affirmed on August 31, 2022. Mr. Szczepaniuk's declaration includes the following information:

- The business of the Opponent includes the acquisition, development, and marketing of alcoholic beverages which are sold to customers and licensed establishments across Canada via provincial or territorial liquor boards and, where applicable, private retail outlets.
- The Opponent has a sister company under the name Mosaïq Vins et Spiritueux Inc. (MVS), owned by the same principals. Mr. Szczepaniuk is also a Managing Director and Vice-President of MVS. The business of MVS includes providing marketing services and sales representation as an agent for alcoholic beverage brands doing business in Quebec.
- The Opponent owns, markets, and sells a number of alcoholic beverage products, including products sold under the trademarks Lemon Hart, Chemineaud, St-Leger, Maxi-Dry, Grüv, and Monkeenuts. The labels for such products include the words "BOTTLED BY" or "PREPARED FOR" MOSAIQ INC. in English and/or French (Exhibit MS-8).
- MVS promotes and markets its services and its clients' products in jurisdictions across Canada. Exhibit MS-11 includes several copies of what appear to be wine bottle labels displaying the word "MOSAIQ" and/or "Représenté par Mosaïq Vins et Spiritueux Inc.".
- The Opponent and MVS also market their services by way of social media channels and websites, appearances before liquor boards, retail stores, licenced establishments, media, trade shows and consumer shows, retail tastings, ambassador programs, printed materials including press releases, sell sheets, and price lists, and outdoor signage (Exhibits MS-8 and MS-11). Combined marketing budgets for the years 2017 through 2022 for Mosaïq and MVS are in the range of \$500,000 per year (Exhibit MS-15). The

marketing budgets for the Opponent alone are only \$7,000 in 2019, \$9,000 in 2018, \$7,000 in 2019, \$0 in 2020, \$1,500 in 2021, and \$2,000 in 2022.

- The Opponent's use of the MOSAIQ Mark began as early as August 22, 1998, as shown in an article published in the Montreal Gazette (Exhibit MS-13).
- The corporate name Mosaïq Vins et Spiritueux Inc. has been in use in Canada since July 22, 2015, as shown in a corporate search document attached as Exhibit MS-14.

[9] Mr. Szczepaniuk states that "My initial thought, when first made aware of the trademark application of the Hop Breeding Company, was one of little concern regarding any chance of consumer or trade confusion between MOSAIQ and MOSAIC." However, he states that after "some basic research", he learned that "this particular ingredient, MOSAIC hops, was a highly sought-after ingredient not only to Master Brewers but even more so to the alcoholic beverages trade and consumers alike". As Exhibit MS-16, he includes pictures of several beer cans displaying the word "MOSAIC" or "Mosaic Pale Ale" on their cans; in this exhibit, he states that in May 22, such products "were found at the Legacy Liquor Store [in Vancouver, BC] on display across from the Rum Section of the store" where the Opponent's Lemon Hart rum is carried.

Cross-Examination of Mr. Szczepaniuk

[10] Mr. Szczepaniuk was cross-examined on April 28, 2023. In the course of cross-examination, Mr. Szczepaniuk confirmed the following information:

- The last acquisition of an alcohol beverage brand by the Opponent took place in 2010 (Q13).
- The Opponent does not directly sell alcoholic beverages to customers, but acts as a "middle person" (Q18) in some instances between provincial liquor boards and private import labels.
- MVS operates solely in Quebec (Q62).
- The photographs from the Legacy Liquor Store (Exhibit MS-16) were taken by an individual named George Angelopoulos, a former Lemon Hart regional

manager, who was also the source of the information regarding placement of the products in that store; Mr. Szczepaniuk had not personally visited the store (Q260-265).

- The “basic research” undertaken by Mr. Szczepaniuk regarding the Mark included speaking with colleagues and others in the alcoholic beverage industry, as well as “a couple of beer types” who “lit up” at the mention of Mosaic hops (Q297).

Applicant’s Evidence

[11] As its evidence in this proceeding, the Applicant filed the affidavits of Jennifer Burns, Executive Director for the Applicant, sworn January 9, 2024, and Hannah Solmon, an articling student with the Applicant’s agent of record, sworn January 8, 2024.

