



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2010 TMOB 133
Date of Decision: 2010-08-26

**IN THE MATTER OF AN OPPOSITION
by Hot Mama's Belize Inc. to application
No. 1,280,433 for the trade-mark HOT
MAMAS in the name of Hot Mamas
Foods Inc.**

[1] On November 22, 2005, Hot Mamas Foods Inc. (the Applicant) filed an application to register the trade-mark HOT MAMAS (the Mark) based on use in Canada since October 18, 2005 in association with “jellies, jams, preserves, basting sauces, pepper sauces and vinaigrette sauces and dressings” (the Wares).

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of December 6, 2006.

[3] On January 26, 2007 Hot Mama's Belize Inc. (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

- (a) Pursuant to s. 38(2)(a) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) the application does not comply with s. 30 of the Act in that the Applicant has not used the Mark since the alleged date of first use in the application.
- (b) Pursuant to s. 38(2)(a) of the Act, the Application does not conform with the requirements of s. 30(i) of the Act as the Applicant knew or ought to have known that due to the Opponent's extensive reputation and goodwill in its

trade-mark HOT MAMAS, the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Wares.

(c) Pursuant to s. 38(2)(c) and 16(1)(a) of the Act, the Applicant is not the person entitled to registration of the Mark in Canada in that at the date of filing the application and at all material times, the Mark was confusing with the Opponent's HOT MAMAS trade-mark which had been previously used or made known in Canada by the Opponent and/or its predecessor in title in association with "pepper sauce, sweet pepper sauce, manganero sauce, pepper jelly, habanero fudge" since at least as early as 2001 and had not been abandoned at the date of advertisement of the application.

(d) Pursuant to s. 38(2)(d) of the Act, the Mark is not distinctive, in particular, it does not actually distinguish nor is it adapted to distinguish the Wares from the wares of the Opponent as described in the other grounds of opposition.

[4] The Applicant served and filed a counter statement on February 28, 2007 in which it generally denied the Opponent's allegations and put the Opponent to the strict proof thereof.

[5] In support of its opposition, the Opponent filed an affidavit of Paul Vickery sworn September 20, 2007, with Exhibits A through G. Mr. Vickery was not cross-examined on his affidavit.

[6] In support of its application, the Applicant filed affidavits of Patricia Parsons, sworn April 14, 2008 and Joanne Robinson, sworn April 15, 2008 with Exhibits A through I. The Opponent requested and was granted an order for cross-examination of both Ms. Parsons and Ms. Robinson but the Opponent chose to only cross-examine Ms. Robinson. A transcript of Ms. Robinson's cross-examination was filed with the Registrar.

[7] Both parties filed written arguments. Neither party requested an oral hearing.

Evidence

Opponent's Evidence

Affidavit of Paul Vickery

[8] Mr. Vickery has been the Secretary and General Manager of the Opponent since its incorporation in Ontario in November 2006. Mr. Vickery is also the Secretary of 1638859 Ontario Inc. c.o.b. Sauce with An Accent of Aurora Ontario (Sauce), the exclusive Canadian distributor for Pepperland Farm c.o.b. Hot Mama's Foods, a Belize company (Pepperland). The Opponent was incorporated as a joint venture between Pepperland and Sauce to "hold" the trade-marks of Pepperland in Canada. These trade-marks include the marks HOT MAMAS (the Opponent's Mark) and HOT MAMAS BELIZE.

[9] I have interpreted Mr. Vickery's use of the term "hold" to mean that the Opponent has a proprietary interest in the Opponent's Mark. Moreover, it is reasonable to infer that the Opponent obtained this proprietary interest from Pepperland, the former owner of the Opponent's Mark in Canada and thus the predecessor in title to the Opponent's Mark.

[10] Mr. Vickery states that Sauce uses the Opponent's Mark under license from the Opponent (Exhibit C). Mr. Vickery states that there is a verbal agreement in place between the Opponent and Sauce.

[11] In his affidavit, Mr. Vickery states that he became aware of the Applicant when Sauce received a cease and desist letter from the Applicant wherein the Applicant alleged prior use of the Mark.

