



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

**Citation: 2016 TMOB 76**  
**Date of Decision: 2016-05-18**

**IN THE MATTER OF AN OPPOSITION**

<b>Chops Restaurants, Limited Partnership</b>	<b>Opponent</b>
<b>and</b>	
<b>The Keg Rights Limited Partnership</b>	<b>Applicant</b>
<b>1,590,195 for LOBSTER SUMMER</b>	<b>Application</b>

FILE RECORD

[1] On August 15, 2012, The Keg Rights Limited Partnership (“KRLP”) filed an application to register the trade-mark LOBSTER SUMMER, based on use of the mark since at least as early as 1997, in association with the goods and services listed below:

*goods*

foods and food products namely, prepared meal entrees, seafood based appetizers and desserts, namely pies, cakes, pastries, tarts, brownie squares, ice cream, frozen desserts, fruit-based prepared desserts, milk-based prepared desserts and chocolate-based prepared desserts

*services*

restaurant, dining room and cocktail lounge services and the provision of entertainment, namely recorded background music

[2] The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated June 5, 2013 and was opposed by Chops Restaurants, Limited Partnership on

July 31, 2013. The Registrar forwarded a copy of the statement of opposition to the applicant on August 15, 2013, as required by s.38(5) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. The applicant responded by filing and serving a counter statement generally denying the allegations in the statement of opposition.

[3] The opponent's evidence consists of the affidavit of Susan Thomson. The applicant's evidence consists of the affidavit of Neil Maclean. Ms. Thomson was cross-examined on her affidavit, the transcript thereof, and two exhibits thereto, forming part of the evidence of record. Both parties submitted written arguments, however, neither party requested an oral hearing.

#### STATEMENT OF OPPOSITION

[4] The pleadings are unusually brief and are shown in full below:

As per the *Trade-marks Act*, Section 38(2)(d), the alleged Trademark[sic] "Lobster Summer" is not distinctive. The alleged Trademark[sic] neither distinguishes nor is it adapted to distinguish the services covered by application No. 1590195 from the goods and services provided by others in association with their trade-marks and trade names[sic] which incorporate the words "LOBSTER SUMMER." The opponent has been using the phrase since 2010. The alleged Trademark[sic] is clearly descriptive and is generic in its use; the phrase constitutes a common feature in the hospitality industry and cannot be exclusively used. (emphasis added)

[5] Giving the above pleadings a wide interpretation, I am prepared to find that the opponent is alleging that the applied-for mark (i) is not distinctive, pursuant to s.2 of the *Trade-marks Act*, because it is commonly used in the hospitality industry, and (ii) is not registrable, pursuant to s.12(1)(b) of the *Act*, because it is clearly descriptive of the applicant's goods and services. I will first review the parties' evidence before considering the two grounds of opposition.

#### OPPONENT'S EVIDENCE

*Susan Thomson*

*Affidavit Evidence*

[6] Ms. Thomson identifies herself as VP of marketing for "Chop Steakhouse & Bar" which I presume is a byname for the opponent. In any event, Ms. Thomson's credentials to give evidence on behalf of the opponent were not questioned at cross-examination. The opponent's theory of the case is set out in para. 5 of Ms. Thomson's affidavit, shown below, and purportedly supported by Exhibits A-H (sourced from the Internet), discussed below:

The alleged Trademark[sic] is clearly descriptive and is generic in its use; it cannot be exclusively used. The phrase constitutes a common theme in not only the hospitality industry, but within the food industry. “LOBSTER SUMMER” is used within the hospitality industry to market the lobster season, generally June through to September. Registering the Trademark[sic] “LOBSTER SUMMER” would be equivalent to attempting to register “Wing Night” or any other common hospitality theme or feature.

#### Exhibit A

This article is entitled *Lobster: Summers’s Meat*. The article explains why, in Boston, lobster is considered a summer food.

#### Exhibit B

This article is entitled *Lobster Tales: A Guide to Great Lobster in Halifax*. The article focuses on restaurants in Halifax that serve lobster based dishes during summer months.

#### Exhibit C

This article is entitled *The Lobster Roll: A City’s Summer Obsession*. The article discusses the prominence of lobsters as a meal during the summer months in the city of New York.

