



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

Citation: 2016 TMOB 152
Date of Decision: 2016-09-13

IN THE MATTER OF AN OPPOSITION

Typhoo Tea Limited	Opponent
and	
The New London Tea Company Limited	Applicant
1,491,231 for THE LONDON TEA COMPANY & Design	Application

The Record

[1] Typhoo Tea Limited (the Opponent) opposes registration of the trade-mark THE LONDON TEA COMPANY & Design (the Mark) as illustrated below:



[2] As detailed later, the application has been amended and now covers only the following goods:

tea; leaf tea; black tea; green tea; white tea; red tea; organic tea; herbal tea contained in tea bags; fruit tea contained in tea bags; spiced tea contained in tea bags; tisanes contained in tea

bags; herbal tisanes contained in tea bags; fruit tisanes contained in tea bags; spiced tisanes contained in tea bags; tea essences; tea extracts; instant tea; tea mixtures; non-medicinal infusions for making tea; iced tea; non-alcoholic tea beverages; non-alcoholic tea-flavoured beverages; herbal tea beverages (the Goods).

[3] The application was originally filed by The London Tea Company (LTC) on August 5, 2010 on the basis of use and registration in the United Kingdom and on proposed use in Canada. It was advertised in the Trade-marks Journal on August 1, 2012. The Opponent filed its statement of opposition on September 28, 2012.

[4] The Applicant filed and served a counter statement on January 8, 2013 in which it denied each and every ground of opposition pleaded by the Opponent.

[5] On December 18, 2014 a revised application to correct the name of the applicant from LTC to The London Tea Company Limited (LTCL) was filed.

[6] On January 26, 2015, the New London Tea Company Limited (the New LTCL) filed for recordal a trade-mark assignment dated November 4, 2012 by which LTCL assigned the present application to the New LTCL. On February 5, 2015 the Registrar recorded that assignment. I shall hereinafter refer to LTC, LTCL and/or the New LTCL as the Applicant, except where otherwise stipulated.

[7] The Opponent subsequently amended its statement of opposition on February 4, 2015 to add an additional ground of opposition. The grounds of opposition presently pleaded are: 30 (e) and (i) (requirements), 12(1)(d) (registrability), 16(3)(a) and (b) (non-entitlement), 2 (distinctiveness) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) and that LTCL does not exist as it was dissolved on April 16, 2014 (the additional ground of opposition). I shall discuss in greater details the circumstances surrounding this additional ground of opposition.

[8] On April 9, 2015 the Applicant filed an amended counter statement to correct the applicant's name from LTC to the New LTCL.

[9] The Opponent filed as evidence the affidavits of Colin Glaysher sworn October 17, 2013 and Keith Packer solemnly affirmed on May 9, 2013.

[10] The Applicant filed as its evidence the affidavits of Shannon Young and Lesley Gallivan sworn on February 10, 2015.

[11] The Applicant filed as additional evidence a certified file history of the present application, issued by the Canadian Trade-marks Office (CTM) on February 27, 2015 and a certified extract from the present application, issued by CTM on March 30, 2015 while the Opponent filed as additional evidence the affidavit of Ranita Nicholas affirmed on February 3, 2015.

[12] Both parties filed written arguments and no hearing was held.

[13] For the reasons detailed below, I reject this opposition.

Preliminary remarks

[14] I wish to point out that in reaching my decision I have considered all the evidence in the file but I will only refer in my reasons for this decision to the relevant portions of the evidence.

[15] There is no doubt that in an ideal situation the application should have been filed in the name of LTCL and shortly after the assignment of November 2012, a revised application should have been filed to identify the New LTDL as the applicant. Since these defects have been raised by the Opponent, I shall determine if they have jeopardized the conformity of this application.

The parties' respective burden of proof

[16] The legal onus is on the Applicant to show that its application does not contravene the provisions of the Act as alleged in the statement of opposition. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* 2002 FCA 291, 20 CPR (4th) 155; and *Wrangler Apparel Corp v The Timberland Company*, 2005 FC 722, 41 CPR (4th) 223].

