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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 76

Date of Decision: 2020-06-30

IN THE MATTER OF AN OPPOSITION

Cole Flath

Opponent

and

Cody Lumax

Applicant

1,803,133 for ALPINE ADDICTS

Application

INTRODUCTION

[1] On October 3, 2016, Cody Lumax (the Applicant) filed application No. 1,803,133 (the Application) to register the trademark ALPINE ADDICTS (the Mark).

[2] The Application, as amended, is in association with the following goods and services (collectively the Goods and Services):

Goods:

- (1) Cell phone cases
- (2) Stickers and decals
- (3) Casual clothing, athletic clothing, outdoor winter clothing and hats.

Services:

- (1) Wholesale and retail sale of clothing
- (2) Providing information in the fields of clothing and clothing fashion, all via private websites, social media websites and social networking websites
- (3) Film production services
- (4) Licensing of motion picture footage and films

[3] The Application is based on use of the Mark in CANADA since May 5, 2016 in association with goods (1); use of the Mark in CANADA since March 3, 2016 in association with goods (2), (3) and services (1), (2); and proposed use of the Mark in CANADA in association with services (3), (4).

[4] The Application was advertised for opposition purposes in the *Trademarks Journal* on October 11, 2017. On December 8, 2017, Cole Flath (the Opponent) filed a statement of opposition against the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). I note that the Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised prior to that date).

[5] The Opponent raises grounds of opposition based on non-entitlement under sections 16(1)(a) and (c), and sections 16(3)(a) and (c) of the Act, and non-distinctiveness under section 2 of the Act, relying on the Opponent's prior use of the trademarks Alpyne Apparel and Alpyne Apparel Mountain Design in association with, *inter alia*, stickers, hats shirts and sweaters. As noted in the statement of opposition, the Opponent's trademark Alpyne Apparel is the subject of application No. 1,803,879 and the trademark Alpyne Apparel Mountain Design (depicted below) is the subject of application No. 1,817,067.



[6] Both parties filed evidence and written representations. A hearing was not requested.

[7] For the reasons set out below, the opposition is rejected.

EVIDENCE

[8] The evidence filed by the parties is briefly summarized, below, and is discussed further in the analysis of the grounds of opposition.

Opponent's Evidence

[9] The Opponent filed the Affidavit of Cole Flath dated June 14, 2018 (the Flath Affidavit). Mr. Flath is the sole proprietor of a business operating under the name Alpyne Apparel, based in Martensville, Saskatchewan.

[10] Mr. Flath describes the following steps in his creation of the business:

- Mr. Flath registered the business name Alpyne Apparel with the relevant provincial business registry in Saskatchewan on December 10, 2014.
- On or about February 8, 2015, Mr. Flath created a Facebook page for the Alpyne Apparel business.
- On February 11, 2015, Mr. Flath registered the domain name <alpyneapparel.com>.
- On or about February 12, 2015, Mr. Flath created an Instagram page for the Alpyne Apparel business.

[11] On October 7, 2016, Mr. Flath filed application No. 1,803,879 for the word trademark Alpyne Apparel. I note that application initially proceeded to registration; however, the registration status was subsequently removed by Federal Court Order in view of an opposition that had been initiated by a third party. As of the date of this decision, the Opponent's application No. 1,803,879 remains pending and opposed by a third party.

[12] Mr. Flath states that since beginning the Alpyne Apparel business, he has used the trade name and trademark Alpyne Apparel in association with the commercial sale of stickers, hats,

shirts and sweaters. Exhibits “F” through “M” to the Flath Affidavit include images of these products bearing the trademark Alpyne Apparel, as well as records of sales of these products on March 3, March 14, April 23 and November 6, 2015. Images of beanies and tank-tops bearing the trademark Alpyne Apparel, as well as records of the sale of these items on August 23, 2015 and November 6 and 7, 2015 are also included in Exhibits “Q” through “W”. I note that some of these sales appear to have been made via the Opponent’s online store, wherein the location of the purchaser is not identified. In other instances, the sales appear to have been made from the Opponent’s business address in Martensville, Saskatchewan.

[13] The exhibits to the Flath Affidavit indicate that the Opponent’s word trademark Alpyne Apparel is often displayed in conjunction with the trademark Alpyne Apparel Mountain Design, depicted in paragraph 5 of this decision, above.

