

Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 71

Date of Decision: 2024-04-02

IN THE MATTER OF AN OPPOSITION

Opponent: Blizzard Sport GmbH

Applicant: GARANT GP

Application: 1,937,005 for BLIZZARD

INTRODUCTION

[1] Blizzard Sport GmbH (the Opponent) opposes registration of the trademark BLIZZARD (the Mark), which is the subject of application No. 1,937,005, filed by GARANT GP (the Applicant) on the basis of use of the Mark in Canada since at least as early as August 2012 in association with [TRANSLATION] “snow brooms” (*brosses à neige*) in Nice class 21.

[2] The application for the Mark was filed on December 19, 2018 and was advertised for opposition purposes in the *Trademarks Journal* on May 11, 2022.

[3] On July 11, 2022, the Opponent filed a statement of opposition alleging grounds of opposition under sections 12(1)(d), 16(1)(a), 2, and 38(2)(e) and (f) of the *Trademarks Act*, RSC 1985, c T-13 (the Act). Most of these grounds turn on a

determination of the likelihood of confusion between the Mark and the trademark BLIZZARD, previously used primarily in association with skis.

[4] On August 17, 2022, the Applicant filed and served its counter statement.

[5] Only the Opponent filed evidence, the most relevant portions of which are summarized below. Neither party filed written representations and no hearing was held.

SUMMARY OF THE OPPONENT'S EVIDENCE

[6] In support of its opposition, the Opponent filed certified copies of its relied-upon trademark registration No. TMA144,156 and of the file history for the Mark, as well as two affidavits of Stefano Trentin. Mr. Trentin was not cross-examined by the Applicant.

First Trentin affidavit

[7] Mr. Trentin is the Business Unit Manager of Blizzard-Tecnica, a division of Tecnica Group S.p.A., an Italian corporation (Tecnica Group) and is, *inter alia*, responsible for coordinating, supervising and reporting on Tecnica Group's BLIZZARD-branded goods sales in Canada, for customer satisfaction in Canada with BLIZZARD-branded goods, for developing Tecnica Group's relationships with Canadian retailers, and for its brand positioning—including how the BLIZZARD brand is presented, positioned and distributed in Canada. (paras 1-4 and 11)

[8] Tecnica Group is an Italian sport equipment manufacturer in the market of footwear and winter sports established in the 1960s. The Opponent is an Austrian sports equipment company established in 1945 and specialized in the manufacturing of alpine skiing equipment. Mr. Trentin provides some information on the Opponent's predecessors in title and indicates that the Opponent became a wholly-owned subsidiary of Tecnica Group in 2006-2007. The Opponent's Canadian trademarks were assigned to Tecnica Group effective December 31, 2022. (paras 7-13 and 18; Exhibits A, C and E)

[9] More specifically, Mr. Trentin indicates the Opponent designs and manufactures all of the BLIZZARD-branded goods and sells them to Tecnica Group who manages

their distribution, and receives all such goods in their finished form, as they are distributed and eventually sold to Canadian retailers and professional racers without any labels or packaging being added (paras 14-17; Exhibit B).

[10] Mr. Trentin provides further information on the Opponent and the reputation of BLIZZARD skis, on Canadian distributors and retailers, on sponsorship of Canadian skiers, as well as various materials showing how the trademark BLIZZARD has been used, promoted and advertised over the years including in Canada mainly in association with skis. These comprise catalogues (1964 and 2016-2022), a newsletter (1964), a brochure (1978), a ski tuning chart and sizer (2019), photographs of skiing teams/medalists and their skis (1982, 1984, 2014), YouTube product reviews (2016, 2020-2021), Wikipedia articles on skiing events and ski racers, as well as newspaper and magazine excerpts and articles (*The Toronto Star* (1988), *Ski Canada Magazine* (1998-2022)). (paras 19-28 and 36-44; Exhibits D to G and K to N)

[11] Mr. Trentin indicates that the market share of BLIZZARD-branded goods in the Canadian ski market is approximately 5.5% and that such goods are aimed to be positioned as a high-end premium racing ski brand (paras 29-30).