#### Exhibit D

This article is entitled *Loving Lobster: 15 Succulent Lobster Recipes*. The article discusses lobster as a summer dinner option.

#### Exhibit E

This is an excerpt from a blog originating in Toronto entitled “*Lobster Fare at the Drake . . .*” It concerns a lobster dinner available at the Drake Hotel in the summer months.

#### Exhibit F

This is an excerpt from *Fodor’s Travel Guide* that lists “10 Best Summer Food Festivals.” The Lobster Festival in Maine is included in this list.

[7] Ms. Thomson’s descriptions of Exhibits G and H are reproduced below (from para. 6 of her affidavit):

g. Attached hereto and marked as Exhibit "G" is a true copy of an excerpt from a blog (www.terencenahar.com), entitled "B.O.B.s Lobster summer pop up @ Borough market" posted on August 13, 2013. It promotes lobster summer pop ups, and depicts the correlation between the two.

h. Attached hereto and marked as Exhibit "H" is a true copy of an article from the Houston Press entitled "Take your 'Lobster' for Lobster at The Palm" printed on July 30, 2013. It promotes the Summer Lobster feature at the Palm as per Exhibit "M" herein.

[8] Paragraphs 7 and 8 of Ms. Thomson's affidavit, shown below, allege further facts to support the ground of opposition based on the non-distinctiveness of the mark LOBSTER SUMMER:

7. The alleged Trademark[sic][LOBSTER SUMMER] is not distinctive to the Keg, and the Trademark[sic] is used freely and openly in the market place to promote Lobster features and menus.

8. I attach the following Exhibits to depict the widespread use of the phrase "Lobster Summer" in the market place, specifically within the restaurant industry, obtained via Internet searches of the term "lobster summer" and "lobster summer dining":

[9] The exhibits mentioned by Ms. Thomson in para. 8 of her affidavit, quoted above, reference (a) "One of the great eating experiences of a Nova Scotia summer!," is eating lobster (b) a Summer Lobster Fest running from July 11<sup>th</sup> to September 3<sup>rd</sup>, (c) a Summer Lobster Special at a restaurant "while supplies last," (d) a "Lobster Summer" menu which includes various lobster courses, (e) promotional material from a restaurant referencing "Summer Lobster," (f) promotional material from a restaurant referencing a "Summer Lobster & Seafood Festival," (g) promotional material from a restaurant announcing that "Mondays throughout the summer are Lobster Night . . ."

[10] Ms. Thomson's descriptions of further exhibit materials are shown below (from para. 8 of her affidavit):

h. Attached hereto and marked as Exhibit "P" is a true copy of promotional material for a[sic] Di Pescara, an American restaurant based out of Illinois which references a "Lobster Wine Dinner" during the summer months.

i. Attached hereto and marked as Exhibit "Q" is a true copy of promotional material for Brasserie Sixty6, a restaurant based out of Ireland. The material is from the restaurant's newsletter and references their "Summer Lobster Festival".

[11] The opponent itself has used the term LOBSTER SUMMER in promotional material (attached as Exhibits R and S) in 2010 and 2012 to advertise lobster meals at its restaurants. The extent of such promotion and the geographic locations of such promotion are not indicated.

*Testimony at Cross-Examination*

[12] The opponent has "locations" in Vancouver, Edmonton, Calgary, Winnipeg, Toronto and Kelowna. The promotional material in Exhibit R, referred to above, was used from June 2 to August 4, 2010. It was featured in the opponent's six locations and in e-mail based advertising to clients or potential clients of the opponent. In 2013 the opponent received a cease and desist letter from the applicant concerning "unauthorized use of our Keg Marks, namely, 'Lobster Summer.'" see Exhibit B to the transcript of cross-examination.

APPLICANT'S EVIDENCE

*Neil McLean*

[13] Mr. Maclean identifies himself as a senior executive of Keg Restaurants Ltd. (KEG), which company is licensed by the applicant KRLP to use the applied-for mark LOBSTER SUMMER. He states that the character and quality of the goods sold and the services performed under the applied-for mark are under the direct or indirect control of KRLP.