[12] As Mr. Vickery's affidavit is directed towards the use and reputation of the Opponent's Mark it will be discussed in further detail below in the assessment of the non-entitlement and non-distinctiveness grounds of opposition.

Applicant's Evidence

Affidavit of Mary Patricia Parsons

[13] Ms. Parsons has known Ms. Joanne Robinson, the President of the Applicant, for over 40 years. Ms. Parsons is not a shareholder of the Applicant but she has assisted the Applicant periodically in various capacities since its inception. Ms. Parsons states that as a result of the assistance she has provided to the Applicant she is cognizant of the facts she attests to.

[14] Ms. Parsons provides an account of her involvement with the Applicant and the Mark and the general advertising efforts associated with the promotion of the Mark. The Opponent submits that Ms. Parsons' affidavit should be disregarded as it does not provide any evidence supporting how she came to be aware of the facts to which she attests in her affidavit. I am satisfied that Ms. Parsons, who has from time to time assisted in the Applicant's operations, is cognizant of the facts to which she attests and I find her affidavit admissible. Furthermore, I note that if the Opponent had any concerns about Ms. Parsons' credibility or required further details of her involvement with the Applicant, it could have followed through with the cross-examination, an order for which the Opponent had requested and been granted.

[15] As Ms. Parsons' affidavit relates to the use of the Mark, it will be discussed in further detail below in the analysis of the s. 30(b) ground of opposition.

Affidavit of Joanne Robinson

[16] Ms. Robinson is the President of the Applicant. Ms. Robinson states that the Applicant is a private family owned business that produces and sells the Wares. Ms. Robinson states that all products produced and sold by the Applicant bear the Mark.

[17] As Ms. Robinson's affidavit is directed towards the use of the Mark it will be discussed in further detail below in the assessment of the s. 30(b) ground of opposition.

Onus

[18] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of 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].

Preliminary Issue – Identification of the Opponent’s Mark

[19] In its written argument, the Applicant argues that the mark shown in the Opponent’s documentary evidence, HOT MAMA’S, is different from the mark claimed in the statement of opposition, namely HOT MAMAS.

[20] The Applicant submits that despite the phonetic identity between HOT MAMA’S and HOT MAMAS they are distinct trade-marks. The Applicant submits that “if HOT MAMA’S can be said to have the precise same meaning as HOT MAMAS then all language would quickly become impossible”.

[21] The Applicant submits that the Registrar is precluded from considering issues not raised in the statement of opposition [see *Imperial Oil Ltd. v. Imperial Developments* (1984), 71 CPR (2d) 107]. I understand the Applicant’s position to be that the evidence introduced by the Opponent does not support the Opponent’s claims to use and making known in Canada of the Opponent’s Mark as alleged in the statement of opposition because the documentary evidence shows a variation of the Opponent’s Mark which includes an apostrophe (HOT MAMA’S).

[22] I agree with the Applicant that the addition of an apostrophe before the “s” does identify the possessive and thus it alters the idea suggested to some extent. However, I do not agree that it creates a trade-mark so entirely different from the one claimed in the statement of opposition that pleadings based on one could not be supported by evidence of the other. Ultimately, I accept the evidence of use provided by the Opponent in support of its statement of opposition [see *Beauty's Restaurant Inc. v. 3000 A.D. Holdings Inc.* (1994), 55 C.P.R. (3d) 275 (T.M.O.B.)].

Preliminary Issue – Scope of Mr. Vickery’s Evidence

[23] In its written argument, the Applicant submits that comments made by Mr. Vickery in his affidavit regarding sales or actions of Pepperland should not be considered as Mr. Vickery is not in a position to make such comments since he is not an officer of Pepperland.

[24] I do not agree with the Applicant’s submission on this point. The Vickery affidavit establishes that the Opponent is a joint venture between Pepperland and Sauce. As the Secretary and General Manager of this joint venture I accept that Mr. Vickery would be in a position to comment on the business activities of one member of this joint venture.