[12] Ms. Burns’ affidavit contains the following information:

- The Applicant, a joint venture between John I. Haas, Inc (Haas) and Yakima Chief Ranches, LLC (YCR), is a hop breeding company based in the United States that breeds and owns a number of popular hops, including MOSAIC brand hops. In 2022, the Applicant was responsible for 37% of hop production by volume in the United States.
- MOSAIC is the trademark used for a variety of hop called HBC 369, developed by the Applicant. MOSAIC hops were the sixth largest hop variety by acreage in 2017, and have subsequently become the second largest hop variety by acreage in 2021 and 2022 (Exhibit 3).
- The Applicant, as an R&D and IP holding company, does not make direct sales, but instead licenses the right to grow, sell, and otherwise use its commercial hops to its owner companies, Haas and YCR. These entities sell hops to all of the major global brewers; Ms. Burns states that more than USD \$1 million worth of MOSAIC hops have been shipped to the Canadian locations of Anheuser-Busch Inbev SA/NV and Molson Coors Beverage Company. Haas and YCR also sell hops to over 1,200 craft breweries in

Canada either directly or through their distribution network, including Hops Connect Canada. The Applicant and its licensee/distributors do not sell hops to provincial liquor distribution boards; Ms. Burns notes that neither provincial liquor distribution boards nor typical retailers of alcoholic beverages sell hops to customers in Canada.

- The first sale of MOSAIC hops in Canada occurred on October 23, 2013; sales in the first two fiscal years averaged approximately CAD \$67,000 per year. Since 2013, the Applicant has sold about 2 million pounds of MOSAIC hops in Canada through its licensees/distributors, with revenue between 2013 and 2020 in excess of CAD \$16 million, and in excess of \$33 million by 2024. Such hops are typically sold ground and dried by weight through third-party retailers or directly through the Applicant's distributors.
- Given the popularity of MOSAIC hops, brewers may promote their use of this hop by listing it as an ingredient in the beer or referencing it in the beer name. Accordingly, MOSAIC is sometimes used in conjunction with the beer type, such as "Mosaic IPA", "Mosaic Pale Ale", or "Mosaic Session Ale". Brewers will also use their own trademarks to indicate the source of the beer. The Applicant licenses this use of MOSAIC by brewers and maintains control of the character and quality of MOSAIC hops.
- Ms. Burns states that she is not aware of any instances of confusion involving the trademarks at issue.

[13] Ms. Solmon's affidavit contains the following information:

- Results for an Electronic Trademarks Database search for all trademarks currently and previously registered to and filed by the entity GRUV INTERNATIONAL INC, showing two expunged trademarks (registration Nos. TMA583,295, "G in a circle with a dot design", and TMA576,441, "GRUV").
- Results of a federal corporate search through an online request with Corporations Canada for the entity GRUV INTERNATIONAL INC, which is listed as "dissolved by the corporation".
- Screenshots from the website *www.lemonhartrum.com*.

- Information to the effect that on January 2, 2024, Ms. Solmon visited the Vancouver-based Legacy Liquor Store referenced in Mr. Szczepaniuk's declaration, where she was advised that the store does not carry the two beer products shown in Exhibit MS-16 to Mr. Szczepaniuk's declaration. She attaches a photograph of a "Lemon Hart & Son" rum product, and a video of the layout of the store including the beer and rum sections.

ANALYSIS

Preliminary Issue: Hearsay

[14] The Applicant submits that the portions of Mr. Szczepaniuk's declaration which relate to the Legacy Liquor Store amount to inadmissible hearsay, as they rely on statements by a third party who is a non-witness, put into evidence for the truth of their contents. It submits that the evidence is not reliable in view of Ms. Solmon's evidence that the store did not carry the beer products shown in Mr. Szczepaniuk's evidence as of 2024, and that the beer products are displayed a significant distance away from the rum products in the store, as opposed to being "across" from the rum section. The Applicant further submits that the evidence is not necessary as Mr. Angelopoulos is both a friend and former employee of Mr. Szczepaniuk, and no explanation is provided as to why he could not have visited the location himself or retained a private investigator, which would have permitted the Applicant to test these statements by way of cross-examination.