[14] Mr. Mclean's remaining evidence is found in paras. 5 and 6 of his affidavit, shown below:

5. In each year commencing in 1997, the LOBSTER SUMMER Goods and Services have been advertised and promoted in Canada on a seasonal basis by KRLP and/or KEG during certain summer months through point of sale promotional materials (including menus and table tent cards) at each of the over 100 Keg Steakhouse + Bar locations across Canada and the United States, as well as through print and online advertising distributed in Canada and the United States, and radio and television commercials broadcast in Canada as part of national advertising campaigns appearing on channels such as The Discovery Channel, The Sports Network (TSN) and TSN SportsRadio, among others (the "LOBSTER SUMMER Advertisements"). In each year since 1997, the LOBSTER SUMMER

Goods and Services have also been heavily promoted on KEG's website www.kegsteakhouse.com. Now shown to me and marked as **Exhibit "A"** to this my affidavit is a batch of copies of LOBSTER SUMMER Advertisements that are representative of point of sale promotional materials and print and online advertising used in Canada and the United States since 1997. Now shown to me and marked as **Exhibit "B"** to this my affidavit is a computer disc containing digital copies of LOBSTER SUMMER Advertisements that are representative of the television commercials broadcast in Canada between 2006 and 2014 .

6. Since 1997, KRLP or KEG has expended in excess of **Five Million Dollars (\$5,000,000)** in annual media purchases and, I estimate periodic expenditures **in excess of Seven Hundred Fifty Thousand Dollars (\$750,000)** in the creative production of promotional and materials, for a total of over \$5,750,000 in promoting the LOBSTER SUMMER Goods and Services in Canada.

[15] I have reviewed the exhibit materials attached to Mr. Maclean's affidavit and I am able to conclude that the applied-for mark has in fact been used by the applicant in association with the goods and services set out in the subject application.

#### CONSIDERATION OF THE GROUNDS OF OPPOSITION

##### *Non-distinctiveness*

[16] The opponent relies on its exhibit materials, discussed earlier, to establish that the food industry promotes the sale and consumption of lobster in the summer months under the phrase LOBSTER SUMMER. The applicant's reply to this allegation is found at pages 6 – 7 of its written argument, shown below:

The relevant date for considering whether the Applicant's trade-mark is distinctive is the date of filing of the Statement of Opposition . . .

Distinctive is defined in the *Act* as follows:

Distinctive in relation to a trade-mark, means a trade-mark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them. [*Trade-marks Act*, Section 2]

We submit that the Opponent has failed to furnish any or sufficient evidence to support the assertion that the Applicant's trade-mark is not distinctive in Canada.

The Opponent has not furnished any credible evidence of use of the words LOBSTER SUMMER in combination or as a phrase by any third party. With respect to CHOP's [the opponent's] own alleged use of LOBSTER SUMMER, no information has been provided whatsoever with respect to the extent of its own use, longevity of use or the number of restaurants in which the "promotional material" appeared.

The Applicant has used and heavily promoted its distinctive mark for over 18 years and, as result of such use and promotion, the Applicant's LOBSTER SUMMER mark has acquired valuable reputation and goodwill and the mark has become closely associated with the Applicant's chain of KEG restaurants . . . the Applicant has taken steps to restrain any use by CHOP based on its longstanding prior rights and, as such, the Opponent should not be in a position to rely on any of its own alleged use of LOBSTER SUMMER to support a claim that the applied for mark is not distinctive of the Applicant.

We therefore submit that the Opponent has failed to satisfy its onus of providing sufficient evidence to support the ground of opposition alleged. In the event that the Registrar were to conclude that the Opponent has discharged its initial evidentiary burden, we submit that the Maclean Affidavit demonstrates the longstanding and extensive use of LOBSTER SUMMER by or enuring[sic] to the Applicant and amply satisfies the legal burden on the Applicant to demonstrate that the applied for mark is distinctive of the Applicant.

[17] Leaving aside the quality and reliability issues related to the opponent's evidence based on Internet searches, I agree with the applicant that the opponent has failed to demonstrate sufficient use of the phrase LOBTSEER SUMMER in Canada by the hospitality industry to meet the opponent's evidential burden to put the distinctiveness of the applied-for mark into issue. If I am wrong in this, then I find that the applicant's evidence of its use of the mark LOBSTER SUMMER is, in the absence of cross-examination, sufficient to establish the distinctiveness of the mark in association with the applicant's goods and services. The ground of opposition based on s.2 of the *Act* is therefore rejected.