Section 30 Grounds of Opposition

Section 30(b)

[25] The material date for considering the circumstances with respect to the ground of opposition based upon non-compliance with s. 30(b) 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.)].

[26] The Opponent did not file any evidence in support of this ground of opposition. The Opponent may rely on the Applicant’s evidence to meet its initial burden [see *Molson Canada v. Anheuser-Busch Inc.*, (2003), 29 C.P.R. (4th) 315 (F.C.T.D.), and *York Barbell Holdings Ltd. v. ICON Health and Fitness, Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)] in relation to this ground, however, the Opponent is under an obligation to show that the Applicant’s evidence is “clearly inconsistent” with the Applicant’s claims as set forth in its application [see *Ivy Lea Shirt Co. v. 1227624 Ontario Ltd.* (1999), 2 C.P.R. (4th) 562 at 565-6 (T.M.O.B.), aff’d 11 C.P.R. (4th) 489 (F.C.T.D.)].

[27] Ultimately, on a fair reading of the Parsons and Robinson affidavits in their entireties, I am satisfied that the evidence adduced therein is not clearly inconsistent with the Applicant’s claimed date of first use for the Mark. As discussed in more detail below, in her affidavit and cross-examination, Ms. Robinson attests to the use of the Mark since the date claimed in the application and provides specimens of use and advertising which I have accepted as showing use

of the Mark. I note, however, that the Opponent alleges some deficiencies with the Applicant's evidence, as will be outlined in the paragraphs that follow.

[28] Ms. Parsons states in her affidavit that the Applicant conceived of the Mark on April 7, 2005 and the domain name *hotmamas.ca* was registered on April 8, 2005. In its written argument, the Opponent submits that the domain name could not have been registered by the Applicant as it was not yet incorporated as of this date. Ultimately, I do not consider this argument to be of any relevance or assistance to the Opponent's case since a domain name registration does not by itself constitute use of that name as a trade-mark.

[29] Ms. Robinson attaches to her affidavit photographs of the Wares and reproductions of sample labels therefore, all of which display the Mark (Exhibit A). The photographs and sample labels are not dated and on cross-examination Ms. Robinson admitted that she was unsure as to the dates of these documents:

Q. 76 – Are these the labels that you were using in your first year?

A. 76 – Yes. The labels as presented right now in the affidavit? Not exactly because of the ... there have been some changes, but basically the face of the label, the main display panel, is in fact what we were using right from the start.

Q. 77 – All right. So the samples that you have given are from the first year; is that correct? The samples at Exhibit A, are these from 2006?

A. 77 – These were actually ... these are recent.

Q. 78 – Okay. So, these are 2008 samples?

A. 78 – Right.

Q. 79 – And the photographs are from 2008 as well, I take it?

A. 79 – No, it is from some time before that. I am not sure exactly when that was done. It was probably done in ... maybe a photograph from 2006.

Q. 80 – Are you guessing?

A. 80 – Yes, I am. I don't know exactly when that photograph was taken. I didn't take it.

Q. 81 – Would you agree that the photograph shows the labels as they appear ... the labels that you have identified as being 2008 labels?

A. 81 – Shows them as they ... no, those are actually ... that photograph is older. Basically the only difference between the labels since we started is the inclusion of the nutritional testing.

Q. 82 – All right, so you are not sure when the photo was taken, no.

A. 82 – I am not sure exactly when that photo was taken, no.

(Emphasis is mine)

[30] Despite Ms. Robinson's admitted uncertainty with respect to the dates of the photographs and reproductions of sample labels attached to her affidavit, I find that her comments on cross-examination (as underlined above) are sufficient to support a finding that the image of the Mark as shown on the sample labels is representative of how the Mark would have been used on labels for the Wares at the date of first use.

[31] In her affidavit, Ms. Robinson provides sales figures for the Wares. Ms. Robinson states that in its first year of business, namely October 18, 2005 to September 30, 2006, the Applicant's sales of the Wares in association with the Mark exceeded \$20,000 and have increased since then [Q65].