[14] At paragraph 13 of the Flath Affidavit, Mr. Flath states that “[i]t is my belief that the Applicant’s use of the proposed trade-mark ‘Alpine Addicts’ has caused, and will continue to cause confusion in the marketplace with my prior trade-mark and trade-name.” In this regard, the Flath Affidavit includes as Exhibit “N” an Instagram message to the Opponent from an individual named Brayden Mather, a snowmobiler who is an ambassador for the Applicant’s brand, stating, “We should have a big team ride”. Mr. Flath states that “[i]t is my belief that Brayden Mather, a rider that appears to be sponsored by Alpine Addicts, confused my business for the business that sponsors him, and it is my belief that the reason for his confusion was that the Applicant’s proposed trade-mark is confusingly similar to my registered trade-mark and trade-name.”

[15] Exhibit “P” to the Flath Affidavit is a screenshot from the Applicant’s website with a photograph of another ambassador for the Applicant’s brand, Courtney Bamford, with a snowmobile, the snowmobile having a sticker bearing the Opponent’s trademark Alpyne Apparel.

[16] Paragraphs 15 through 17 of the Flath Affidavit, and the related Exhibits “Q” through “W”, include photographs of side-by-side comparisons of various clothing items (namely beanies and tank-tops) bearing the Opponent’s and the Applicant’s respective trademarks. Mr. Flath

states that it is his belief that the Applicant intentionally designed these clothing items to resemble those offered by the Opponent.

[17] Mr. Flath was not cross-examined on his affidavit.

Applicant's Evidence

[18] The Applicant filed the Affidavit Cody Lumax dated October 9, 2018 (the Lumax Affidavit) and the Affidavit of John Seymour dated October 11, 2018 (the Seymour Affidavit). Neither affiant was cross-examined.

Lumax Affidavit

[19] Mr. Lumax is the sole proprietor of a business operating under the name Alpine Addicts, based in Swan River, Manitoba.

[20] Mr. Lumax describes the following steps in his creation of the business:

- Mr. Lumax indicates that “[i]n or around December, 2015”, he created an Instagram page bearing the Mark. Mr. Lumax states that he continues to post videos and other content showcasing backcountry snowmobiling and snowmobilers on this Instagram page.
- Mr. Lumax states that he started his business under the name Alpine Addicts in February, 2016. He indicates that the business seeks to create a social community for backcountry snowmobilers and people who seek adventure in the outdoors. The business obtained a business number from the Manitoba Companies Office on March 11, 2016.
- On or around April 18, 2016, Mr. Lumax registered the domain name <alpine-addicts.com>.
- On or around August 15, 2016, Mr. Lumax created a Facebook page for the business.

[21] Mr. Lumax states that he spent the following amounts in advertising and promotion costs: \$10,726.60 in 2016; \$19,046.86 in 2017; and \$15,318.45 in 2018.

[22] Mr. Lumax states that he sells his goods and services to consumers online through his website, at retail fairs, wholesale through certain distributors and to his ambassadors.

[23] Exhibits “G” through “W” to the Lumax Affidavit include images of various goods bearing the Mark sold by the Applicant, including athletic pants, long sleeve t-shirts, cell phone cases, hats, hoodies and stickers, as well as records of various sales of these items between February 15, 2016 and February 24, 2018. Also included are images of the Applicant’s goods bearing the Mark, displayed for sale at a retail fair.

[24] I note that the Lumax Affidavit demonstrates that the Applicant’s Mark is often depicted in the design form shown below, which is the subject of the Applicant’s related application No. 1,803,134:



[25] At paragraphs 26 to 31 of the Lumax Affidavit, Mr. Lumax seeks to address various statements set out in the Flath Affidavit filed by the Opponent, including the following:

- Mr. Lumax describes a conversation between himself and Brayden Mather, the individual referenced at paragraph 13 of the Flath Affidavit.
- Mr. Lumax provides an explanation regarding the appearance of the Opponent’s trademark Alpyne Apparel in an image on the Applicant’s website, as described in paragraph 14 of the Flath Affidavit.
- Mr. Lumax denies intentionally designing clothing items (discussed in paragraphs 15 through 17 of the Flath Affidavit) to resemble those of the Opponent.

