

Federal Court



Cour fédérale

Date: 20220902

Docket: T-1488-21

Citation: 2022 FC 1254

Ottawa, Ontario, September 2, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

**101217990 SASKATCHEWAN LTD. DBA
DISTRICT BREWING COMPANY**

Applicant

and

LOST CRAFT INC.

Respondent

JUDGMENT AND REASONS

[1] The Trademarks Opposition Board dismissed District Brewing’s application for the trademark “Find Your Craft,” because an identical mark was used by Lost Craft before District Brewing’s application was filed. I am dismissing District Brewing’s appeal of that decision. I find that the Board did not impermissibly assess the use of Lost Craft’s mark in relation to brewery services, even though its notice of opposition referred only to beer. I also find that the

Board made no palpable and overriding error in concluding that Lost Craft used the “Find Your Craft” trademark on its delivery van before the date of filing.

I. Background

[2] The applicant, District Brewing, is a beer manufacturer in Regina, Saskatchewan. On September 8, 2016 [the date of filing], it filed an application to register the trademark “Find Your Craft” in association with beer.

[3] The respondent, Lost Craft, is a brewery in Toronto, Ontario. It filed an opposition, based on its alleged use of the trademark “Find Your Craft” before the date of filing. More precisely, it asserted that District Brewing was not a person entitled to registration because its proposed trademark was confusing with a trademark previously used by Lost Craft “in association with beer.” This ground of opposition is found in section 16(3)(a) of the *Trademarks Act*, RSC 1985, c T-13 [the Act], as it read at the date of filing.

[4] In a decision indexed as 2021 TMOB 151, the Trademarks Opposition Board [the Board] allowed Lost Craft’s opposition and dismissed District Brewing’s application for registration. According to the Board, Lost Craft did not offer any evidence of its use of the trademark “Find Your Craft” in association with beer before the date of filing. Nevertheless, the Board found that Lost Craft used the “Find Your Craft” trademark in association with “brewery services,” because it was featured on its delivery van starting in early August 2016. Although the notice of opposition referred only to “beer” and not “brewery services,” the Board noted that Lost Craft’s evidence and submissions referred to both, and that District Brewing understood the case to

meet. The Board then proceeded to the confusion analysis. As the marks were identical and there was a clear overlap between District Brewing's beer and Lost Craft's brewery services, the Board had no difficulty finding that there was a reasonable likelihood of confusion between the parties' marks.

II. Analysis

[5] District Brewing now appeals the Board's decision pursuant to section 56 of the Act. It argues that the Board erred in considering a ground of appeal that was not pled in Lost Craft's notice of opposition. It also submits that the Board erred in finding that Lost Craft had used the trademark "Find Your Craft" before the date of filing, in association with either beer or brewery services.

[6] I am dismissing District Brewing's appeal. In my view, the Board's consideration of Lost Craft's use of the trademark in association with brewery services does not amount to a new ground of opposition. Moreover, the Board did not err in its review of the evidence concerning Lost Craft's use of the trademark.

[7] I reach these conclusions applying the standard of review set forth in *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 [*Clorox*]. With respect to questions of law, the standard is correctness; in other words, this Court substitutes its own decision for that of the Board. With respect to questions of fact or mixed law and fact, this Court intervenes only if the Board made a palpable and overriding error. Nevertheless, if the parties bring new evidence that

materially affects the Board's findings of fact or exercise of discretion, this Court reviews the matter afresh, as if it were hearing it in the first instance.

A. *A New Ground of Appeal?*

[8] In this Court, District Brewing's first ground of appeal is that the Board exceeded its jurisdiction by considering Lost Craft's use of the trademark in association with brewery services, whereas the notice of opposition referred to beer only. I disagree with District Brewing.

[9] Pleadings play a crucial role in civil procedure. They circumscribe the questions at issue at each stage of the proceeding and provide notice to the other party of the case to meet. Parties are usually not allowed to bring evidence or make submissions pertaining to matters not pleaded. Nevertheless, this requirement, aimed at ensuring the fairness and efficiency of the process, should not be applied in a rigid manner. A decision-maker may show a degree of flexibility in allowing a party to raise an issue that is outside a literal reading of the pleadings, provided that no unfairness results.

[10] With respect to trademark oppositions, section 38(3)(a) of the Act provides that "A statement of opposition shall set out ... the grounds of opposition in sufficient detail to enable the applicant to reply thereto." In *Schneider Electric Industries SAS v. Spectrum Brands, Inc*, 2021 FC 518 [*Schneider*], my colleague Justice Nicholas McHaffie summarized how this provision has been interpreted. For our purposes, the following two principles are relevant. First, an opponent cannot argue a ground that was not pleaded in the notice of opposition: *Schneider*, at paragraph 27. Second, a ground of opposition is defined mainly by reference to the provision

of the Act that is relied upon and, where applicable, the trademark with which the challenged trademark is alleged to be confusing: *Schneider*, at paragraphs 2, 28 and 35. For example, in *Molson Breweries v Pernod Ricard SA* (1995), 64 CPR (3d) 356 (FCA), the opponent was prevented from arguing abandonment, where its notice of opposition referred only to a failure to comply with section 30(b), as it then read.

[11] In this case, Lost Craft's opposition was based on section 16(3)(a) of the Act, as it then read. It was based on a likelihood of confusion with the "Find Your Craft" trademark used by Lost Craft. These two essential parameters did not change when Lost Craft asserted that its trademark was used in association with brewery services, in addition to beer. The fact that Lost Craft's notice of opposition provided the further detail that the mark was used in association with beer does not mean that enlarging the scope of the alleged use to include brewery services constitutes a new ground of opposition: *Schneider*, at paragraph 38.