[32] In its written argument, the Opponent submits that the Applicant has not provided any evidence of invoices or sales records to support the claimed sales figures alleged in its evidence. I note that, unless the Opponent meets its burden, the Applicant is not under a burden to prove continuous use of the Mark since the date claimed in the application and as a result, this alleged deficiency is not detrimental to the Applicant's case at this stage.

[33] Ms. Parsons states that the Applicant has advertised and promoted the Wares at trade and consumer shows throughout Ontario, beginning in 2005 and continuing to do so at the time Ms. Parsons swore her affidavit. Ms. Robinson attaches to her affidavit a photograph of a booth from one such event which displayed the Mark (Exhibit F) and invoices dated December 29, 2005 and February 8, 2006 evidencing the Applicant's purchase of space for vendor booths at such events (Exhibit E). In her affidavit, Ms. Parsons states that at these trade shows, samples of the Wares bearing the Mark are distributed to approximately half of the attendees, many of whom purchase

these products as well. Ms. Robinson also states that, depending on the size and attendance at the shows, the Applicant typically sells between \$2000 and \$5000 worth of the Wares at each show. I note, that nothing in the cross-examination transcript contradicts these figures.

[34] Ms. Parsons states that, as a vendor at these trade and consumer shows, the Applicant is featured on the events' websites and in related press releases, and in some instances, the Wares are included in pre-event media baskets. Although neither the Parsons nor Robinson affidavits provide any supporting documentation for these assertions, this is not determinative of the issue.

[35] Ms. Parsons states that the Applicant participated in the Gourmet Food & Wine Expo, held at the Metro Toronto Convention Centre in November 2005, at which the Applicant distributed over 15,000 samples of the Wares and sold approximately 960 jars of the Wares with further orders taken for later delivery. The case law is clear that, where it is the normal course of trade, the distribution of samples followed by the sale of goods qualifies as use pursuant to s. 4 of the Act [see *Canadian Olympic Association v. Pioneer Kabushiki Kaisha* (1992), 42 C.P.R. (3d) 470 (T.M.O.B.)].

[36] While not raised by the Opponent, I note that the Applicant's claimed date of first use for the Mark is identical to the Applicant's date of incorporation. While at first glance this may appear suspicious, the mere fact that an applicant's date of incorporation coincides with its claimed date of first use is not in itself sufficient to cast doubts on the applicant's claimed date of first use [see *Canadian Occidental Petroleum Ltd. v. Oxychem Canada Inc.* (1990), 33 C.P.R. (3d) 345 (T.M.O.B.)].

[37] Ultimately, given that for the purposes of a s. 30(b) ground of opposition, the Applicant is not under a burden to prove continuous use of the Mark since the date claimed in the application unless the Opponent meets its burden, none of the deficiencies alleged by the Opponent are sufficient for me to conclude that the Applicant's evidence is clearly inconsistent with the claimed date of first use, namely, October 18, 2005.

[38] Based on the foregoing, the Opponent has failed to meet its initial evidential burden and accordingly, the s. 30(b) ground is dismissed.

Section 30(i)

[39] The requirement under s. 30(i) of the Act is to include, in the application, a statement that the applicant is satisfied that it is entitled to use the mark in Canada in association with the wares. The Applicant provided such a statement in its application.

[40] In a situation like the present where the relevant statement is provided, a s. 30(i) ground of opposition should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of an applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 at 155 (T.M.O.B.)]. As this is not a case where there is evidence of bad faith, I am dismissing this ground of opposition.

Section 16(1)(a) Ground of Opposition

[41] The material date for considering the entitlement ground of opposition is the claimed date of first use for the Mark, namely, October 18, 2005 [see s. 16(1) of the Act].

[42] Despite the burden of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's Mark, the Opponent has the initial onus of proving that the trade-mark alleged in support of its ground of opposition based on s. 16(1)(a) of the Act was being used or had been made known in Canada prior to the material date and had not been abandoned at the date of advertisement of the application, namely, December 6, 2006 [s. 16(5) of the Act].

[43] In his affidavit, Mr. Vickery states that the Opponent is the owner of the Opponent's Mark which has been used in Canada in association with "food products, including pepper sauce, sweet pepper sauce, manganero sauce, pepper jelly and habanero pepper mash" (the Opponent's Products).