Seymour Affidavit

[26] Mr. Seymour is a legal assistant employed by the agent for the Applicant. His affidavit includes, *inter alia*, the results of various searches of the Canadian Trademarks Office Database for applications and registrations for trademarks that include the words “ALPINE” or “ALPYNE”.

ONUS AND MATERIAL DATES

[27] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the Application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[28] The material dates with respect to the grounds of opposition are as follows:

- Sections 38(2)(c)/16(1)(a) and (c) of the Act – the date of first use of the Applicant’s Mark;
- Sections 38(2)(c)/16(3)(a) and (c) of the Act – the filing date of the Application; and
- Sections 38(2)(d) and 2 of the Act - the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317 (FC)].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Non-entitlement – Sections 16(1)(a) and 16(3)(a)

[29] With the Opponent’s grounds of opposition under sections 16(1)(a) and 16(3)(a) of the Act, the Opponent alleges that the Applicant is not the party entitled to registration of the Mark in view of the Opponent’s prior use of his trademarks Alpyne Apparel and Alpyne Apparel

Mountain Design. These grounds of opposition turn on the question of whether, as of the material date, there was a likelihood of confusion between the Applicant's Mark and the Opponent's trademarks Alpyne Apparel and Alpyne Apparel Mountain Design.

[30] As noted above, the material date for the 16(1)(a) ground of opposition is the date of first use claimed in the Application, which in this case is May 5, 2016 for goods (1), and March 3, 2016 on goods (2), (3) and on services (1), (2). The material date for the section 16(3)(a) ground is the filing date of the Application, namely, October 3, 2016. Given that each of these material dates fall within a seven-month period, and the evidence indicates that the Opponent's use of his trademarks in Canada precedes all of these dates, in my view, the different material dates have no impact on the confusion analysis. That is to say, the outcome of the confusion analysis would be the same regardless of which of the material dates is considered.

[31] Further, since the Opponent's evidence demonstrates that he commenced use of his trademarks prior to the material dates, and there is no evidence to suggest that the Opponent abandoned his trademarks as of the date the Application was advertised, the Opponent has met his initial evidential burden for the sections 16(1)(a) and 16(3)(a) grounds of opposition.

Test for confusion

[32] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[33] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401 (SCC); *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 (SCC) at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 (SCC) at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[34] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

[35] In the present case, in considering the issue of confusion, I will focus my analysis on the Opponent's trademark Alpyne Apparel, as in my view that trademark represents the Opponent's best case. If the Mark is not confusing with the Opponent's trademark Alpyne Apparel, it will not be confusing with the Opponent's trademark Alpyne Apparel Mountain Design (subject of application No. 1,817,067), as the latter contains no word matter and in my view bears little resemblance to the design logo used by the Applicant.

Inherent distinctiveness of the trademarks and extent to which they have become known

[36] At the outset of the analysis, it is useful to identify the meanings likely to be attributed to the terms that comprise the parties' marks. I have exercised my discretion to refer to the following dictionary definitions from the *Canadian Oxford Dictionary*, 2nd ed. [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29 which provides that the Registrar can take judicial notice of dictionary definitions]:

“alpine” – *adjective* – of or relating to high mountains.

“apparel” – *noun* – clothing, dress.

“addict” – *noun* – 1 a person addicted to a habit [...]. 2 *informal* an enthusiastic devotee of a sport or pastime [...].

[37] I consider the Opponent's trademark Alpyne Apparel to have a low degree of inherent distinctiveness, as it is highly suggestive, if not descriptive, of clothing suitable for use in the mountains. While the spelling of the first word "Alpyne" in the Opponent's trademark is unusual, in my view, it would still be readily understood as a reference to "alpine", and thus the unique spelling does not increase the inherent distinctiveness of the trademark as a whole to a significant degree. Trademarks that have a low degree of inherent distinctiveness are generally afforded a narrow scope of protection, such that comparatively small differences will be sufficient to distinguish between such marks [see *Breville Pty Ltd v Keurig Green Mountain, Inc.*, 2014 TMOB 248, 130 CPR (4th) 246 at para 32].

[38] The Applicant's Mark ALPINE ADDICTS has a slightly higher degree of inherent distinctiveness than the Opponent's trademark. While the Mark is suggestive of goods and services designed for and/or designed by individuals devoted to alpine endeavors, in my view, it is less directly descriptive of the Goods and Services than is the Opponent's trademark.