[12] Thus, the Board did not err in law by basing its decision on a ground not pleaded.

[13] The issue then becomes whether the Board erred in finding that District Brewing was aware of the case to meet. As this is a question of mixed fact and law, I cannot intervene unless the Board made a palpable and overriding error. In this regard, District Brewing's written submissions to the Board make it clear that it was aware that Lost Craft was relying on the use of its trademark in association with brewery services. The fact that it chose to raise an objection instead of responding on the merits is immaterial. The Board did not commit any palpable and overriding error in this regard.

B. *Use of the Mark Before the Date of Filing*

[14] District Brewing submits that the Board erred in finding that Lost Craft used the trademark “Find Your Craft” in association with brewery services prior to the date of filing.

[15] In this regard, the Board accepted Lost Craft’s evidence that the trademark “Find Your Craft” was applied on its delivery van on August 10, 2016. It also found it reasonable to assume that the van was driven after that date, thus advertising Lost Craft’s brewery services. The Board noted that the lack of evidence of the precise locations where the vehicle was used did not detract from its finding, although it might affect the distinctiveness of the trademark.

[16] In this Court, Lost Craft brought additional evidence. It filed an affidavit of its principal, Mr. De Silva, who provided additional evidence of his dealings with the company that decorated the delivery van and asserted that the van was used “to deliver product and provide services to customers prior to September 8, 2016” and, in particular, to travel to “large events” where Lost Craft’s services were required. Mr. De Silva was cross-examined. He said that Lost Craft did not brew its beer itself, but hired a third party for this purpose. He was not able to name any festivals or large events in which Lost Craft participated between August 10, 2016 and September 8, 2016.

[17] In my view, the new evidence does not materially affect the Board’s findings of fact. The Board did not rely on the fact that Lost Craft brewed its beer itself, nor on its participation in festivals. It simply found that the van bearing the trademark would have been used to deliver

beer and provide brewery services to clients. The evidence regarding the vehicle decoration company simply reinforces the Board's finding that the trademark was affixed to the van on August 10, 2016. For this reason, I will be reviewing the Board's decision in this regard for a palpable and overriding error.

[18] I am unable to conclude that the Board made such an error. The Board did not have to find extensive use to substantiate the ground of opposition set forth in section 16(3)(a). Based on the evidence filed by Lost Craft, it was open to the Board to find that the trademark "Find Your Craft" was affixed to the van on August 10, 2016. It was equally open to the Board to infer that the van was used for its intended purposes between that date and the date of filing, that is, September 8, 2016. Mr. De Silva's inability to name an event or festival in this period is immaterial.

[19] In reality, District Brewing is arguing that Lost Craft's evidence was insufficient to sustain the Board's finding. To be sure, the evidence could certainly have been more fulsome. However, decisions must often be made with less than perfect evidence. In this case, the Board reached a finding based on the evidence and did not make any palpable and overriding error.

[20] District Brewing also argued that Lost Craft could not have been engaged in the provision of brewery services, as it does not own a brewery and subcontracts the manufacturing of its beer. However, I do not read the Board's decision as equating brewery services and the manufacturing of beer. While the evidence and the Board's decision are silent on this issue, counsel for Lost Craft suggested at the hearing that brewery services include technical services provided to

restaurants or other venues where Lost Craft's beer is sold. I do not need to reach a firm conclusion on this issue, because the burden of proof lies with the applicant for registration, here, District Brewery. In his affidavit filed before the Board and in his further affidavit filed in this Court, Mr. De Selva asserted that Lost Craft is providing brewery services. In cross-examination, Mr. De Selva was never asked what these brewery services are, so the statement in his affidavit still stands. Therefore, the fact that Lost Craft subcontracts the manufacturing of its beer does not prove that it does not offer brewery services, whatever these may be. The Board did not make a palpable and overriding error in this regard, and the new evidence does not materially change the picture.

[21] For the sake of completeness, I mention that District Brewing is not challenging in this Court the Board's finding of likelihood of confusion.

III. Disposition

[22] District Brewing failed to show that the Board made a mistake of law or a palpable and overriding error with respect to questions of fact or mixed law and fact. The new evidence does not materially add to the record before the Board. Accordingly, its appeal is dismissed.

[23] I am awarding Lost Craft its costs in the amount of \$7,500. This is the amount of costs that District Brewing claimed in the case it prevailed. Lost Craft claims a higher amount, based in large part on a misstatement of the law found in District Brewing's memorandum. Counsel for District Brewing apologized for the misstatement, and I accept that this was the result of

inadvertence. This is not a situation warranting an increased costs award. In all the circumstances, I find that \$7,500 is an appropriate amount.

JUDGMENT in T-1488-21

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.
2. The applicant must pay costs to the respondent in the amount of \$7,500, inclusive of disbursements and taxes.

"Sébastien Grammond"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1488-21

STYLE OF CAUSE: 101217990 SASKATCHEWAN LTD. DBA DISTRICT
BREWING COMPANY v LOST CRAFT INC.

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 16, 2022

JUDGMENT AND REASONS: GRAMMOND J.

DATED: SEPTEMBER 2, 2022

APPEARANCES:

Andy Chow FOR THE APPLICANT

Michal Kasprowicz FOR THE RESPONDENT

SOLICITORS OF RECORD:

MLT Aikins LLP FOR THE APPLICANT
Vancouver, British Columbia

DLA Piper (Canada) LLP FOR THE RESPONDENT
Toronto, Ontario