



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

Citation: 2016 TMOB 85
Date of Decision: 2016-06-02

IN THE MATTER OF AN OPPOSITION

Anheuser-Busch, LLC

Opponent

and

Coors Brewing Company

Applicant

1,565,713 for STONES

Application

[1] On February 24, 2012, Coors Brewing Company (the Applicant) filed an application to register the trade-mark STONES (the Mark). The application is based on proposed use in association with the goods “brewed alcoholic beverages, namely beer”.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 24, 2012.

[3] On March 25, 2013, Anheuser-Busch, LLC (the Opponent) filed a statement of opposition. The grounds of opposition are summarized below:

- Pursuant to sections 38(2)(b) and 12(1)(d) of the Act, the Mark is not registrable as it is confusing with each of the registered trade-marks below:
 - ROLLING ROCK – TMA343,589 – “beer and ale” – owned by the Opponent;
 - ROLLING ROCK & Design – TMA468,289 – “alcoholic brewery beverages” – owned by the Opponent;
 - ROLLING ROCK – TMA508,752 – “alcoholic brewery beverages” – owned by the Opponent;

- ROLLING ROCK – TMA605,320 – “alcoholic brewery beverages” – owned by the Opponent;
- ROLLING ROCK & DESIGN – TMA819,129 – “beer and brewed malt-based beverages namely beer; beverage glassware and drink coasters (beer mats)” – owned by the Opponent;
- STONE’S – TMA169,502 – “wines” – owned by Western Wines Holdings Limited;
- STONE’S & Design – TMA244,602 – “wines” – owned by Western Wines Holdings Limited;
- KEYSTONE – TMA406,906 – “beer” – owned by the Applicant; and
- KEYSTONE – TMA544,677 – “beer” – owned by the Applicant.
- Pursuant to sections 38(2)(c) and 16(3)(a) of the Act, the Applicant is not entitled to registration of the Mark since, at the filing date of the application, the Mark was confusing with the Opponent’s ROLLING ROCK trade-marks which had been previously used and/or made known in Canada by the Opponent in association with the goods set out above and had not been abandoned.
- Pursuant to sections 38(2)(d) and 2 of the Act, the Mark is not distinctive as it does not distinguish, nor is it adapted to distinguish, the Goods from the goods of the Opponent associated with its ROLLING ROCK trade-marks and from the goods of others namely Western Wine Holdings Limited and the Applicant associated with STONE’S and KEYSTONE marks as set out above.
- Pursuant to sections 38(2)(a) and 30(e) of the Act, the statement that the Applicant intends to use the Mark in association with the Goods was false for one or more of the following reasons:
 - the Applicant did not intend, either itself or through a licensee, to associate the Mark with the Goods in a manner that would constitute use in accordance with section 4 of the Act;
 - the Applicant had used the Mark in Canada as of the filing date;
 - as of the filing date, the Applicant intended to assign the mark to another company – Molson Coors Brewing Company (UK) Limited or another Molson Coors company prior to commencing use of the Mark in Canada;
 - the Applicant never intended to display the Mark on its own but rather a composite mark (KEYSTONES or the phrase GRAB SOME STONES) and not in a manner such that the Mark would stand out from the surrounding text or otherwise be perceived as a mark; and
 - Molson Coors Brewing Company (UK) Limited intends to use the Mark in Canada through a licensee but does not intend to control the character or quality of the Mark enough to comply with section 50.
- Pursuant to sections 38(2)(a) and 30(i) of the Act, the Applicant could not have been satisfied that it was entitled to use the Mark since, at the filing date, it was aware of the Opponent’s allegedly confusing trade-marks; and
- Pursuant to sections 38(2)(a) and 30(b) of the Act, the application does not comply with section 30(b) of the Act since the Applicant or its predecessors have used the Mark in Canada but failed to claim a date of first use.

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

[5] In support of its opposition, the Opponent filed affidavits of Dane Penney, a trade-mark searcher, and Michael Burgess, a law student, both employed by the Opponent's agent. Both of the Opponent's affiants were cross-examined and the transcripts made of record.

[6] In support of its application, the Applicant filed affidavits of D. Jill Roberts, a law clerk, and Ashley Lam, a law student, both employed by the Applicant's agent.

[7] Both parties filed written arguments and were represented at an oral hearing.

Onus and Material Dates

[8] 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 its ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[9] The material dates that apply to the grounds of opposition are as follows:

- sections 38(2)(b)/12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)];
- sections 38(2)(c)/16(3) – the date of filing the application [section 16(3) of the Act];
- sections 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].
- sections 38(2)(a)/30 - the date of filing the application [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB)].