Preliminary issue: The additional ground of opposition

[17] The additional ground of opposition was pleaded as follows in the amended statement of opposition:

Applicant does not exist – Sections 38(2)(a), (b) and (c)

5. The Applicant does not formally legally exist. At one time a corporation, the Applicant was dissolved on April 16, 2014. As such, the Trade-mark does not conform to the requirements of Section 30, the trade-mark is not registrable, and the Application is not the person entitled to the registration of the Trade-mark, in accordance with Sections 38(2)(a), (b), and (c).

[18] As drafted this cited paragraph does not constitute a proper ground of opposition. Firstly, section 30 of the Act concerns the contents of an application and not the trade-mark applied for. Moreover, it is not the ‘Application’ that is ‘...not the person entitled to the registration..’ but rather the Applicant. Even if I were to read properly the ground of opposition by replacing in the second line the word ‘Trade-mark’ by ‘Application’ and on the fourth line the word ‘Application’ by ‘Applicant’, I would still dismiss that ground of opposition for the reasons that follow.

[19] In support of this ground, the Opponent made the following submissions in its written argument:

- LTC did not exist at the filing date of the application;
- The revised application filed by LTCL was contrary to section 31(a) of the *Trade-marks Regulations*;
- Even when the revised application was filed (December 18, 2014), LTCL did not exist as it had been dissolved on April 16, 2014.

[20] I can dispose of the Opponent’s first two arguments by referring to the Applicant’s agent letter dated December 18, 2014 filed in support of its request to change the name of the applicant named in the original application from LTC to LTCL. That letter is part of the record as the Opponent filed a certified copy of the entire file as of February 27, 2015.

[21] In the aforesaid letter, the agent for the Applicant explains that the original applicant should have been identified as LTCL and not LTC. The agent confirms that at the time of filing of this application, there was no company identified as LTC. The agent goes on to state:

Due to clerical inadvertence on behalf of our instructing principal, which represents the interest of the Applicant and from which we receive instructions, the Applicant was incorrectly identified in the subject application as The London Tea Company instead of The London Tea Company Limited, the correct name of the Applicant. The error in the name of the Applicant was attributable to a clerical mistake contained in the correspondence from our instructing Principal.

[22] I do not interpret such modification in the applicant's name to be contrary to rule 31(a) of the Regulations. In fact, in the *Trademarks Examination Manual*, which is a reference guide for trademark applicants and agents on how examiners will interpret and apply the legislation, the following example is given on what will be accepted as a change in the applicant's name:

II.5.1.7 Wrong Identification of Applicant:

(...)

When an application is filed in the name of a non-legal entity, no affidavit is required to correct the applicant's name to a legal entity such as changing Farm Foods to Farm Foods Ltd. or to Mary Smith trading as Farm Foods.

[23] As for the Opponent's third argument that when such modification was requested, LTCL did not exist as it had been dissolved on April 16, 2014, the Opponent did prove such fact through the affidavit of Ranita Nicholas, an employee of the Opponent's agent firm. Attached to her affidavit is a Certified 'Dissolved Certificate' from the United Kingdom Companies House dated January 27, 2015 indicating that LTCL was dissolved on April 16, 2014.

[24] However, the certified copy of the entire file as of February 27, 2015 shows that LTCL assigned this application on November 4, 2012, prior to the dissolution of LTCL, to the New LTCL. Accordingly, when the request for the change of name of the original applicant from LTC to LTCL was made, the application was owned by the New LTCL. In fact, on January 26, 2015 a further request to change the name of the applicant from LTCL to the New LTCL was filed in order to reflect the identity of the true owner of the application.

[25] For all these reasons, I dismiss this ground of opposition.