*Clearly Descriptive*

[18] The applicant's written argument does not address the ground of opposition based on s.12(1)(b), presumably because the applicant has not given as broad an interpretation to the pleadings as I have. The opponent, however, supports the allegation in its written argument, as follows:

12. Section 12(1) of the *Trademarks[sic] Act* states:

13. (1) Subject to section 13, a trade-mark is registrable if it is not . . .

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin."

14. The purpose of section 12(1)(b) is that no one person should be able to appropriate such a word and place legitimate competition at an undue disadvantage in relation to language that is common to all: *General Motors Corp. v. Bellows* (1949), 10 CPR 101 at 112-113.

15. Further, In *Mitel Corporation v. Registrar of Trade Marks* (1984), Dube J. stated:

"Undoubtedly, the decision whether a trade mark is clearly descriptive is one of first impression . . . . The Court must place itself in the shoes of the ordinary consumer who sees the trade mark advertised in store windows, or reads it in newspaper advertisements, or hears it over the radio or the television. The use of a dictionary may be useful, but a coined mark which has not acquired dictionary status still remains within the ambit of paragraph 12(1)(b). . . . In such instances the Court may look at the component parts of the trade mark in order to assess what the mark as a whole looks, or sounds like. Words or prefixes having a laudatory connotation are *prima facie* descriptive terms, although in certain associations such epithets may have lost their descriptive impact."

He also states:

"...the mark is not to be considered in isolation; it must be perceived in connection with the wares to which it is associated."

16. The Opponent respectfully, submits the mark LOBSTER SUMMER is either clearly descriptive of lobster being sold in the summer or deceptively misdescriptive.

17. The words LOBSTER and SUMMER are common in the English language and their meanings are trite. An ordinary consumer would recognize that LOBSTER refers to a large marine crustacean, namely food, and SUMMER refers to a season in the year.

18. The Opponent respectfully submits an ordinary consumer would see the mark LOBSTER SUMMER and associate the words with food, i.e. lobster, that is consumed in the summer.

[19] Of course, with respect to para. 15 quoted above, my considerations are restricted to whether the applied-for mark is clearly descriptive, rather than deceptively misdescriptive, because the latter allegation was not pleaded in the statement of opposition.



*Test for Whether a Mark is Clearly Descriptive*

[20] I would first note that the material date for assessing a s.12(1)(b) ground of opposition is the filing date of the application, in this case August 15, 2015.

[21] The analysis under s.12(1)(b) has been recently reviewed in *Engineers Canada/ Ingénieurs Canada v Burtoni*, 2014 TMOB 174 at paras. 14 to 16. Essentially, the mark in issue must be considered as a matter of first impression, in its entirety and not dissected into its constituent parts. The word “character” in s.12(1)(b) means a feature, trait or characteristic of the goods and/or services and the word “clearly” means “easy to understand, self-evident or plain.” The proper test for a determination of whether a trade-mark is clearly descriptive is one of first impression in the mind of a reasonable person. The determination of the issue is not arrived at by critically analyzing the words of the trade-mark in isolation, but in association with the goods and/or services with which it is used. Common sense is also applied in making the determination.

[22] The opponent’s above submissions in its written argument might be persuasive if the mark in issue was SUMMER LOBSTER instead of LOBSTER SUMMER. The latter phrase, looked at as a whole, is a coined construction having no meaning; it is a nonsense phrase where the first term “lobster” acts as an adjective to describe the noun “summer.” The phrase may suggest “a summer full of lobster,” that is, a summer when the lobster harvest was unusually plentiful. I do not find that the phrase LOBSTER SUMMER describes any character or quality of applicant’s goods and services in a way that is “easy to understand, self-evident or plain” because the phrase, as a matter of first impression, is too enigmatic. The ground of opposition based on s.12(1)(b) of the *Act* is therefore rejected.

DISPOSITION

As the two grounds of opposition pleaded by the opponent have been rejected, and pursuant to

the authority delegated to me under s.63(3) of the *Trade-marks Act*, the opposition is rejected.

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Myer Herzig  
Member, Trade-marks Opposition Board

**APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** No Hearing Held

**AGENT OF RECORD**

No Agent Appointed

FOR THE OPPONENT

Osler Hoskin & Harcourt

FOR THE APPLICANT