[44] In its written argument, the Applicant submits that the use of the word "including" in Mr. Vickery's definition of the Opponent's Products suggests that this is not an exhaustive list and that the Opponent may also be selling food products which are entirely different from the Wares. The Applicant submits that, as a result, any mention of the Opponent's Products in the Vickery affidavit cannot necessarily be interpreted as only referring to the pepper sauce products.

[45] While I agree with the Applicant that the word “including” has the potential to create a non-exhaustive list, based on a review of the evidence as a whole, I am willing to accept that references to the Opponent’s Products include only “pepper sauce, sweet pepper sauce, manganero sauce, pepper jelly and habanero pepper mash”. I base this finding on the fact that the photographs of products attached to the Vickery affidavit show only pepper sauces, Sauce is described as being a distributor of pepper sauces and there is no mention anywhere in the evidence of other types of food products produced or distributed by the Opponent. Furthermore, in the statement of opposition the Opponent claims prior use of the Opponent’s Mark in association with “pepper sauce, sweet pepper sauce, manganero sauce, pepper jelly and habanero fudge”.

[46] Mr. Vickery states that prior to the incorporation of the Opponent, Pepperland, a Belizean company, had used the Opponent’s Mark for a number of years in association with the Opponent’s Products. As discussed previously, I have accepted that Pepperland is the Opponent’s predecessor in title. In support of the Opponent’s contention of use by Pepperland prior to October 2005, Mr. Vickery attaches a selection of invoices from 2000 to 2004 along with the sworn statement that these invoices evidence Canadian sales of products bearing the Opponent’s Mark [Exhibit G].

[47] The Applicant identifies a number of deficiencies with these invoices:

- (a) The invoices do not show the Opponent’s Mark; rather they feature only the trade name “Hot Mama’s Foods” along with a business address in Belize.
- (b) The invoices themselves are not sufficient to show use of the Opponent’s Mark since there is no evidence to support a finding that the wares identified in the invoices were ever delivered in Canada or that the Opponent’s Mark was displayed on the Opponent’s Products at that time.
- (c) The Opponent has not provided copies of shipping or customs clearance documents to evidence the importation of the Opponent’s Products into Canada.

- (d) The invoices are for relatively small volumes of product and all invoices are from the winter months or March, both popular times of year for Canadians to travel south, including to places like Belize.

[48] Ultimately, the Applicant submits that it is not clear whether these invoices represent actual sales of the Opponent's Products in Canada. The Applicant submits that these invoices may actually evidence sales of the Opponent's Products in Belize to Canadian tourists. I have no clear evidence supporting the Applicant's submission on this point. That said I find that the language used in the Vickery affidavit, namely that these invoices evidence "Canadian sales" is ambiguous and it is not automatically clear that these are sales in Canada. The affiant himself acknowledges that the Opponent's Products are advertised and sold in Belize, which he states is a popular travel destination for Canadian tourists.

[49] As submitted by the Applicant, the law is clear that use of a trade-mark does not occur in Canada until the recipient of the goods takes possession of these in Canada [see *Manhattan Industries Inc. v. Princeton Manufacturing Ltd.* (1971), 4 CPR (2d) 6 at 16 (F.C.T.D.)]. The invoices attached to the Vickery affidavit do not feature shipment dates and the Opponent has not provided any evidence to support when the goods identified therein were delivered to the Canadian addresses.

[50] Based on the foregoing, I find that the invoices attached to the Vickery affidavit are not sufficient to establish sales of the Opponent's Products in Canada at the material date. Even if I am incorrect in disregarding these invoices, I note that, as established in the comments that follow, there is no evidence of record to establish that the Opponent's Mark was displayed on the Opponent's Products, or in any other way so associated to comply with s. 4(1) of the Act, at the material date.