Ground of opposition summarily dismissed

Ground of opposition based on Section 30(i) of the Act

[26] For sake of reference I shall reproduce the pertinent extract of the Opponent's amended statement of opposition:

Section 38(2)(a)

1. Based on the grounds set out in Section 38(2)(a), the Trade-mark is not registrable in view of the provisions of Section 30 of the Act in that:
 - a) The Application does not conform to the requirements of Section 30(i) of the Act in that the Applicant could not have said that it was satisfied that it would be entitled to use the Trade-mark in Canada in association with the services set out in the Application and the aforesaid advertisement. At the Filing Date the Applicant was aware (or should have been aware) of the Opponent's prior rights in the Typhoo Marks, such mark being owned and used by the Opponent since at least 2001 in Canada. As at the date of advertisement of the Application, the Typhoo Marks had not been abandoned by the Opponent.
 - b) The Applicant could not have been satisfied under paragraph 30(i) that it is entitled to use the Trade-mark in association with the services described in the Application, as the Applicant was not the owner of the Trade-mark applied for as at the Filing Date.
 - c) The Applicant does not use and does not intend to use the Trade-mark.

[27] Sub-paragraphs a) and b) are allegations aimed at supporting a ground of opposition based on section 30(i) of the Act.

[28] As mentioned by the Applicant in its written submissions, the original application covered both, goods and services. However, the revised application filed on February 19, 2015 sought the deletion of the services identified in the original application. The Registrar accepted such revised application on April 23, 2015. The Opponent never saw fit to further amend its statement of opposition to make reference to the Goods in those sub-paragraphs.

[29] Since the ground of opposition based on section 30(i) is limited to the services and that there are no longer services listed in the application, this ground of opposition is dismissed.

[30] Even if I were to consider that the Opponent meant to refer to the Goods as opposed to services in this ground of opposition, I would still dismiss it. The fact that the Applicant may have been aware of the Opponent's trade-marks at the filing date of the application, such knowledge did not prevent the Applicant from asserting in its application that it was satisfied that

it was entitled to use the Mark in association with the Goods. An opponent may rely on section 30(i) in specific cases such as where bad faith on the part of the applicant is alleged [see *Sapodilla Co Ltd v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB)]. There is no allegation to that effect in the statement of opposition or evidence of bad faith on the part of the Applicant in the record.

Ground of opposition based on lack of distinctiveness of the Mark (Section 2)

[31] Again, as drafted, the Opponent has only referred to the Applicant's services in this ground of opposition [see paragraph 4 of the Amended Statement of Opposition]. For the same reasons detailed in paragraph 28 above, I also dismiss this ground of opposition.

Ground of opposition based on Section 30(e) of the Act

[32] The ground of opposition has been reproduced above in paragraph 26 and I refer to subparagraph 1c). In its written argument the Opponent submits that the Applicant has not put forward any evidence in the record that it has used or is intending to use the Mark. The Opponent goes on to state given that it is impossible to prove a negative, it is the Applicant's onus to prove that it at least intends to use the Mark in Canada.

[33] The word 'impossible' is not appropriate. In *Northland Products Co v 1324555 Ontario Inc* 2012 TMOB 151, 2012 CarswellNat 3884, Member Jill Bradbury described the Opponent's burden in the following terms:

It is difficult for an opponent to provide evidence of what an applicant's intention was when it filed its application and so the initial onus on an opponent with respect to a section 30(e) ground is necessarily light.

[34] To meet such initial burden, the Opponent may rely on the Applicant's evidence. However, the fact that the Applicant did not put forward any evidence on its intention to use the Mark in Canada should not be interpreted as an absence of intention to use the Mark, as suggested by the Opponent.

[35] Given, that the Opponent has not met its initial burden on this issue, the ground of opposition based on section 30(e) of the Act is dismissed.

Ground of opposition based on Section 16(3)(b) of the Act

[36] With respect to this ground of opposition the Opponent, in its amended statement of opposition, is referring solely to the Opponent's registered trade-marks, namely LONDON FRUIT & HERB, registration TMA759711 and LONDON FRUIT & HERB, registration TMA764009 (the Opponent's Registered marks).

