



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

Citation: 2016 TMOB 136
Date of Decision: 2016-08-03

IN THE MATTER OF AN OPPOSITION

S & P Ingredient Development, LLC

Opponent

and

Christina Lynn Melnyk

Applicant

1,546,057 for SALT OF LIFE

Application

I Background

[1] On October 3, 2011, the Applicant filed application No. 1,546,057 for the trade-mark SALT OF LIFE (the Mark). The application covers “Himalayan crystal salt products, namely, table salt, bath salts, crystal rock for making salty water; salts, namely, pure salts from natural deposits as common salts for food supplements, body scrubs, horse licks, salt tiles and salt cooking stones” and it is based upon use in Canada since January 20, 2009.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of December 11, 2013. The Opponent opposed the application under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) by filing a statement of opposition on June 3, 2014. The Opponent subsequently requested leave to file an amended statement of opposition on August 27, 2014 and leave was granted on September 4, 2014.

[3] The grounds of opposition (as amended) are based upon sections 30(b) and 2 (distinctiveness) of the Act.

[4] Only the Applicant filed evidence. Its evidence consists solely of the affidavit of Mary Angela Gonsalves, sworn July 24, 2015 (the Gonsalves affidavit). Ms. Gonsalves was not cross-examined.

[5] Both parties filed written arguments and attended a hearing held on July 21, 2016.

[6] For the reasons that follow, the opposition is rejected.

II Onus

[7] 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 [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

III Evidence

[8] As previously mentioned, the only evidence in this proceeding is the Gonsalves affidavit, filed by the Applicant. Ms. Gonsalves is an assistant employed by the agent for the Applicant's law firm [para 1]. Attached as Exhibit MAG-1 to her affidavit, is a copy of a Statement of Registration of General Partnership or Sole Proprietorship from the British Columbia Ministry of Finance Registry Services for a business identified as SALT OF LIFE IMPORTS. Ms. Melnyk (the Applicant) is listed as being one of two partners in the partnership. The date of registration is December 15, 2008. The start date of business in British Columbia is listed as November 26, 2008.

IV Analysis

Non-compliance – Section 30(b)

[9] The statement of opposition contains two grounds based upon section 30(b) of the Act.

[10] First, the Opponent has pleaded that the application for the Mark does not comply with section 30(b) of the Act, as contrary to what was claimed in the application, the Mark has not

been used in association with the entire statement of goods in the application since the claimed date of first use. Specifically, the Opponent asserts that the Mark has not been in association with salts, namely, pure salts from natural deposits as common salts for food supplements, body scrubs, horse licks, salt tiles and salt cooking stones, since the claimed date of first use in the application, if at all.

[11] Second, the Opponent has pleaded that the application for the Mark does not comply with section 30(b) of the Act, as the Applicant herself has not continuously used the Mark in association with the goods set out in the application, but rather, the Mark is used and has been used by a separate entity called Salt of Life Imports, which is a general partnership registered in the Province of British Columbia.

[12] The material date for assessing a section 30(b) ground of opposition is the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475]. The initial burden on an opponent is light respecting the issue of non-conformance with section 30(b) of the Act because the facts regarding an applicant's first use are particularly within the knowledge of an applicant [*Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986) 10 CPR (3d) 84 (TMOB) at 89].

[13] An opponent can meet its initial burden under section 30(b) by reference not only to its own evidence but also to the applicant's evidence [*Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD)]. However, an opponent may only successfully rely upon the applicant's evidence to meet its initial burden if it can show that it puts into issue the claims set forth in the applicant's application [*Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd* 2014 FC 323 at paras 30-38 (CanLII); *Garbo Group Inc v Glamour Secrets Pro Inc*, 2016 TMOB 59 (CanLII) at para 48].

[14] At the hearing, the Opponent admitted that it likely has not met its burden in respect of this ground and I find that it has not.

[15] While it is true that the Opponent's initial burden is light under section 30(b) because it has limited access to information regarding use relative to the Applicant, its burden is not eliminated altogether. There remains an evidential burden upon it to establish facts which, if true,

would support a finding that the Applicant had not used the Mark in Canada, since the claimed date of first use, in association with the goods set out in the application [*John Labatt, supra; Dion Neckwear Ltd v Christian Dior SA et al* (2002), 2002 FCA 29 (CanLII), 20 CPR (4th) 155 (FCA)].

[16] Neither party filed any evidence of use of the Mark in association with the goods identified in the application as of the claimed date of first use, or as of any other date, for that matter. The only evidence of record is the Gonsalves affidavit, which consists of nothing more than a copy of Statement of Registration of General Partnership or Sole Proprietorship from the British Columbia Ministry of Finance Registry Services for a business identified as SALT OF LIFE IMPORTS, wherein Ms. Melnyk (the Applicant) is listed as being one of two partners in a partnership. This document does not demonstrate use of the Mark by the Applicant (or by the partnership identified therein) in association with the goods identified in the application. It does not even prove that the partnership was active at the time that the application for the Mark was filed or at any other date. At most, it speaks to the existence of the registration of a partnership between Ms. Melnyk and another individual as of the date of registration.