[15] I concur with the Applicant that the portions of Mr. Szczepaniuk's declaration relating to the Legacy Liquor Store amount to hearsay, and am not prepared to give weight to these sections of the declaration. However, as discussed below, the issue of whether or not these portions of the Opponent's evidence are hearsay is not determinative of the outcome of this decision.

Preliminary Issue: Facts Not In Evidence

[16] The Applicant submits that the Opponent introduces a number of facts not in evidence in its written representations, including the following statements:

- “Producers of alcoholic beverages regularly have their representatives and/or agents call on restaurants and bars directly to attempt to make an arrangement for their products to be carried by the respective retailer or [...] to discuss the availability of new products” (Opponent’s written representations, para 16);
- “producers that have purchased hop extracts from the Applicant that have been used to make their beer will, in all probability, advise the retailer of this fact to sell more product because of the popularity of beer made with these hops” (para 16);
- “A consumer [at a retail outlet for alcoholic beverages] would be exposed to both the [Opponent’s MOSAIQ Mark], such as on the label of the [wine] bottle, and the [Mark] on the beer cans” (para 19); and
- “The operations of the producers and marketers within the alcoholic beverages industry have a substantial degree of overlap resulting in circumstances that could lead to confusion” (para 20).

[17] Pursuant to section 49 of the *Trademarks Regulations*, SOR/2018-227, evidence in an opposition proceeding must be submitted in the form of an affidavit or statutory declaration except as otherwise provided. Accordingly, any facts introduced in written representations will not be considered. However, for the reasons discussed below, even if I were to consider these facts, it would not change the outcome of this decision.

Preliminary Issue: MVS Not A Party

[18] The Applicant submits that MVS is not a party to the opposition as it has not been named as a joint opponent. Accordingly, the Applicant submits that the Opponent cannot rely on use of the trade name “Mosaiq Wine and Spirits Inc” by MVS for its grounds of opposition asserted under sections 38(2)(c) and 16(1)(a) and (c).

[19] Pursuant to section 17(1) of the Act, an opponent may not rely upon use or making known of a trademark or trade name by third parties in challenging an applicant’s entitlement to registration [see also *CTV Ltd v InterMedia Vibe Holdings LLC* (2010), 88 CPR (4th) 188 (TMOB)]. As such, the Opponent’s evidence pertaining to the

“Mosaiq Wine and Spirits Inc” trade name is not relevant to the ground of opposition asserted under section 16(1)(c) (and in any event, MVS appears to have not been incorporated as of the relevant date for the section 16 grounds of opposition, *per* Szczepaniuk declaration at para 22). However, Mr. Szczepaniuk has confirmed that the Opponent has licensed MVS to use the MOSAIQ Mark, and I am prepared to accept that any use of that trademark by MVS would have been subject to control by the Opponent and would have enured to the benefit of the Opponent, given that Mr. Szczepaniuk is the managing director of both entities [see *Petro-Canada v 2946661 Canada Inc* (1998), 83 CPR (3d) 129 (FCTD); *Lindy v Canada (Registrar of Trade Marks)*, [1999] FCJ No 682 (FCA)].

Ground of Opposition: Section 12(1)(d)

[20] The Opponent alleges that contrary to section 12(1)(d) of the Act, the Mark is not registrable due to the Opponent’s registrations for the Opponent’s Marks. I have exercised my discretion to check the register and confirm that these registrations remain extant [per *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden for the section 12(1)(d) ground of opposition.

[21] Since the Opponent has discharged its evidentiary burden regarding this ground of opposition, I must assess whether the Applicant has discharged its legal onus to prove, on balance of probabilities, that there is no reasonable likelihood of confusion between the Applicant’s Mark and the aforementioned registrations of the Opponent. The material date with respect to confusion with a registered trademark is the date of this decision [*Simmons Ltd v A to Z Comfort Beddings Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[22] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree

of resemblance between the trademarks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [see, in general, *Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22, and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 (*Masterpiece*)]. Moreover, in *Masterpiece*, the Supreme Court stated that the degree of resemblance between the trademarks is often likely to have the greatest effect on the confusion analysis.

