



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 85
Date of Decision: 2020-07-24

IN THE MATTER OF AN OPPOSITION

Blackbird Pub Ltd.

Opponent

and

Donnelly Hospitality Management Ltd.

Applicant

1,809,892 for THE BLACKBIRD

Application

[1] Blackbird Pub Ltd. (the Opponent) opposes registration of the trademark THE BLACKBIRD (the Mark), that is the subject of application No. 1,809,892 by Donnelly Hospitality Management Ltd. (the Applicant). Filed on November 16, 2016, the application is based on use of the Mark in Canada since at least as early as October 2013 with restaurant services; bar services.

[2] The Opponent alleges a single ground of opposition: that the application does not conform to the requirements of section 30(b) of the *Trademarks Act*, RSC 1985, c T-13 (the Act). As 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 section 30(b) ground of opposition (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 before this date). Only the Opponent filed evidence and made submissions at a hearing.

[3] For the reasons that follow, I refuse the application on the basis that the Applicant has failed to prove that its application complies with section 30(b) of the Act.

Section 30(b) Ground of Opposition

[4] The Opponent alleges that the application does not comply with section 30(b) of the Act as the statement that the Mark has been used in Canada since at least as early as October 2013 is false in that, if the trademark had been used in Canada since that date, it had not been used by the Applicant.

[5] The issue under section 30(b) is whether an applicant has continuously used the Mark in the normal course of trade from the alleged date of first use claimed to an applicant's filing date [*Immuno AG v Immuno Concepts, Inc* (1996), 69 CPR (3d) 374 (TMOB); *Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD) at 262].

[6] There is an evidential burden on an opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Limited v The Molson Companies Limited*, (1990), 30 CPR (3d) 293 at 298 (FCTD)]. The presence of an evidential burden on an opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. The evidential burden on an opponent respecting the issue of an applicant's non-compliance with this section of the Act is a light one [*John Labatt Ltd v Molson Companies Ltd.* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 at paras 33-38]. If an opponent meets its evidential burden, an applicant must prove, on a balance of probabilities, that it has used the mark as of the date claimed.

The Opponent Meets its Evidential Burden

[7] The Opponent filed the affidavit of Karen Chow, an articling student with its agent. Ms. Chow attached a statement of claim, statement of defence, reply, and notice of discontinuance in a Federal Court action between the Applicant and Opponent (Exhibit A); business licences for the premises at 905 Dunsmuir Street (Exhibits B-J), which appears to be the

premises of The Blackbird Public House restaurant according to the Applicant’s statement of claim (Exhibit A, statement of claim, para 5); and corporate searches for various entities referenced in Exhibits A-J (Exhibits K-N).

[8] I find the following sufficient to meet the Opponent’s light evidential burden, particularly in view of the fact that the Applicant has failed to cross-examine Ms. Chow, file any evidence, or make any submissions to refute this evidence.

- (a) The statement of claim at Exhibit A lists the Applicant as one of the Plaintiffs and states at paragraph 5:

Since 2013, [The Blackbird Enterprises Ltd.] has operated a bar and restaurant at 905 Dunsmuir St., Vancouver, BC (the “Blackbird Premises”), in association with the BLACKBIRD Trademarks and the trade name “The Blackbird Public House” (the “Blackbird Trade Name”). All such use has been under license from Donnelly to use the BLACKBIRD Trademarks and Blackbird Trade Name, with Donnelly having control over all trademark and trade name use and the quality and character of the associated services.

Despite the hearsay nature of the evidence, I am considering it for the truth of its contents, since I consider it necessary for the Opponent to file these documents in support of its ground of opposition and that they are reliable since the Applicant, being a party, had the opportunity to refute the statements therein [*Reliant Web Hostings Inc v Tensing Holding BV* 2012 CarswellNat 836 (TMOB) at para 35].

- (b) Copies of Business Licences issued by the City of Vancouver to a number of different entities for a restaurant located at 905 Dunsmuir St.:

Exhibit	Licence Holder	Period
B	The Blackbird Eatery & Public House Enterprises Ltd. (BC0957085)	October 10, 2013 – December 31, 2013

C	0925120 BC Ltd	March 6, 2014-December 31, 2014
D	0937514 BC Ltd	July 16, 2014 – December 31, 2014
E	0925120 BC Ltd	April 10, 2015- December 31, 2015
F	0937514 BC Ltd	January 6, 2015-December 31, 2015
G	0925120 BC Ltd	November 13, 2015-December 31, 2016

- (c) Corporate searches showing that the Applicant’s Incorporation Number is BC0630229 (Exhibit K) and The Blackbird Enterprises Ltd. Incorporation Number is BC0957085 (Exhibit M).

[9] The evidence summarized above raises a doubt as to the correctness of the Applicant’s statement that it has used the Mark in association with the services since at least as early as October 2013. Even if I accepted the pleading in the statement of claim and reply that the Applicant had licensed the use of the Mark to The Blackbird Enterprises Ltd., this does not necessarily support the inference that the other entities who received business licences offered services under licence from the Applicant or as a sublicensee of The Blackbird Enterprises Ltd.

The Applicant Fails to Meet Its Legal Onus

[10] Since the Applicant has advanced no evidence or arguments in support of its application’s compliance with section 30(b) of the Act, I find that the Applicant has not met the legal onus upon it. In particular, in the absence of evidence or submissions, I do not find the

assertion in the Applicant's counter statement that the application is in full compliance with section 30 of the Act to be sufficient to meet its legal onus.

[11] Accordingly, this ground of opposition is successful.

Disposition

[12] Having regard to the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

Natalie de Paulsen
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

Hearing Date: 2020-07-15

Appearances

Mihaela Hutanu For the Opponent

No one appearing For the Applicant

Agents of Record

SMITHS IP For the Opponent

NORTON ROSE FULBRIGHT CANADA LLP/S.E.N.C.R.L.,S.R.L. For the Applicant