[37] The extracts of CIPO's website concerning these registrations show that both applications which lead to the Opponent's Registered marks were filed prior to the present application. However, section 16(4) of the Act stipulates that in order to rely on prior filed application(s) it (they) must be pending at the date of advertisement of the Applicant's application (August 1, 2012). In this case, both of the Opponent's applications were no longer pending on August 1, 2012, having been registered prior to such date (February 17, 2010 for TMA759711 and April 12, 2010 for TMA764009).

[38] As a consequence, this ground of opposition is dismissed for failure by the Opponent to meet its initial burden.

Remaining grounds of opposition

Ground of opposition based on Section 12(1)(d) of the Act

[39] This ground of opposition must be assessed at the date of the Registrar's decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 at 424 (FCA)].

[40] In its amended statement of opposition, the Opponent is relying on the Opponent's Registered marks. They both cover the same goods, namely:

Tea, black tea, green tea, herbal tea, fruit tea, fruit and herbal flavoured tea, tea essences, tea extracts, instant tea, tea mixtures; herbal infusions contained in tea bags and fruit infusions contained in tea bags (the Opponent's Products).

[41] Mr. Packer is the Opponent's Chief Executive Officer. He filed as Exhibit K to his affidavit, Internet print-outs from the online records of the Canadian Intellectual Property Office providing particulars of these registrations. I checked the register and these two registrations are extant. Consequently, the Opponent has met its initial burden under this ground of opposition.

[42] The test for confusion is outlined in section 6(2) of the Act. Some of the surrounding circumstances to be taken into consideration when assessing the likelihood of confusion between two trade-marks are described in section 6(5) of the Act: the inherent distinctiveness of the trade-marks and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the goods, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks in appearance, or sound or any ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [see *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22 (CanLII), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 623(CanLII), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc et al*, 2011 SCC 27 (CanLII), 92 CPR (4th) 361 (SCC)].

[43] The test under section 6(2) of the Act does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source. In the instant case, the question posed by section 6(2) is whether a consumer, with an imperfect recollection of the Opponent's Registered marks, who sees the Applicant's Goods in association with the Mark, would think they emanate from, or are sponsored by, or approved by the Opponent.

[44] As stated in *Masterpiece, supra*, in most instances the degree of resemblance is considered to be the most important factor. As such, I shall begin my analysis with this factor.

The degree of resemblance

[45] The only common feature in the marks at issue is the word 'London'.

[46] The word 'London' has geographical significance as it is the name of a city in the United Kingdom. I can take judicial notice of that fact, but in any event there is evidence in the record to that effect. Ms. Young is a trade-mark agent with the Applicant's agent firm. She filed as Exhibit B to her affidavit the results of her search of the Internet encyclopedia site Wikipedia and as Exhibit C entries found for the term London in the *Webster's New World College Dictionary* (4th Ed) 2001 and *The Canadian Oxford Dictionary* (2nd Ed) 2004. In all of these references, London is defined as the capital of England.

[47] Finally, geographical designations, such as ‘London’, are not inherently distinctive [see *London Drugs Ltd v International Clothiers Inc* 2014 FC 223 (FC)].

[48] The Opponent argues that the marks are nearly identical: LONDON FRUIT & HERB compared with LONDON TEA COMPANY. I do not agree with this simplistic analysis. It does not take into consideration the fact that the Mark has a distinctive design component. The dominant feature of the Opponent’s registered marks is LONDON, while the dominant features of the Mark are the letters L and T. The word LONDON is written in much smaller script inside the letter L.

[49] In sound the Mark would be pronounce ‘L-T-The London tea company’ while the Opponent’s marks are pronounced ‘London fruit and herb’.

[50] As for the ideas suggested by the parties’ marks, they differ. The Opponent’s Registered marks are highly suggestive of fruit and herb originating from the city of London, while the Mark is highly suggestive of the fact that the Applicant sells or offers for sale tea originating from London.