[23] Finally, section 6(2) of the Act does not concern confusion between the trademarks themselves, but confusion regarding goods or services from one source as being from another source. In this case, the question posed by section 6(2) is whether there would be confusion regarding the goods sold under the Mark such that they would be thought to have emanated from the Opponent.

[24] In conducting the confusion analysis, I will focus on the Opponent's MOSAIQ Mark, as in my view it represents the Opponent's best case with respect to the issue of confusion. Indeed, as the rest of the Opponent's Marks do not contain the word "MOSAIQ" or "MOSAIC", and do not otherwise resemble the Mark, I concur with the Applicant that there is no likelihood of confusion with respect to these trademarks and the Mark.

Inherent and acquired distinctiveness

[25] The Opponent submits that its trademark is inherently distinctive as it is a coined word and does not describe or suggest any intrinsic quality or characteristic of the Opponent's business or activities. By contrast, the Opponent notes that the Mark is a common English word.

[26] The Applicant submits that according to the *Canadian Oxford Dictionary*, the word "mosaic" means "a picture of pattern produced by an arrangement of small variously coloured pieces of glass or stone", which has no connection to the Applicant's Goods. As the Opponent's MOSAIQ Mark is a coined term, both trademarks possess some inherent distinctiveness.

[27] Although neither trademark is suggestive of their owner's respective goods or services, I find that the MOSAIQ Mark has a slightly greater degree of inherent distinctiveness than the Mark due to its stylized spelling.

[28] As for acquired distinctiveness, the Opponent submits that its MOSAIQ Mark has been used in Canada since 1998, and has therefore acquired a significant amount of distinctiveness. By contrast, the Applicant submits that the Opponent has adduced no evidence of revenue generated from performance of its services in Canada or sales figures for any products. As for the marketing budget figures included in Mr. Szczepaniuk's declaration, the Applicant notes that the Opponent's budget amounts to only \$26,500 over six years, if the advertising expenditures for MVS are not considered. However, as noted above, I consider that any use of the MOSAIQ Mark by MVS would enure to the Opponent, and note that its annual marketing expenditures are in the range of \$500,000 per year. As for the acquired distinctiveness of the Mark, the Applicant submits that it has sold about 2 million pounds of hops associated with the Mark in Canada since 2013, amounting to over \$33 million in revenue as of 2024.

[29] I accept that both the MOSAIQ Mark and the Mark have acquired some distinctiveness, with the Mark's level of acquired distinctiveness being somewhat higher due to the large volume of sales in evidence of MOSAIC hops in Canada since 2013. Accordingly, as the MOSAIQ Mark has a slightly higher degree of inherent distinctiveness and the Mark has a somewhat higher degree of acquired distinctiveness, I find that this factor favours neither party to any significant extent.

Length of time in use

[30] The Opponent submits that it first used its MOSAIQ Mark in August 1998, and has used it continuously since then, while the Mark has only been used since 2013. The Applicant submits that the Opponent's position is that confusion is primarily likely to occur due to the display of the MOSAIQ Mark on beverage labels, and that there is no evidence of display of the MOSAIQ Mark on beverage labels until around 2011 or 2012 on the Lemon Hart rum products (Szczepaniuk cross-examination, Q 236). While Mr. Szczepaniuk's declaration refers to a Gräv beverage product displaying the Opponent's

MOSAIQ Mark as early as 2004, the Applicant submits that this beverage was never marketed in Canada (as confirmed in the Opponent's answers to undertakings). The Applicant submits that the remaining products cited by the Opponent as displaying the Opponent's MOSAIQ Mark date to 2015 or after.

[31] Nevertheless, I note that Exhibit MS-7 to Mr. Szczepaniuk's declaration shows that the Opponent has been promoting and marketing its products to liquor boards in Canada since 1998, and that the appearance of the MOSAIQ Mark on the Lemon Hart rum products still predates the Applicant's use of the Mark in Canada.

[32] Accordingly, this factor favours the Opponent.