[51] In his affidavit, Mr. Vickery states that the Opponent's Mark appears on labels attached to the bottles containing the Opponent's Products. Mr. Vickery attaches to his affidavit photographs of labels showing the Opponent's Mark on each of the Opponent's Products (Exhibits A1 – A5). The affidavit is clear that these labels were not in use at the material date; rather, they were only intended to be used commencing in September 2007.

[52] Mr. Vickery also attaches to his affidavit undated photographs of actual bottles of the Opponent's Products bearing the Opponent's Mark (Exhibit B1-B5). It is unclear from the Vickery affidavit whether these photographs are representative of the use of the Opponent's Mark at the material date.

[53] Ultimately, the most I can infer from the photographs and labels attached to the Vickery affidavit is that they demonstrate how the Opponent's Mark may have been used on the Opponent's Products at the time the affidavit was sworn, which is approximately two years subsequent to the material date.

[54] Mr. Vickery also attaches to his affidavit an undated photograph of a brochure distributed to customers and potential customers of the Opponent's Products (Exhibit B6). The brochure shows photographs of the Opponent's Products bearing the Opponent's Mark, however, without a date for the brochure I am unable to conclude whether this is representative of the manner in which the Opponent's Mark would have been used in association with the Opponent's Products at the material date. Furthermore, I note that, even if the brochure had been dated as of the material date, use of the Opponent's Mark in advertising is not in itself sufficient to constitute use in association with Opponent's Products [see *BMW Canada Inc. v. Nissan Canada Inc.* (2007), 60 C.P.R. (4th) 181 (F.C.A.)].

[55] Both Ms. Robinson and Mr. Vickery attach to their affidavits materials printed from the website *www.saucewithanaccent.ca* (the Sauce Website) (Exhibit C to Robinson affidavit and Exhibit E to Vickery affidavit). The Applicant submits that the content of the Sauce Website supports a finding that the Opponent had not used the Opponent's Mark prior to the Applicant's first use of the Mark.

[56] Very little weight can be placed on Internet evidence of this nature [see *Candrug Health Solutions Inc. v. Thorkelson* (2007), 60 C.P.R. (4th) 35 (F.C.T.D.), reversed (2008), 64 C.P.R. (4th) 431 (F.C.A.)]. Furthermore, the Sauce Website cannot be relied upon as evidence of the truth of the statements made thereon. The most that could be inferred from Exhibit E to the Vickery affidavit is that the Sauce Website existed on the date it was printed, namely September 19, 2007. The same inference cannot be made for Exhibit C to the Robinson affidavit as it is not dated.

[57] Even if I was willing to infer from the Sauce Website that the Opponent was distributing the Opponent's Products in Canada as of September 19, 2007, this remains insufficient to support the ground of opposition as this date is approximately two years subsequent to the material date.

[58] Mr. Vickery attaches to his affidavit a list of "current Canadian customers" to which Sauce distributes the Opponent's Products (Exhibit F). Again, even if I was willing to infer from the customer list that the Opponent was selling the Opponent's Products in association with the Opponent's Mark to the listed customers on the date the affidavit was sworn, namely September 20, 2007, this remains insufficient to support the ground of opposition as this date is approximately two years subsequent to the material date.

[59] Mr. Vickery states that in the five year period prior to the date of his affidavit (2002-2007), Pepperland, the Opponent and Sauce have generated average revenues of \$2000 per annum in Canada for sales of the Opponent's Products sold in association with the Opponent's Mark. Mr. Vickery states that the level of sales has increased annually to approximately \$6000 for the year 2006.

[60] The Opponent's sales figures are, however, of little assistance since there is no evidence of record establishing that the Opponent's Mark was in use in association with the Opponent's Products at the material date.

[61] In its statement of opposition, the Opponent also claimed making known of the Opponent's Mark prior to the material date. Mr. Vickery states that the Opponent's Mark is promoted in resorts and the tourist village in Belize. Even if the Opponent had provided clear evidence supporting its assertion of promotion in Belize, this would not have been sufficient to evidence making known in Canada of the Opponent's Mark as defined in s. 5 of the Act.

[62] Based on the foregoing, I find that there is no evidence of record demonstrating use or making known in Canada of the Opponent's Mark by the Opponent or its predecessor in title in compliance with s. 4(1) of the Act in association with the Opponent's Products prior to October 18, 2005.