[51] Overall, I conclude that the only resemblance is the presence of a common word identifying a well-known city in England. Given the differences in sound, visually and in the ideas suggested by the parties’ marks, this factor favours the Applicant.

Inherent distinctiveness and the extent the trade-marks are known

[52] As discussed previously, the word ‘London’ is somewhat suggestive of the origin of the parties’ goods. Moreover, the words FRUIT and HERB are descriptive of the nature of the Opponent’s Products. In fact, the Opponent disclaimed the exclusive use of those words in its registrations. Consequently, the Opponent’s trade-mark LONDON FRUIT & HERB is not highly distinctive. Accordingly, it would be entitled to a narrow ambit of protection.

[53] In so far the Mark is concerned, as stated above, it does contain a design element which makes the Mark more inherently distinctive than the Opponent’s Registered marks.

[54] The degree of distinctiveness of a trade-mark may be enhanced through its use or promotion in Canada. I shall now review the evidence filed by both parties on this issue.

[55] Mr. Packer provides a brief history of the corporate structure of the Opponent as well as the nature of its business over the years. For further details on the Opponent's business activities, he filed various extracts of different websites of the Opponent, including its Canadian website.

[56] Mr. Packer affirms that the Opponent has been selling in Canada, since at least as early as 2001, its LONDON FRUIT & HERB line of products. It includes fruit and herbal flavoured tea, flavoured green teas and various non-alcoholic products such as fruit flavoured infusions, herbal flavoured infusions and fruit, spice and flower-flavoured infusions (the Opponent's LONDON Products).

[57] Mr. Packer states that the Opponent's LONDON Products are distributed in Canada exclusively through the Opponent's Canadian distributor, C.B. Powell Limited (Powel).

[58] Mr. Packer has provided, as Exhibit E to his affidavit, the number of cases and packs of the Opponent's LONDON Products sold to Powel for resale in Canada for the calendar years 2007 to 2012 as well as for the months of January and February 2013. While the yearly number of packs sold varied between over 80,000 and over 144,000 during the years 2007 to 2009, there has been a sharp decrease in the number of packs sold since then, to reach a bottom low of approximately 18,500 packs sold to Powell in 2012.

[59] The Applicant is raising the issue that the evidence filed by Mr. Packer shows use of the trade-marks LONDON FRUIT & HERB Co. and LONDON FRUIT & HERB COMPANY as it appears on the various extracts of the various Opponent's websites filed as exhibits B, C and D to his affidavit. I consider the use of such trade-marks to be use of the Opponent's Registered marks [see *Canada (Registrar of Trade-marks) v Cie Internationale pour l'informatique CII Honeywell Bull, SA* (1985), CPR (3d) 523 (FCA)]. In any event, in the text of these extracts, there are numerous references to the Opponent's Registered marks.

[60] Mr. Glaysher is Powel's Executive Vice-President since 2007 and has been working for Powel since 2001. In the first paragraph of his affidavit, he alleges to have personal knowledge of the facts set out in his affidavit, except where his knowledge is stated to be based on information and belief and where so stated he believes the same to be true.

[61] As Mr. Glaysher started working in 2001 for Powel, any allegation concerning Powel prior to 2001 and where Mr. Glaysher did not mention that the allegation made is based on information and belief will be disregarded. Without limiting the generality of the foregoing and as illustration purposes, I refer to paragraphs 4 and 5 of his affidavit.

[62] Mr. Glaysher confirms Mr. Packer's statement that Powel is currently the Opponent's distributor of the Opponent's Products. He lists in paragraph 8 of his affidavit the name of the stores, the provinces and the year such stores began selling in Canada the Opponent's LONDON Products. He filed, as Exhibit B to his affidavit, representative samples of invoices relating to the sale of the Opponent's LONDON Products bearing the Opponent's Registered marks. He also filed as Exhibit A to his affidavit, the yearly sales figures of the Opponent's LONDON Products in association with the Opponent's Registered marks in the Province of Ontario for the period from January 1, 2001 to December 31, 2012.