Nature of the goods, services or business and nature of the trade

[33] When considering sections 6(5)(c) and (d) of the Act, it is the statement of services as defined in the registration relied upon by the Opponent and the current statement of Goods in the application for the Mark that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. However, as each statement must be read with a view to determining the probable type of business intended, evidence of the parties' actual trades is useful [see *McDonald's Corp v Coffee Hut Stores Ltd*, 1996 CanLII 3963 (FCA); *McDonald's Corp v Silcorp Ltd* (1989), 55 CPR (2d) 207 (FCTD), aff'd (1992), 41 CPR (3d) 67 (FCA)].

[34] The Opponent submits that although its services are not the same as the goods of the Applicant, both relate to the alcoholic beverage industry in Canada. As the Opponent's evidence indicates that it conducts marketing events at trade and consumer shows and that such events may include updates on new beer products (Exhibit MS-11), there is a likelihood that both the Opponent's MOSAIQ Mark and the Mark would be used at the same locations. Similarly, the Opponent submits that both trademarks would be likely to appear on beverage labels sold at the same retail outlets.

[35] The Applicant submits that neither party sells to end users or consumer purchasers of alcoholic beverages, and neither parties' use of their trademarks gives rise to an association with the source of an alcoholic beverage product. In this respect, the Applicant notes that while the Opponent is the legal owner of a number of the trademarks associated with the beverages it distributes, it does not present itself as the source of those products; instead, the labels typically state that the products were "Prepared for" or "Bottled for" the Opponent. As for the Mark, the Applicant submits that where it appears on labels for beer products, it is to identify an ingredient rather than to identify a specific source of beer.

[36] I agree with the Applicant that the nature of the parties' goods and services is very different. Although both relate to the alcoholic beverage industry in general, the Opponent's services (wholesale and promotion of alcoholic beverages) and the Applicant's goods (hops) are dissimilar in nature, as the former involve sales of finished products to liquor boards and retailers, while the latter are ingredients sold to brewers. The goods and services meet very different needs of their customers, and are used at very different stages of the process of producing alcoholic beverages, with hops being used in the brewing process and the Opponent's services relating to finished beverages being brought to market. While both trademarks may appear on labels of alcoholic beverages at retail outlets, I do not consider this to be determinative, since neither party's goods or services include sale of alcoholic beverages to end users.

[37] In this respect, I note that in a technical sense, the Applicant could be considered to be selling its hops products to end consumers as a component of finished beer products. Nothing in the Act requires a trademark to be used in association with a "stand-alone" product; use within the meaning of the Act may be established where a Mark is used in association with a component of a complete product [see *Gowling, Strathy & Henderson v Tundra Knitwear Ltd* (2001), 13 CPR (4th) 559 at para 7; *Gowling WLG (Canada) LLP v Pelican International Inc*, 2016 TMOB 144 at paras 16-18]. However, the fact that the Opponent's MOSAIQ Mark functions as an identifier for the corporate distributor of a beverage, while the Mark identifies an ingredient in a beer product, serves to underscore the dissimilar nature of the Opponent's services and the

Applicant's goods. In this respect, I note that in *San Miguel Brewing International Limited v Molson Canada 2005*, 2013 FC 156, at para 33 (*San Miguel*), the Federal Court held that the ordinary consumer of alcoholic beverages can be expected to possess some awareness of the products they encounter in the marketplace:

Appl[ying the ordinary consumer test] to the beer consumer (the relevant "ordinary person" at the bar or beer/liquor store), I am of the view that the ordinary beer drinker is sensitive to the names of beers and to what they know and like. The test is premised on the ordinary beer drinking consumer – not on what might be a legal fiction of the non-beer drinking life partner who is asked to pick up beer.

[38] In this case, the goods and services at issue are not merely two competing beer brands, but promotional and wholesale services and beer ingredient goods whose only commonality is a connection to the alcoholic beverages industry. Accordingly, I find that this factor favours the Applicant.

