

**IN THE MATTER OF AN OPPOSITION by
Apollo Pharmaceutical Inc. and Apollo
Pharmaceutical (Canada) Inc. to application No.
1,132,564 for the trade-mark APOLLO in the
name of Rwachsberg Holdings Inc.**

On February 28, 2002, Apollo Health and Beauty Care, a partnership, filed an application to register the trade-mark APOLLO (the “Mark”). The application is based upon use of the Mark in Canada since at least as early as November 1993 in association with the following wares:

body wash, bubble bath, shower gel, bar soap, liquid soap, anti-bacterial liquid soap, anti-bacterial bar soap, refresher sprays, baby shampoo, baby conditioner, baby lotion, baby oil, baby petroleum jelly.

In 2003, the application was assigned to R. Wachsberg Holdings Inc.

The application was advertised for opposition purposes in the Trade-marks Journal of March 9, 2005.

On August 8, 2005, Apollo Pharmaceutical Inc. and Apollo Pharmaceutical (Canada) Inc. (collectively the “Opponent”) filed a statement of opposition.

A counter statement was filed and served.

On October 7, 2005, an affidavit was filed to support a request that the trade-mark owner’s name be corrected to read Rwachsberg Holdings Inc. (instead of R. Wachsberg Holdings Inc.). Thus the application is now in the name of Rwachsberg Holdings Inc.

The term “Applicant” will be used below to refer to both Rwachsberg Holdings Inc. and its predecessor-in-title, Apollo Health and Beauty Care, a partnership.

In support of its opposition, the Opponent filed the affidavits of Jaclyn A. Marmara and Sandra

D.W. Kleinert.

In support of its application, the Applicant filed the affidavits of Richard Wachsberg and Danielle Lanteigne, plus a certified copy of the file history with respect to the present application.

No cross-examinations were conducted.

Only the Applicant filed a written argument. An oral hearing was not requested.

Onus

The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (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 [see *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

Section 30 Grounds of Opposition

The Opponent has pleaded multiple grounds pursuant to s. 30. The material date that applies to a s. 30 ground of opposition is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.) at 475].

i) s. 30(a)

The Opponent has pleaded that the application does not comply with s. 30(a) in that the application does not contain a statement in ordinary commercial terms of the specific wares in association with which the Mark is proposed to be used, in particular “refresher sprays” is not an ordinary commercial term. There is no evidence supporting this allegation and this ground is therefore dismissed on the basis that the Opponent has not met its initial burden.

ii) s. 30(b)

The Opponent has pleaded that the application does not comply with s. 30(b) in that:

- a) the Mark was not in use in Canada in association with the wares identified in the application since the date claimed in the application, namely November 1993;
- b) the claimed use by the Applicant's predecessor(s) in title is not properly claimed in the application.

An opponent's burden is lighter respecting the issue of non-conformance with s. 30(b) [see *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986), 10 C.P.R. (3d) 84 at 89] and this burden can be met by reference not only to the Opponent's evidence but also to the Applicant's evidence [see *Labatt Brewing Company Limited v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) (F.C.T.D.) 216 at 230]. However, the Applicant's evidence may only satisfy the Opponent's evidential burden if it is clearly inconsistent with the claims set forth in the application.

Regarding the first arm of the s. 30(b) ground, there is no evidence supporting the allegation that the Applicant's Mark was not in use as of November 1993. Ms. Marmara, a law student articulated to the firm representing the Opponent, gives evidence of her unsuccessful attempts to locate the Applicant's wares in 2005. If her evidence is admissible, it does not support a conclusion that the Applicant's Mark was not in use in Canada two years earlier. Moreover, the Applicant has relied upon the decision in *Valenite Inc. v. Modco Coatings Ltd.* (2001), 13 C.P.R. (4th) 348 (T.M.O.B.) as support for its position that evidence of an affiant visiting a number of stores in one city or geographic area is not sufficient evidence to meet an opponent's evidential burden under s. 30(b). For both of these reasons, I find that the Opponent has not met its initial burden regarding the first arm of its s. 30(b) ground. I also note that Mr. Rachsberg has attested that Apollo Health and Beauty Care Corporation began manufacturing and selling the applied for personal care products to national retailers in Canada under the trade-mark APOLLO at least as early as November 1993.

Regarding the second arm of the s. 30(b) ground, I note that the application when filed claimed use of the Mark by Apollo Health and Beauty Care, a partnership, or its predecessor in title, Apollo Health and Beauty Care Corporation, by itself or through a licensee, or by itself and through a licensee. I interpret the pleading as questioning whether Apollo Health and Beauty

Care, a partnership, was at that time proper claiming Apollo Health and Beauty Care Corporation as a predecessor. The Opponent has not filed any evidence in support of this challenge. Instead, we have Mr. Rachsberg's attestation that the trade-mark APOLLO was assigned in Canada from the corporation to the partnership on November 1, 2000.

Thus, both arms of the s. 30(b) ground are dismissed on the basis that the Opponent has not met its initial burden.

Distinctiveness Ground of Opposition

The Opponent has pleaded that the Mark is not distinctive in that:

- i) it does not distinguish nor is it adapted to distinguish the services [sic] of the Applicant from the services provided by others in the Canadian marketplace in association with trade-marks and trade-names comprised of the term Apollo for wares and services in the field of consumer goods;
- ii) pursuant to the assignment in favour of the Applicant, rights in the Mark subsisted with two or more persons and those rights were exercised contrary to s. 48(2) of the Act; and
- iii) the Mark was used by a person without the direct or indirect control by the owner of the character or quality of the wares in association with which the Mark was used, contrary to the requirements of s. 50 of the Act.

The material date for considering the issue of distinctiveness is the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)].

As of August 8, 2005, there is no evidence of the use of the term Apollo by the Opponent or any third parties. Accordingly, the Opponent has not met its evidential burden with respect to the first arm of its pleading.

The Opponent has also not met its evidential burden with respect to the second and third arms of its pleading. Instead, the Applicant has evidenced that the Mark was assigned and that the owner

of the Mark at all times controlled the character and quality of the wares that were sold in association with the Mark either by itself or by a licensee.

The distinctiveness ground of opposition is accordingly dismissed in its entirety.

Disposition

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

DATED AT TORONTO, ONTARIO, THIS 2nd DAY OF DECEMBER 2008.

Jill W. Bradbury
Member
Trade-marks Opposition Board