Preliminary Comment

[10] While I have reviewed and considered all of the evidence and submissions of record, for the purposes of my decision only that which is directly pertinent to my findings will be specifically mentioned.

Grounds Summarily Dismissed

[11] At the hearing the Opponent submitted that it would only be making submissions on the section 12(1)(d) registrability ground. While not withdrawing any of the other grounds, the Opponent admitted that the ground of opposition alleging confusion with the registered trademark STONES (TMA169,502) made for its strongest likelihood of success.

[12] I indicated at the hearing that in my decision I would be finding that the Opponent had failed to meet its evidential burden with respect to the grounds of opposition alleging non-compliance with section 30, non-entitlement and non-distinctiveness. I will address these grounds now.

Non-compliance with section 30(b) of the Act

[13] While the legal burden is upon the Applicant to show that the application complies with section 30 of the Act, there is an initial evidential burden on the Opponent to establish the facts relied upon in support of its section 30 ground of opposition. However, the evidential burden on the Opponent respecting the issue of the Applicant's non-compliance with section 30(b) is a light one [see *Molson Canada v Anheuser-Busch Inc* (2003), 29 CPR (4th) 315 (FCTD)].

[14] The Opponent has not filed any evidence to support a finding that the Mark was used in Canada prior to the filing date. The Opponent has failed to meet its evidential burden and this ground of opposition is rejected.

Non-compliance with section 30(e) of the Act

[15] For ease of reference, the Opponent's allegations forming the basis for this ground of opposition are set out below. The Opponent has not provided any evidence to support these pleaded allegations of non-compliance with section 30(e) of the Act:

- a. the Applicant did not intend, either itself or through a licensee, to associate the Mark with the Goods in a manner that would constitute use in accordance with section 4 of the Act;
- b. the Applicant had used the Mark in Canada as of the filing date;
- c. as of the filing date, the Applicant intended to assign the mark to another company – Molson Coors Brewing Company (UK) Limited or another Molson Coors company prior to commencing use of the Mark in Canada;
- d. the Applicant never intended to display the Mark on its own but rather a composite mark (KEYSTONES or the phrase GRAB SOME STONES) and not in a manner such that the Mark would stand out from the surrounding text or otherwise be perceived as a mark; or
- e. Molson Coors Brewing Company (UK) Limited intends to use the Mark in Canada through a licensee but does not intend to control the character or quality of the Mark enough to comply with section 50.

[16] With respect to (c) above, notwithstanding the fact that the application was assigned effective September 1, 2012 to Molson Coors Brewing Company (UK) Limited and subsequently assigned back to the Applicant effective September 2, 2012 (the assignments filed as exhibits to the Lam affidavit), this alone does not show that the Applicant lacked the intention to use the trade-mark as of the filing date. There is nothing in the assignments which suggests that the Applicant did not have the intention to use the Mark as of the material date.

[17] As a result the Opponent has failed to meet its evidential burden and this ground of opposition is dismissed accordingly.

Non-compliance with section 30(i) of the Act

[18] Where an applicant has provided the statement required by section 30(i), a section 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Since there is no evidence to support a finding that this is such a case, this ground of opposition is rejected.

Non-entitlement Ground of Opposition – section 16(3) of the Act

[19] The Opponent is under an initial burden of establishing use of one or more of the pleaded marks prior to the filing date for the application for the Mark (February 24, 2012) as well as non-abandonment of its pleaded marks at the date of advertisement (October 24, 2012).

[20] The Opponent has failed to provide any admissible evidence establishing use of its pleaded ROLLING ROCK trade-marks in Canada in association with the pleaded goods at the material date for this ground of opposition. While Mr. Burgess's affidavit evidences the availability of ROLLING ROCK beers at various liquor stores across Canada and a single purchase of the product, his evidence dates from August 2013 and thus post-dates the material date (February 24, 2012). The only evidence of sales of the Opponent's goods is one single purchase by an employee of the Opponent's agent's firm which postdates the material date (Burgess affidavit). There is no evidence of sales figures, advertising expenses, etc. evidencing a reputation for the Opponent's ROLLING ROCK trade-marks in Canada. The existence of the registrations is not sufficient to enable the Opponent to meet its evidential burden [see *Rooxs, Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB)]. As a result, I find that the Opponent has failed to meet its evidential burden in support of this ground of opposition and it is dismissed accordingly.

Non-distinctiveness Ground of Opposition

[21] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Goods from those of others throughout Canada [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d) 272 (TMOB)], there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness.