[39] As for the nature of the trade, the Opponent submits that because the Opponent's MOSAIQ Mark and the Mark both appear on beverage labels and cans, both would likely appear at alcoholic beverage retail outlets. In this respect, the Opponent submits that in assessing the similarity of the nature of the respective goods, services, and trade, it is necessary to consider all goods which normally fall within the scope of the Applicant's statement of goods, and all trade channels through which they would normally be offered [citing *Drug Trading Co Ltd v Sancell Inc* (1985), 5 CPR (3d) 132 (TMOB); and *Parmic Inc v Tenovus Consultants Inc* (1986), 12 CPR (3d) 573 (TMOB)].

[40] The Applicant submits that while both parties operate in the alcoholic beverages industry, defined broadly, the parties engage in commerce through different supply chains, for different purposes, and target distinct consumers. The Applicant notes that the Opponent's clients include liquor boards, retail outlets selling alcoholic beverages, and licensed establishments, whereas its consumer base consists of international commercial breweries, craft brewers, and individual home brewers.

[41] While the Applicant submits that there is no admissible evidence that alcoholic beverage products displaying the Mark and the Opponent's MOSAIQ Mark are sold in

through the same retail channels, bearing in mind that I must consider all trade channels through which the goods and services at issue would normally be offered, I accept that it is at least possible that beer products listing MOSAIC hops as an ingredient, and one of the alcoholic beverage products displaying the Opponent's MOSAIQ Mark, could be stocked and sold by the same retail outlet or liquor board [for similar conclusions, see *Champagne Moët & Chandon v Chatam International Inc* (2001), 12 CPR (4th) 549 (TMOB) at 554-558; *Labatt Brewing Company Limited v Cerveceria Nacional Dominicana C por A* (2004), 42 CPR (4th) 554 (TMOB)].

[42] Nevertheless, the Opponent provides its wholesale services to liquor boards, licensed establishments, and retailers, who then sell such beverages to end consumers, while the Applicant sells its hops to brewers, who use such products to produce beer which is then sold through boards and retailers to end consumers. Thus, the parties' intended channels of trade overlap in the most general sense only in that they are directed towards entirely different types of buyers in the alcoholic beverage industry writ large. Even if beer products listing MOSAIC hops were to be marketed or sold through liquor boards, retail outlets, or at trade shows where the Opponent promotes its services, section 6(2) of the Act does not concern confusion between the trademarks themselves, but confusion regarding goods or services from one source as being from another source; namely, whether there would be confusion regarding the goods sold under the Mark such that they would be thought to have emanated from the Opponent. Again, in my view, a consumer of ordinary intelligence (whether a prospective buyer at a trade show or an ordinary purchaser of alcoholic beverages at a liquor store) would not be misled as to the source of such disparate goods and services.

[43] As such, I find that this factor favours the Opponent to a nominal degree only.

Degree of resemblance

[44] When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality; it is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trademarks. The Supreme Court of Canada in *Masterpiece* has

advised that the preferable approach when comparing trademarks is to begin by determining whether there is an aspect of the trademark that is particularly striking or unique.

[45] The Opponent submits that the trademarks are nearly identical in appearance, with the only difference being the letters “C” and “Q” at the ends of the words, and are identical phonetically and suggest identical ideas. The Applicant submits that the trademarks differ in appearance given the letter “Q” in the Opponent’s MOSAIQ Mark, and suggests that it “also permits a pronunciation of ‘mosay-IQ’”. Further, the Applicant submits that the Opponent’s MOSAIQ Mark is a coined word with no clearly associated meaning, whereas the Applicant’s Mark is a common dictionary term.

[46] I agree with the Opponent that the trademarks at issue are visually nearly identical, and that they are likely to be phonetically identical. To the extent that “MOSAIQ” would be read as a stylized version of the word “mosaic”, the trademarks suggest the same idea.

[47] Accordingly, this factor favours the Opponent.

Additional surrounding circumstances: Admission Against Interest

[48] The Applicant submits that Mr. Szczepaniuk expressly admits that his initial impression was that the trademarks were not confusing, and that his conclusions to the contrary only arose after he conducted subsequent research. As the test for confusion involves the first impression in the mind of a casual consumer who does not give the matter any detailed consideration or scrutiny [*Masterpiece* at para 40], this admission by Mr. Szczepaniuk is sufficient to dispose of this proceeding in favour of the Applicant, since the fact that confusion does not arise as a matter of first impression is “not contested in this opposition”.