[63] Mr. Glaysher filed, as Exhibit D to his affidavit, black and white reproductions of the packaging for various Opponent's LONDON Products in association with the Opponent's Registered marks. The same argument raised by the Applicant and described earlier concerning the trade-mark(s) appearing on the packaging of the Opponent's LONDON Products is put forward with respect to this Exhibit and I refer to my earlier ruling in paragraph 57 to dispose of it.

[64] As for the sales figures mentioned in paragraph 11 of Mr. Glaysher's affidavit, they cover the past 12 years (2003-2013). Moreover they represent the Opponent's sales as opposed to those of Powel in Canada. Also, there is no breakdown on a yearly basis, except for the content of Exhibit U to his affidavit. However, it is unclear if those yearly sales figures are those of the Opponent to Powel or those of Powel in Canada. Additionally, in Exhibit U, the yearly sales figures declined drastically starting in 2011. They went from over \$1.6 million in 2005 to approximately \$76,000 in 2012. I cannot afford as much weight as the Opponent would have liked on the total sales value of \$8 million for this period because the bulk of these sales seem to have occurred more than 5 years ago.

[65] I may add, as additional evidence of use of the Opponent's Registered marks in association with the Opponent's Products, the Applicant filed the affidavit of Ms. Gallivan. She

is an employee of the firm representing the Applicant. She describes how she was able to order from the Opponent's Canadian website some of the Opponent's Products in different packages. These packages were produced and relied upon to support the Applicant's contention that the Opponent is not using the Opponent's Registered marks but rather the trade-marks LONDON FRUIT & HERB Co and LONDON FRUIT & HERB COMPANY. I already disposed of that argument.

[66] Mr. Glaysher goes on to state that the Opponent embarked on various promotional campaigns in Canada for the Opponent's Products in association with the Opponent's Registered marks. Here is a summary of those promotional activities:

- Attendance by Powel's sales broker in western Canada to the Grocery Showcase West annual trade show, since at least 2004 (see Exhibits F to L inclusive to Mr. Glaysher's affidavit);
- In-store advertisements and distribution of coupons as appears from flyers and coupons distributed in Sobeys grocery and London Drugs chain stores (see Exhibits M to Q inclusive to Mr. Glaysher's affidavit);
- In-store displays (see Exhibits R and S to Mr. Glaysher's affidavit).

[67] Mr. Galysher has also included in the sales report, Exhibit U, the yearly promotional expenses incurred by the Opponent. It is unclear how these figures were obtained by Mr. Glaysher.

[68] Despite the flaws in the Opponent's evidence and identified above, I conclude that the Opponent's Registered marks are known to some extent in Canada.

[69] There is no evidence of use of the Mark by the Applicant in Canada.

[70] Overall, the Mark is more inherently distinctive than the Opponent's Registered marks but they are more known in Canada than the Mark.

The length of time the marks in issue have been in use

[71] From the evidence described under the previous sub-heading, I conclude that this factor favours the Opponent.

The nature of the parties' respective goods and their channels of trade

[72] Clearly, from a plain reading of the Goods and the Opponent's Products, they overlap. In the absence of evidence of the Applicant's channels of trade for the Goods, since the parties' goods overlap, I can assume that the parties' channels of trade also overlap.

Additional relevant criteria submitted by the parties

Instances of confusion

[73] Mr. Packer alleges in his affidavit that he is aware of several instances where the Opponent received customer phone calls, inquiring about the Applicant's Goods. There is no allegation that those phone calls originate from Canada. As Mr. Packer, the Applicant and the Opponent are all located in England, and that there has been no evidence of use of the Mark in Canada, one has to assume that these phone calls originated from England. As such, they are not that relevant to this case. Moreover, there are no details as to how many phone calls were received, when and what were the specific enquiries about the Applicant's Goods.