[22] Pursuant to its evidential burden, the Opponent is under an obligation to show that, as of the filing of the statement of opposition, one or more of the pleaded trade-marks had become known sufficiently to negate the distinctiveness of the Mark as of the date of opposition (March 25, 2013) [see *Bojangles' International, LLC v Bojangles Café Ltd* (2004), 40 CPR (4th) 553, affirmed (2006), 48 CPR (4th) 427 (FC)].

[23] As discussed further above in the analysis of the non-entitlement ground of opposition (and below in the analysis of the non-registrability ground), the Opponent has failed to evidence use of the pleaded trade-marks at the material date (March 25, 2013) and the mere existence of registrations is not sufficient to enable the Opponent to meet its evidential burden. As a result, the Opponent has failed to meet its evidential burden under this ground of opposition.

Non-registrability ground of opposition – section 12(1)(d)

[24] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration(s) relied upon is in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration(s) relied upon by an opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)].

[25] I have exercised my discretion and note that each of the pleaded registrations remains extant and thus the Opponent has met its initial evidential burden.

[26] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[27] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See, in general, *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC) and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 96 CPR (4th) 361 (SCC).]

[28] The registrations pleaded by the Opponent can be grouped into three categories – (a) the Opponent's ROLLING ROCK trade-marks; (b) the Western Wines Holdings Limited STONE'S trade-marks; (c) the Applicant's KEYSTONE trade-marks.

[29] At the hearing, the Opponent made submissions only with respect to the STONE'S trade-mark (TMA169,502) admitting that its case was strongest with respect to this trade-mark.

[30] I will assess the likelihood of confusion with the trade-marks in each of the three categories in turn.

The STONE'S registrations owned by Western Wines Holdings Limited

Section 6(5)(a) and (b) of the Act

[31] While the Opponent has provided some evidence indicating the availability of Western Wines Holdings Limited STONE'S green ginger flavoured wine at liquor stores in Canada dating from August 2013 which display the registered STONE'S trade-marks on the label (Burgess affidavit), it has not provided any evidence of sales figures, advertising expenditures, Canadian visits to the evidenced websites, or any other evidence which would serve to support a finding on the extent to which the STONE'S trade-marks had become known in Canada. The only evidence of use of the STONE'S marks in accordance with section 4(1) of the Act relates to a single purchase of the STONE'S green ginger flavoured wine product by an employee of the Opponent's agent.

[32] It should be noted that the mere existence of the Western Wines Holdings Limited STONE'S registrations enables me only to infer *de minimis* use [see *Entre Computer Centers Inc v Global Upholstery Co.* (1991), 40 CPR (3d) 427 (TMOB)].

[33] The application for the Mark is based on proposed use and there is no evidence of record showing use of the Mark in accordance with section 4(1) of the Act nor any evidence of sales figures or other evidence to enable me to make a finding as to the extent to which the Mark has become known in Canada.

[34] Based on the foregoing, I can only infer that neither the Mark nor the registered STONE'S marks has become known to any extent in Canada.

Section 6(5)(c) and (d) – the nature of goods, services or business and trade

[35] The Opponent points to the evidence in the Burgess affidavit which shows that beer and wine are sold by the same retailers. The Opponent also relies upon *Molson Companies Ltd v Gustav Adold Schmittsches Weingut* (1991), 35 CPR (3d) 371 (TMOB) in which the Registrar

dealt with the issue of confusion between the trade-mark GOLDEN EAGLE for wine and the opponent's trade-mark GOLDEN for beer:

With respect to the nature of the wares and the respective channels of trade associated with the wares of the parties, both brewed alcoholic beverages and wines are products of the alcoholic industry and might well be sold through the same establishments or retail outlets, at p. 375

...the average consumer would not perceive there to be any measurable differentiation between the wares of the parties and that the channels of trade associated with these wares could in fact overlap in that beer and wine could be sold in close proximity to each other in the same retail outlet, at p. 376

(emphasis is mine)

[36] By contrast, the Applicant relies on *Bénédictine Distilleries de la Liqueur de l'Ancienne Abbaye de Fécamp v John Labatt Ltd/Ltée* (1990), 28 CPR (3d) 487 (FCTD) for the proposition that beer and wine are different products and that there is considerable knowledge within the buying public to be conscious of the distinction between these products.

[37] At the oral hearing the Applicant relied on *Andres Wines Ltd. v Vina Concha Y Toro S.A.* (2001), 13 CPR (4th) 110 (FCTD) to support the proposition that the fact that beer and wine are sold in different sections of the same stores decreases the likelihood of confusion between the parties' trade-marks. In *Andres Wines*, the evidence established that the geographic origin of the wine plays a significant role in the manner in which wine is sold and how it is selected by consumers. Since one party's wine was Canadian and one was Chilean, and since wines are organized by country of origin, the party's wines would never be sold in close proximity to each other in the same stores.