[49] However, the question of whether confusion between the parties’ trademarks arises as a matter of first impression is not a question of fact, but a legal determination made in accordance with the law and relevant jurisprudence [see *California Fashion Industries Inc v Reitmans (Canada) Ltd* (1991), 38 CPR (3d) 439 (FCTD); *Labatt*

Brewing Co v Molson Breweries, A Partnership (1996), 68 CPR (3d) 202 (FCTD)]. Accordingly, I do not find that this is a relevant surrounding circumstance that assists the Applicant.

Additional surrounding circumstances: No instances of actual confusion

[50] Evidence of instances of actual confusion is not required in order to demonstrate a likelihood of confusion. However, concurrent use of two trademarks without such instances of actual confusion is a surrounding circumstance which can suggest an absence of a likelihood of confusion, depending on the specific nature and duration of that concurrent use [see *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29, 20 CPR (4th) 155 (FCA) at para 19; see also *Maple Leaf Consumer Foods Inc v Kelbro Enterprises Inc*, 2012 TMOB 28, 99 CPR (4th) 424]. In this case, as the parties' trademarks appear to have coexisted and been used and/or promoted extensively in Canada over a span of more than ten years without any evidence of confusion [Burns affidavit, paras 34-35], I find that the absence of any instances of confusion to be an additional surrounding circumstance that favours the Applicant.

Conclusion

[51] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection and have considered all of the surrounding circumstances. In most instances, it is the degree of resemblance between the trademarks that is the most crucial factor in determining the issue of confusion [*Masterpiece; Beverley Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145 (FCTD) at 149, aff'd 60 CPR (2d) 70 (FCA)]. Furthermore, section 6(2) of the Act is not concerned with confusion between the trademarks themselves, but rather confusion as to the source of the goods and services at issue.

[52] In this case, despite the similarity between the trademarks at issue, I am of the view that the ordinary consumer is unlikely to be misled as to the source of the goods or services in this case, bearing in mind that ordinary consumers are "owed a certain amount of credit for their intelligence or knowledge" [*San Miguel, supra*; see also *Damm v Hijos De Rivera, SA*, 2015 TMOB 230 at paras 52-55]. In reaching this conclusion, the

Court in *San Miguel* referred to the earlier case of *Carling O’Keefe Breweries of Canada Ltd v Anheuser-Busch Inc* (1982), 68 CPR (2d) 1 (FCTD) [reversed in part on other grounds in (1986), 10 CPR (3d) 433], in which the Court observed that “regular beer drinkers will have considerable loyalty to their favourite brand”. Applying this reasoning to the current case, where the goods and services at issue are considerably more different from each other than the competing beer brands in the aforementioned cases, I have no difficulty concluding that the average beer drinker or brewer, and especially the corporate brewers who are the among the Applicant’s usual customers, would be able to differentiate between the Mark appearing in association with hops, and the MOSAIQ Mark appearing in association with the distribution of spirits and other non-beer alcoholic beverages. Similarly, I do not believe it is likely that the liquor boards and retailers who are the Opponent’s customer base would believe, as a matter of first impression, that the alcoholic beverages promoted and sold by the Opponent would emanate from a hops company, or vice versa.

[53] I am also mindful that “the Registrar need not be satisfied beyond doubt that confusion is unlikely”, as such a standard would create an “insurmountable burden because certainty in matters of likelihood of confusion is a rare commodity” [*Drummond Brewing Company Ltd v Moosehead Breweries Limited*, 2017 TMOB 113 at para 65, citing *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29 at paras 10-11].

[54] Thus, considering the differences in the nature of the parties' goods, services, and trade, I find that the balance of probabilities between finding that there is no reasonable likelihood of confusion and finding that there is a reasonable likelihood of confusion, slightly favours the Applicant. In this respect, I am in agreement with Mr. Szczepaniuk’s initial impression that there is “little concern regarding any chance of consumer or trade confusion between MOSAIQ and MOSAIC” given that the Applicant is “merely providing an ingredient used in the production process of beers” [Szczepaniuk declaration, para 31]. While the absence of actual confusion is not determinative, I find that it tends to confirm that the differences in the goods and services at issue makes confusion unlikely.