[63] Ultimately, I find that the Opponent did not discharge its burden of showing use or making known of the Opponent's Mark prior to the claimed date of first use for the Mark and I dismiss the ground of opposition based on s. 16(1)(a) of the Act accordingly.

Distinctiveness Ground of Opposition

[64] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Wares from those of others throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)], there is an initial evidential burden on the Opponent to demonstrate that, as of the filing date of the statement of opposition, namely January 26, 2007 (the material date), the Opponent's Mark had become known sufficiently to negate the distinctiveness of the Mark [see *Bojangles' International, LLC v. Bojangles Café Ltd.* (2004), 40 C.P.R. (4th) 553, aff'd (2006), 48 C.P.R. (4th) 427 (F.C.T.D.); *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.); *Clarco Communications Ltd. v. Sassy Publishers Inc.* (1994), 54 C.P.R. (3d) 418 at 431 (F.C.T.D.); *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at 424 (F.C.A.); and *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.)].

[65] While the Vickery affidavit was not sufficient to support the Opponent's claims of use and making known in Canada of the Opponent's Marks prior to October 18, 2005, I will now consider the advertising and promotional activities referred to in the Vickery affidavit to determine whether the Opponent's Mark had become sufficiently known as of January 26, 2007 in association with the Opponent's Products to negate the distinctiveness of the Mark.

[66] As mentioned previously, Mr. Vickery states that Pepperland, the Opponent and Sauce have together generated average revenues in Canada of approximately \$2000 per annum for the years 2002-2007, with sales of \$6000 in 2006.

[67] In his affidavit, Mr. Vickery states that the Opponent, through the actions of Sauce, has promoted the Opponent's Products through participation in festivals and markets in Ontario, including the Aurora Street Festival in 2006 and 2007, the Toronto Hot and Spicy Festival in 2006 and on occasion at the 400 Market located at Innisfil Road and Highway 400. Mr. Vickery

has not provided any supporting documentation to prove the Opponent's participation in these trade shows and festivals. Without evidence of the manner in which the Opponent's Mark is displayed at such events or customer attendance figures therefore, not much can be made of the statement that the Opponent has participated in these events.

[68] Mr. Vickery also states that the Opponent and Sauce sponsor a ladies softball team in Aurora/Newmarket to further promote the Opponent's Products. Mr. Vickery did not provide any details regarding the use of the Opponent's Mark in these sponsorship activities or the number of Canadians who have been exposed to these sponsorship activities. Furthermore, I note that the Vickery affidavit fails to evidence an association between the Opponent's Mark and the sponsorship program.

[69] Finally, Mr. Vickery states that the Opponent's Products are regularly featured on a local cable television show in Aurora, Ontario. Mr. Vickery, however, did not provide any evidence supporting this assertion, or any evidence regarding the viewership numbers for these programs.

[70] Mr. Vickery does not provide advertising expenditure figures but rather states that, other than the foregoing, the Opponent spends very little on promoting the Opponent's Products as they have become successful largely from word-of-mouth advertising alone. I will not consider Mr. Vickery's opinion regarding whether or not the Opponent's Products have become "successful" as this is merely the affiant's opinion on an issue that goes to the merit of the opposition [see *British Drug Houses Ltd. v. Battle Pharmaceuticals* (1944), 4 C.P.R. 48 at 53 and *Les Marchands Deco Inc. v. Society Chimique Laurentide Inc.* (1984), 2 C.P.R. (3d) 25 (T.M.O.B.)].

[71] Based on the foregoing, I find that the Vickery affidavit is not sufficient to support a finding that Opponent's Mark had become sufficiently known as of January 26, 2007 in association with the Opponent's Products to negate the distinctiveness of the Mark and as a result the Opponent has not met its evidential burden under this ground of opposition.

[72] Accordingly, I dismiss this ground of opposition based on non-distinctiveness.

Disposition

[73] Pursuant to the authority delegated to me under s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

Andrea Flewelling
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office