[39] With respect to the extent to which the respective parties' trademarks have become known, the evidence indicates that the Opponent has been using his trademark Alpyne Apparel since March 2015, and the Applicant has been using his Mark since March 2016. While both parties have provided evidence of a limited number of individual sales on various dates, neither party has provided any data relating to total sales volumes. The Applicant has provided evidence of annual advertising expenditures in excess of \$10,000 for 2016 through 2018, but little evidence from which to assess the scope or impact of that advertising expenditure. Consequently, in my view, I do not have sufficient evidence to assess the degree to which either parties' trademarks have become known.

[40] Given that the Applicant's Mark has a higher degree of inherent distinctiveness than the Opponent's trademark, and I do not have sufficient evidence to assess the degree to which the marks have become known, on balance, this factor favours the Applicant.

Length of time the trademarks have been in use

[41] The Opponent's evidence indicates that he has been using his trademark Alpyne Apparel since March 2015. The Applicant's evidence indicates that he has been using his Mark since March 2016. This factor therefore favours the Opponent.

Nature of the goods and services; nature of the trade

[42] The evidence indicates that there is significant overlap in the parties' goods and services, as well as their channels of trade. Both parties are offering goods and services, including the sale of clothing and related accessories, to winter outdoor enthusiasts, including snowmobilers. Thus, this factor favours the Opponent.

Degree of resemblance

[43] Resemblance must be assessed with a consideration of whether there is an aspect of the mark that is particularly striking or unique [see *Masterpiece, supra*, at para 64].

[44] In my view, the striking or unique aspect of the Opponent's trademark is the word "Alpyne", given its unusual spelling and the fact that there is nothing striking or unique about the descriptive word "Apparel" in association with clothing goods.

[45] With respect to the Applicant's Mark, in my view, the striking or unique aspect is the term "ALPINE ADDICTS" in its entirety. With the Applicant's Mark, the word "ALPINE" is spelled in the customary way, which reduces the degree to which that word on its own is striking. Also, since the word "ADDICTS" is not descriptive of the Applicant's Goods and Services, in my view, the Applicant's Mark is more likely to be read and understood as a unitary phrase than is the case with the Opponent's trademark Alpyne Apparel.

[46] The resemblance between the parties' trademarks derives primarily from the similar appearance and sound of the first portions of the marks (i.e. "Alpyne" vs. "ALPINE"). However, the fact that this shared component in the parties' marks is descriptive minimizes the impact of the similarity [see *Venngo Inc v Concierge Connection Inc*, 2015 FC 1338, aff'd 2017 FCA 96, 146 CPR (4th) 182 (*Venngo*); see also *Prince Edward Island Mutual Insurance Co v Insurance*

Co of Prince Edward Island (1999), 86 CPR (3d) 342 (FC)]. In this regard, the following statement of the Federal Court in *Venngo* at paragraph 124 is instructive:

However, the Court should be wary of providing broad protection to any trademark that uses descriptive or highly suggestive words as a basis for a claim of distinctiveness and alleged confusion between that mark and other trademarks or trade names [...].

[47] The remaining portions of the marks (i.e. “Apparel” vs. “ADDICTS”) look and sound quite different. Further, in my view, the ideas conveyed by the parties’ respective marks as a whole are also different. The Opponent’s trademark more directly describes clothing designed for use in the mountains. The Applicant’s Mark, in my view, is suggestive of a lifestyle involving individuals who are addicted to alpine pursuits.

[48] Ultimately, while there is some degree of resemblance owing to the presence of the word “alpyne” / “alpine” in both parties’ trademarks, given the descriptive nature of that term, and given the low inherent distinctiveness of the Opponent’s trademark as a whole, I consider the degree of resemblance between the trademarks to be fairly low. In my view, this factor favours the Applicant.

Surrounding circumstances

Actual Confusion

[49] When assessing the issue of the likelihood of confusion, evidence of actual confusion in the marketplace is a relevant surrounding circumstance. However, it is not dispositive and does not override the other factors in the section 6 analysis [see *Venngo, supra*, at paras 123 to 126 (FC)].