[55] Accordingly, the Applicant has met its legal onus. The section 12(1)(d) ground of opposition is therefore rejected.

Ground' of Opposition: Section 16(1)(a)

[56] Pursuant to sections 38(2)(c) and 16(1)(a) of the Act, the Opponent pleads that the Applicant is not the person entitled to registration of the Mark in Canada because, at the time of the filing date of the application, the Mark was confusing with the Opponent's trademark MOSAIQ, registration No. TMA524,413 (the MOSAIQ Mark) that had been previously used in Canada. The material date for this ground of opposition is October 23, 2013, the Applicant's date of first use of the Mark in Canada [Burns affidavit, para 22].

[57] In order to meet its initial burden under this ground, the Opponent must show that at least one of its trademarks was used prior to the material date and was not abandoned at the date of the advertisement of the application. Accordingly, the relevant evidence on which the Opponent can rely is evidence of use that pre-dates the material date. I find that the Opponent has met its burden since, as noted above, its evidence shows that it has been using the Mark since as early as 1998. However, although the difference in material dates means that the acquired distinctiveness and absence of actual confusion factors no longer favour the Applicant, I reach the same conclusion in the confusion analysis as in the section 12(1)(d) ground for the reasons discussed above.

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

Ground of Opposition: Section 16(1)(c)

[59] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark in Canada because, at the time of the filing date of the application, the Mark was confusing with the trade names Mosaiq, Mosaiq Inc., and Mosaiq Wine and Spirits Inc., used in association with the services of wholesale of alcoholic beverages and the promotion of such beverages by means of live presentations in stores, bars and restaurants, and by means of advertising in print, electronic, audio and audiovisual

media; promotion and sale of beers and other alcoholic beverages; and development of alcoholic beverages, including beer-based beverages.

[60] As discussed above, because MVS is not a party to these proceedings, the Opponent cannot rely on “Mosaic Wine and Spirits Inc.” for the purposes of this ground of opposition. In any event, as the distinction between the use of “Mosaic” as a trademark or trade name has no impact on the confusion analysis, I reach the same conclusion in the confusion analysis as in the section 12(1)(d) and 16(1)(a) grounds for the reasons discussed above. In this respect, while the statement of opposition refers to the Opponent being the developer of “beer-based beverages”, there is no evidence of the Opponent ever developed such products in Canada. In this respect, I note that while the Opponent’s evidence refers to a malt-based beverage called “Gräv”, the evidence indicates that this product was not marketed in Canada by the Opponent (Szczepaniuk answers to undertakings, Q2).

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

Ground of Opposition: Section 2

[62] The Opponent has also pleaded that contrary to section 2 of the Act, the Mark is not distinctive of the Applicant’s Goods as it does not distinguish those goods from the services of the Opponent provided in association with the MOSAIQ Mark. The material date with respect to a distinctiveness ground of opposition is the date of filing of the opposition (June 28, 2018) [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FCTD)].

[63] In *Bojangles’ International, LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 33-34, the Federal Court provided that a trademark could negate another mark’s distinctiveness if it was known to some extent at least and its reputation in Canada was substantial, significant or sufficient, or alternatively, if it is well known in a specific area of Canada. An attack based on non-distinctiveness is not restricted to the sale of goods or services in Canada. It may also be based on evidence of knowledge or reputation of an opponent’s trademark including reputation spread by means of word of mouth or

newspaper and magazine articles [*Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD)].

[64] Even if I were to find that the Opponent meets its evidential burden for this ground, as the difference in material dates does not lead to a different outcome for the confusion analysis, I reach the same conclusions with respect to confusion as those set out in the section 12(1)(d) ground.

[65] This ground of opposition is therefore rejected.

DISPOSITION

[66] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition.

G.M. Melchin
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Opponent: Daniel F. O'Connor

For the Applicant: Clark Wilson LLP