[38] The Burgess affidavit demonstrates that while the Applicant's beers and Western Wines Holdings Limited's wines are available for sale in the same stores they are being sold in different locations of these stores. The Burgess features product displays which demonstrate that beers are sold near other beers and wines are sold near other wines.

[39] I am of the view that *Andres Wines* can be distinguished from the present case. Firstly there was clear evidence in that case supporting a finding that the geographical origin of the wine was an important factor consumer considered in selecting a wine. The evidence also established

that wines are organized in stores by geographical origin. While it is true that this results in wines from different geographical origins being sold in different areas of the store – the fact that the wines emanate from different geographical origins also serves to suggest that they are not produced by the same manufacturer. For example, it would be unlikely that a Canadian wine producer would also be the producer of a Chilean wine.

[40] The same inference cannot be made in the present case. Specifically, there is evidence in the present case which prevents me from making an inference that it is unlikely that a wine producer would also produce beer. Specifically, the evidence shows that Western Wines Holdings Limited manufactures both wine products and a beer product (alcoholic ginger beer) [see Burgess affidavit]. While I agree with the Applicant that this evidence does not support a finding that the alcoholic ginger beer product is available for sale in Canada – it does support a finding that the producer of STONE’S green ginger flavoured wine also produces alcoholic ginger beer.

Section 6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[41] The parties’ marks share a great deal of similarity in appearance and sound – the only difference being the presence of an apostrophe in the Western Wines Holdings Limited registrations. The degree of similarity in appearance is slightly lower for the design mark (TMA244,602) due to the presence of the various design elements.

[42] With respect to ideas suggested, I agree with the Applicant that the addition of the apostrophe creates a difference in the ideas suggested. The Mark suggests a plurality of small sedimentary particles (stones) whereas the Western Wines Holdings Limited trade-marks suggest the possessive form of the surname Stone.

Additional Surrounding Circumstance – State of the Register Evidence

[43] In his affidavit, Mr. Penney provides evidence of the existence of other STONES trade-marks associated with wine – namely four registered trade-marks, belonging to three distinct owners.

[44] State of the register evidence will only be relevant insofar as one can make inferences from it about the state of the marketplace. Inferences about the state of the marketplace can only be drawn where large numbers of relevant registrations are located [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432; *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FCTD); *Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA)] or where evidence of use of the marks in the marketplace.

[45] While I am of the view that four registered trade-marks (belonging to three distinct owners) is insufficient to find that STONES trade-marks have been commonly adopted in association with wine, I am prepared to find that the evidence results in the inference that Western Wines Holdings Limited does not have a monopoly over the use of the component STONES in the alcoholic beverages sector [see *Jacques Vert PLC v YM Inc*, 2014 TMOB 88].

Conclusion

[34] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having considered all of the surrounding circumstances, I find that the balance of probabilities is evenly balanced between a finding of confusion between the Mark and Western Wines Holdings Limited STONE'S registered trade-mark and a finding of no confusion.

[35] As the onus is on the Applicant to establish on a balance of probabilities that the Mark is not confusing with the STONE'S trade-marks, I must decide against the Applicant. Based on the foregoing, I find that the ground of opposition based on section 12(1)(d) of the Act is successful with respect to the STONE'S registered trade-mark (TMA169,502). With respect to the design trade-mark (TMA244,602), notwithstanding a slightly lower degree of visual resemblance, my conclusion is the same.

The Opponent's ROLLING ROCK trade-marks

[46] Recently, in *Masterpiece* the Supreme Court of Canada discussed the importance of the section 6(5)(e) factor in conducting an analysis of the likelihood of confusion between the parties' marks in accordance with section 6 of the Act (see para 49):

...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start...

[47] Under the circumstances of the present case, I consider it appropriate to analyse the degree of resemblance between the parties' marks first.

Section 6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[48] The law is clear that when assessing confusion it is not proper to dissect trade-marks into their component parts, rather, marks must be considered in their entirety [see *British Drug Houses Ltd v Battle Pharmaceuticals*, [1944] Ex CR 239, at 251, affirmed [1946] SCR 50 and *United States Polo Assn v Polo Ralph Lauren Corp* (2000), 9 CPR (4th) 51 at para 18, aff'd [2000] FCJ No 1472 (CA)].

[49] Firstly, I note that the parties' marks share no similarity in appearance or sound whatsoever.