[50] In the present case, the Opponent relies on an incident described at paragraph 13 of the Flath Affidavit, wherein a snowmobiler named Brayden Mather, who is sponsored by the Applicant, sent a message to the Opponent via Instagram that appears to have been intended for the Applicant. I note that at paragraph 26 of the Lumax Affidavit, Mr. Lumax states that he subsequently spoke with Mr. Mather “who has advised me and I verily believe that he was not confused between the Mark and Mr. Flath’s ALPYNE APPAREL mark.” However, I afford no

weight to that evidence from Mr. Lumax as it is lacking in detail and is hearsay that does not meet the requirement of necessity.

[51] Ultimately, I am not persuaded that the alleged incident of actual confusion assists the Opponent in this case. First, in my view, it is not an example of consumer confusion by a customer or potential customer; instead, it appears to be more in the nature of a mistake by an individual who is already a sponsored representative of the Applicant. In any event, it has been held that a single instance of actual confusion is not determinative [see *ITV Technologies Inc v WIC Television Ltd*, 2005 FCA 96, 38 CPR (4th) 481 (FCA) at para 47], and I similarly find in this case that the limited evidence of alleged actual confusion does not weigh in the Opponent's favour.

Alleged Intentional Copying


[52] The Opponent in his evidence asserts his belief that certain of the Applicant's clothing items bearing the Mark were intentionally designed to resemble corresponding clothing items of the Opponent bearing his trademarks. The Applicant in his evidence denies this. While that allegation might be a factor to consider in a claim for infringement or passing off, in the present case, I do not give this allegation any weight. First, the Opponent did not cross-examine on the Lumax Affidavit, where facts relating to this allegation could have been explored. Second, and more importantly, the issue in this proceeding is whether there is a likelihood of confusion between the Mark as applied for and the Opponent's previously used trademarks, and in an opposition proceeding an applicant's intention has little, if any, relevance to that issue [see *Toyota Jidosha Kabushiki Kaisha v Lexus Foods Inc* (2000), 9 CPR (4th) 297 (FCA) at para 11; see also *Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22, 49 CPR (4th) 321 at para 90].




State of the Register

[53] State of the register evidence can be introduced to show that a mark or portion of a mark is common among different traders, and thus that consumers are accustomed to distinguishing between the marks based on relatively small differences. However, state of the register evidence is only relevant insofar as inferences may be made from it concerning the state of the marketplace in Canada, and inferences about the state of the marketplace can only be drawn

when a *significant* number of pertinent registrations are located [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); and *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[54] In the present case the Applicant has introduced state of the register evidence by way of the Seymour Affidavit, which contains printouts of search results of active trademark applications and registrations which include the elements “alpine” and “alpyne”. While numerous registrations and applications were identified by these searches, I have disregarded the search results for which full particulars were not provided, as the associated goods and services are necessary in order to assess the relevance of the reference. The Seymour Affidavit includes the full particulars for the following four registrations and one allowed application:

App./Reg. No.	Trademark	Owner	Goods/Services
TMA482,742	ALPINE	Moosehead Breweries Limited	Clothing, namely t-shirts, tank tops, undershirts, sweatshirts, sweatpants, polo shirts, ties, baseball shirts, hockey shirts, sweaters, jackets; hats, namely caps, woolen knit hats, summer mesh hats, sun visors, corduroy hats; novelty items, namely posters, playing cards, decals, [...]
TMA478,394		Moosehead Breweries Limited	Clothing, namely t-shirts, tank tops, undershirts, sweatshirts, sweatpants, polo shirts, ties, baseball shirts, hockey shirts, sweaters, jackets; hats, namely caps, woolen knit hats, summer mesh hats, sun visors, corduroy hats; novelty items, namely posters, playing cards, decals, [...]
1,822,943		AJG Apparel Inc. / Vêtements AJG Inc.	Outerwear, namely, coats, jackets, vests, snowsuits, baby buntings, hats, mittens, gloves.