[17] This evidence is not sufficient to support a finding that the Mark had not been used in Canada since the claimed date of first use, in association with the goods set out in the application. I am therefore unable to conclude that the Opponent has met the initial evidential burden upon it in respect of this ground of opposition.

[18] Accordingly, the first ground of opposition based upon section 30(b) of the Act is unsuccessful.

[19] That leaves us with the second ground of opposition raised under section 30(b).

[20] The Opponent is of the view that it has met its burden in respect of this ground.

[21] In support of its position, the Opponent submits that the registry document attached as Exhibit MAG-1 to the Gonsalves affidavit suggests that contrary to what was stated to be the case in the application for the Mark as originally filed, the Applicant itself did not use the Mark, but rather, the Mark was used by the partnership SALT OF LIFE IMPORTS. The Opponent further points out that the application as originally filed contained a statement that the Mark has

been used by the Applicant since the claimed date of first use, and that during the course of this opposition proceeding (on August 28, 2014), the Applicant amended it so as to state that the Mark has been used by the “applicant or a licensee of the applicant, or both”.

[22] The Opponent is of the view that the amendment was improper and should not have been permitted. It also relies upon the amendment as further support for its submission that the Mark was not used by the Applicant, but rather, by the company Salt of Life Imports. The Opponent argues that a negative inference should be drawn from the amendment and that I should infer that it was made to address an issue in the application as originally filed with respect to who was using the Mark, in order to defeat the Opponent’s section 30(b) ground of opposition.

[23] With respect to the propriety of the amendment, I note that sections 31 and 32 of the *Trade-marks Regulations* (the *Regulations*) set out the types of amendments that are not permitted to an application after filing (section 31) and after advertisement (section 32). While section 31 of the *Regulations* prohibits an amendment that would change the identity of the applicant (except after recognition of a transfer by the Registrar), it does not prohibit an amendment to make reference to use by a licensee. Thus, the amendment to the Applicant’s application does not appear to have been improper.

[24] Contrary to the Opponent’s submissions, I am also of the view that this amendment, in combination with the registry document from the Gonsalves affidavit is insufficient to call into question whether the application was compliant with section 30(b) of the Act as of the filing date.

[25] The claimed date of first use in the application for the Mark is January 20, 2009. It stands in the name of Christina Lynn Melnyk and it was filed on October 3, 2011. The Statement of Registration attached as Exhibit MAG-1 to the Gonsalves affidavit identifies December 15, 2008 as the date of registration and the start date of business in British Columbia as being November 26, 2008.

[26] As previously discussed, the registry document is useful only to the extent that it is evidence of its own existence. The mere fact that the Applicant was a partner in a partnership that was stated in the document to have come into existence on November 26, 2008 and

registered on December 15, 2008 does not establish that the Mark was in use in association with the goods covered in the application on either of those dates, as of the claimed date of first use, or as of the filing date of the application for the Mark, nor does it establish who was using the Mark as of any of those dates.

[27] Furthermore, I note that unlike section 30(e) of the Act, which deals with applications filed based upon proposed use in Canada, section 30(b) of the Act does not require an applicant to specify whether the mark has been used by the applicant by itself or through a licensee or by itself and through a licensee. The fact that the Applicant voluntarily amended its application to make reference to use being by the “applicant or a licensee of the applicant, or both” on August 28, 2014 is therefore, in my view, inconsequential. Furthermore, the amendment was made well after the filing date of the application for the Mark and the filing date is the material date for assessing a section 30(b) ground of opposition. In the absence of any other evidence relating to use of the Mark, I am not prepared to draw a negative inference from the Applicant’s amendment to its application.

[28] Overall, I do not find the evidence in this case sufficient to cast doubt on whether the application for the Mark was compliant with section 30(b) of the Act at the material date. I am therefore unable to conclude that the Opponent has met its burden in respect of this ground.

[29] Accordingly, the second ground of opposition raised under section 30(b) is also unsuccessful.

Non-distinctiveness – Section 2

[30] The Opponent has pleaded that the Mark is not distinctive within the meaning of section 2 of the Act because it does not distinguish and is not adapted to distinguish the goods of the Applicant since it has been used by others in Canada. In particular, the Opponent alleges that it has been used by Salt of Life Imports, a general partnership registered in the Province of British Columbia, to designate a reference to Himalayan Salt or Himalayan crystal salts.

[31] Once again, I note that no evidence of use or reputation has been filed in this case. I am therefore also unable to conclude that the Opponent has met its burden in respect of this ground.

[32] Accordingly, this ground of opposition is also unsuccessful.

V Disposition

[33] In view of the foregoing, 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.

Lisa Reynolds
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE: 2016-07-21

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