[50] With respect to the ideas suggested by the parties' marks, I agree with the Applicant that the mere fact that the words "rock" and "stones" suggest sedimentary materials is not sufficient to create any significant degree of similarity in idea suggested. Rather, I find that when considered as a whole, the parties' marks suggest different ideas.

[51] Having found that the parties' marks share no resemblance in appearance or sound and very little similarity in ideas suggested, I must now assess the remaining relevant surrounding circumstances to determine whether any of these other factors are significant enough to find a likelihood of confusion [see *Masterpiece, supra* at para 49].

Section 6(5)(a) and (b) of the Act

[52] For the reasons set out below – these factors do not significantly favour either party and are thus not determinative of the likelihood of confusion as between the parties' marks.

[53] In association with the parties' goods, namely beer/brewed alcoholic beverages, I find that both parties' marks are inherently distinctive.

[54] While the Opponent has provided some evidence indicating the availability of the Opponent's ROLLING ROCK beers at liquor stores in Canada dating from August 2013 (Burgess affidavit), it has not provided any evidence of sales figures, advertising expenditures, numbers of visits by Canadians to the evidenced websites, or any other evidence which would serve to support a finding on the extent to which the ROLLING ROCK trade-marks had become known in Canada. The only evidence of use of the Opponent's ROLLING ROCK trade-marks in accordance with section 4(1) of the Act relates to a single purchase of the Opponent's product by an employee of the Opponent's agent.

[55] It should be noted that the mere existence of the Opponent's registrations enables me only to infer *de minimis* use [see *Entre Computer Centers Inc v Global Upholstery Co.* (1991), 40 CPR (3d) 427 (TMOB)].

[56] The application for the Mark is based on proposed use and there is no evidence of record showing use of the Mark in accordance with section 4(1) of the Act nor any evidence of sales figures or other evidence to enable me to make a finding as to the extent to which the Mark has become known in Canada.

[57] Based on the foregoing, I can only infer that neither party's marks have become known to any extent in Canada. Thus, these factors do not favour either party.

Section 6(5)(c) and (d) – the nature of goods, services or business and trade

[58] The nature of the parties' goods, business and trade is identical.

Additional Surrounding Circumstance – State of the Register/Marketplace Evidence

[59] In her affidavit, Ms. Roberts provides evidence of the existence of other ROCK trade-marks associated with alcoholic beverages, including beer – namely 13 registered trade-marks. Most notably, the Roberts affidavit establishes the existence of Big Rock Brewery's BIG ROCK

beers. Ms. Roberts provides evidence establishing the availability of the BIG ROCK beers in liquor stores in Canada.

[60] State of the register evidence will only be relevant insofar as one can make inferences from it about the state of the marketplace. Inferences about the state of the marketplace can only be drawn where large numbers of relevant registrations are located [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432; *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FCTD); *Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA)] or where evidence of use of the marks in the marketplace.

[61] While I am of the view that 13 entries (most of which belong to one entity, namely Big Rock Brewery Limited Partnership) is insufficient to find that ROCK trade-marks have been commonly adopted in association with beer and brewed alcoholic beverages, I am prepared to find that the evidence results in the inference that the Opponent does not have a monopoly over the use of the component ROCK in the beer and brewed alcoholic beverage sector. As such, this factor slightly favours the Applicant. [see *Jacques Vert PLC v YM Inc*, 2014 TMOB 88]

Conclusion

[62] In applying the test for confusion I have considered it as a matter of first impression. While I acknowledge that the nature of the parties' goods and trade is the same, I note that the degree of resemblance in the trade-marks is often considered the most important factor (see *Masterpiece* at para 49). In this case there is no resemblance between the parties' marks in terms of appearance or sound and only a minimal degree of similarity in ideas suggested. Based on the foregoing, I am satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's registered ROLLING ROCK trade-marks

The Applicant's KEYSTONE registrations

[63] These registered trade-marks, being owned by the Applicant itself, do not create a likelihood of confusion and cannot form a barrier to registration of the Mark.

Conclusion

[64] As further discussed above, the section 12(1)(d) ground of opposition is successful with respect to the registered trade-marks STONE'S (TMA169,502) and STONE'S and Design (TMA244,602) and consequently the Mark will be refused.

Disposition

[65] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(8) of the Act.

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

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

HEARING DATE: 2016-05-17

APPEARANCES

Mark L. Robbins

FOR THE OPPONENT

Adele J. Finlayson

FOR THE APPLICANT

AGENT(S) OF RECORD

Bereskin & Parr

FOR THE OPPONENT

Moffat & Co.

FOR THE APPLICANT