			
TMA737,083		Vaclav Hrbek BODY-HF	Sports spectacles; protective helmets, namely cycling helmets, ski helmets, climbing helmets; clothing, footwear, headgear, namely socks, underwear, shorts, capris, Bermuda shorts, pants, outdoor pants, softshell pants, ski pants, running pants, ski running pants, mountaineering pants, expeditionary pants, cycling pants, city pants, feather pants, skirts, salopettes, t-shirts, tops, boleros, undershirts, sweaters, sweatshirts, polo necks, fleece jackets, shirts, jackets, outdoor jackets, softshell jackets, ski jackets, running jackets, ski running jackets, mountaineering jackets, expeditionary jackets, cycling jackets, city jackets, feather jackets, coats, anoraks, cardigans, overalls, ski suits, caps, headbands, baseball caps, gloves, shoes, slippers, sandals, climbing boots, outdoor shoes, skiing coats, running shoes, ski running shoes, cycling shoes, beach shoes; sporting articles, namely, cases for skis, cases for skiing, climbing gear and accessories namely, seats, ice-axes, climbing ropes.
TMA267,767		Alpine Stars Research S.R.L.	Boots for motorcyclists.

[55] In my view, the five above-referenced trademarks are relevant, in as much as they prominently include (or are comprised of) the word “alpine” in association with relevant goods. However, alone, the presence of these five marks on the register is insufficient to allow me to draw any inferences regarding the state of the marketplace in Canada with respect to trademarks which incorporate the word “alpine”. In particular, I do not have any evidence of record to demonstrate that the above-referenced third party trademarks are actually in use in Canada.

[56] Accordingly, in my view, the state of the register evidence does not assist the Applicant.

Conclusion regarding confusion

[57] Taking into account all of the relevant factors set out above, and particularly in view of the low degree of inherent distinctiveness of the Opponent’s trademark Alpyne Apparel, and the limited degree of resemblance between the marks, I am satisfied that the Applicant has met his legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion.

[58] Therefore, the non-entitlement grounds of opposition under sections 16(1)(a) and 16(3)(a) are rejected.

Non-entitlement – Sections 16(1)(c) and 16(3)(c)

[59] With a ground of opposition under section 16(1)(c) or 16(3)(c) of the Act, an opponent must rely on prior use of a trade name. However, in the present case, the Opponent in his statement of opposition does not plead any prior use of a trade name; only prior use of his trademarks Alpyne Apparel and Alpyne Apparel Mountain Design. Consequently, I dismiss the Opponent’s sections 16(1)(c) and 16(3)(c) grounds of opposition as being insufficiently pleaded.

[60] However, even if I were to consider that the Opponent had sufficiently put in issue grounds of opposition under sections 16(1)(c) and 16(3)(c) by virtue of the evidence he filed of his use of the trade name Alpyne Apparel, I would dismiss those grounds of opposition based on the same analysis of confusion set out above under the sections 16(1)(a) and 16(3)(a) grounds of opposition. In my view, the Applicant has satisfied his legal burden of demonstrating that there is

no likelihood of confusion between the Mark and the Opponent's trade name Alpyne Apparel as of the material dates for the sections 16(1)(c) and 16(3)(c) grounds of opposition.

Non-distinctiveness – Section 2

[61] With this ground of opposition, the Opponent pleads that the Mark is not distinctive in view of the Opponent's prior use and advertisement of the trademarks Alpyne Apparel and Alpyne Apparel Mountain Design. The material date for this ground of opposition is the date of filing the statement of opposition, namely, December 8, 2017.

[62] In order to meet its initial evidential burden under this ground of opposition, an opponent must show that its trademark had a substantial, significant or sufficient reputation in Canada in association with relevant goods and/or services [see *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 (FC) at para 34]. Based on the evidence submitted by the Opponent, I am not satisfied that he has met his initial evidential burden. In particular, while the Opponent has provided evidence of use of his trademarks in advance of the material date, including evidence of a collection of individual sales of items bearing the Opponent's trademarks, I have no data from the Opponent as to the volume of his sales or the scope of his advertising. Consequently, in my view, the Opponent has not met his evidential burden with respect to the distinctiveness ground of opposition, as I have no evidence with which to assess the extent of the reputation in Canada in the Opponent's trademarks.

[63] However, even if I had concluded that the Opponent met his initial evidential burden under this ground, I nevertheless would have rejected the Opponent's section 2 ground of opposition based on the same analysis of confusion as set out above with respect to the non-entitlement grounds of opposition. Specifically, I find that the Applicant has met his legal burden to demonstrate that there is no likelihood of confusion between the Mark and the Opponent's trademark as of the material date for the section 2 ground.

DISPOSITION

[64] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

Locus Law

For the Opponent

Taylor McCaffrey LLP

For the Applicant