The state of the register

[74] Ms. Young has been a trade-mark agent with the Applicant's agent firm. On February 6, 2015 she conducted a search of the Canadian register of trade-marks to locate active trade-mark registrations and pending trade-mark applications which contain or comprise the term LONDON and registered or applied for in association with goods classified by CIPO as falling within class 30 (food-spices, bakery goods). She filed as Exhibit A to her affidavit the results of such search namely, the details of each registration and pending application located.

[75] State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD)]. Inferences about the state of the marketplace can only be drawn from state of the register evidence where a large number of relevant registrations have been located [see *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[76] In its written argument, the Applicant refers specifically to 8 citations namely: LIPTON OF LONDON, ACE CAFÉ LONDON, LONDON NATURALS, LONDON ORCHARDS, LONDON PLANTATION, LONDON GOURMET, LONDON DIARY and OLD LONDON. Moreover, the Applicant argues that all cited official marks are also relevant as they can be viewed as covering all goods and services including food and beverages.

[77] Out of these 8 citations, only three are relevant: LIPTON OF LONDON, ACE CAFÉ LONDON, LONDON NATURALS. This number is not sufficient to draw an inference that the word ‘London’ was widely used at the relevant date as part of a trade-mark in association with the type of goods offered by the parties.

[78] As for the various official marks, most of them relate to the city of London, Ontario or have a distinct design which makes the likelihood of confusion with the Mark, unlikely.

[79] To sum up, I do not consider the state of the register evidence in this case, to be relevant.

Conclusion

[80] From this analysis of all the relevant surrounding circumstances, I conclude that the Applicant has discharged its burden to prove, on a balance of probabilities, that the Mark is not likely to cause confusion with the Opponent’s Registered marks when used in association with the Goods. In fact, the parties’ marks are weak and except for the presence of the word London, the marks in issue do not resemble one another visually, phonetically and in the ideas suggested. These differences are sufficient to negate the overlap in the parties’ respective goods and their channels of trade.

[81] Therefore, I dismiss this ground of opposition.

Ground of opposition based on Section 16(3)(a) of the Act

[82] Under this ground of opposition, the Opponent has the initial burden to prove that it has used its mark LONDON FRUIT & HERB in Canada or that it had been known in Canada prior to the relevant date (August 5, 2010) and that it had not abandoned such use at the date of advertisement of the present application (August 1, 2012) [see section 16(5) of the Act].

[83] The Opponent, through the affidavits of Mr. Packer and Mr. Glaysher, has satisfied its burden to prove that its mark LONDON FRUIT & HERB has been so used in Canada.

[84] The outcome of an analysis of the likelihood of confusion between the Opponent's trade-mark LONDON FRUIT & HERB and the Mark would be the same as the one reached under the previous ground of opposition for the following reasons.

[85] The difference in the relevant dates between the previous ground of opposition and the present one affects only slightly the conclusions reached under each of the relevant factors analyzed above. Under the present ground of opposition, I cannot take into consideration the Opponent's sales after August 5, 2010. As such, I would not be able to conclude that the Opponent's sales have declined in Canada over the last few years. However, the length of time the Opponent's trade-mark LONDON FRUIT & HERB had been in use would be less.

[86] Overall, my analysis of the relevant factors under the previous ground of opposition would not be materially affected by the earlier relevant date. My conclusion that there is no likelihood of confusion between the Mark and the Opponent's trade-mark LONDON FRUIT & HERB still applies.

[87] I dismiss this ground of opposition for the same reasons as those detailed under the previous ground of opposition.

Disposition

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

Jean Carrière
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No hearing

APPEARANCES

Aird & Berlis LLP

FOR THE OPPONENT

Marks & Clerk

FOR THE APPLICANT

Agents of Record

Osler, Hoskin & Harcourt LLP

FOR THE OPPONENT

Smart & Biggar

FOR THE APPLICANT