[12] In terms of sales, Mr. Trentin provides partially redacted sales reports for 1987, 1989, 1990 and 1991 showing the wholesale price of BLIZZARD-branded goods shipped to Canada by the Opponent and wholesale revenue generated from such goods being sold in Canada. He states that the average annual revenue in Canada at that time was approximately \$1,721,100. Mr. Trentin also provides wholesale sales for BLIZZARD-branded skis and accessories between 2010-2021 from Tecnica Group to Tecnica Group Canada and from Tecnica Group Canada to Canadian retailers—averaging between \$2.2 and \$2.8 million per year—and attaches sample invoices for some such sales, as well as a list of Canadian retailers located in Alberta, British Columbia, New Brunswick, Newfoundland and Labrador, Ontario, PEI, Quebec and Saskatchewan. (paras 31-35; Exhibits H to J)

[13] Mr. Trentin further provides the results of searches he conducted of the Applicant's website and Google searches for the queries: "promotional snow brush

Canada”, “how to transport skis” and “Can I be ticketed for not clearing the snow off my car?”. He also includes a side-by-side comparison of BLIZZARD-branded skis and an undated picture provided by the Opponent’s legal counsel “possibly representing the Applicant’s [...] goods”. (paras 45-50; Exhibits O to R)

[14] Mr. Trentin finally provides observations he has made with respect to weather conditions in Canada, Canadian drivers, ski resort conditions, ski resort visitors and their modes of transportation, as well as his opinion on consumer perception and on the likelihood of confusion between the goods covered by the application for the Mark and the BLIZZARD-branded goods distributed on behalf of the Opponent (paras 51-54).

[15] It is appropriate to note at this juncture that I have given no weight to any opinion or conclusion statements made by Mr. Trentin on issues of fact and law that are to be determined by the Registrar in the present proceeding.

Second Trentin affidavit

[16] The Second Trentin affidavit supplements the First Trentin affidavit with further details with respect to Canadian advertising. More specifically, Mr. Trentin provides advertising and promotional expenses incurred for the BLIZZARD-branded goods in Canada between 2017-2022.

PARTIES’ RESPECTIVE BURDEN OR ONUS

[17] There is an initial evidential burden on the Opponent to adduce sufficient 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)]. If this burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that no grounds of opposition prevent registration of the Mark.

GROUND OF OPPOSITION

Section 12(1)(d) – Non-registrability

[18] Having regard to the provisions of section 12(1)(d) of the Act, the Opponent pleads that the Mark is not registrable as it is confusing with the Opponent's registration No. TMA144,156 for the trademark BLIZZARD for use in association with skis (the BLIZZARD Registration). The BLIZZARD Registration was registered on February 25, 1966 from an application filed on May 26, 1965 based on, *inter alia*, use of the trademark BLIZZARD in Canada since at least as early as October 1957.

[19] Having exercised the Registrar's discretion to check the register, I note that registration No. TMA144,156 is in good standing as of the date of this decision. I also note that this registration is no longer owned by the Opponent but now stands in the name of Tecnica Group, which is not a named party to this proceeding. An assignment, with an effective date of December 31, 2022, was recorded against the registration on February 13, 2023. The Opponent did not request leave to amend its statement of opposition to reflect the change. Nevertheless, an opponent may rely on third party registrations for the purposes of a section 12(1)(d) ground of opposition [*USV Pharmaceuticals of Canada Ltd v Sherman and Ulster Ltd* (1974), 15 CPR (2d) 79 (TMOB)].

Test for confusion

[20] The test to determine the issue of confusion is set out in section 6(2) of the Act which stipulates that the use of a trademark causes confusion with another if the use of both trademarks in the same area would likely lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[21] 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, namely: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time they have been in use; the nature of the goods or business;

the nature of the trade; and the degree of resemblance between the trademarks including in appearance or sound or in the ideas suggested by them. These are not exhaustive and different weight can be assigned to each factor in a context-specific assessment [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22].

Inherent distinctiveness

[22] This factor does not favour either party. The marks possess a similar degree of inherent distinctiveness as they are both composed of the same ordinary dictionary term that is suggestive in the context of the goods respectively covered (namely in that both goods can be used for or during winter storm conditions).

Time in use and extent known

[23] These factors favour the Opponent. Mr. Trentin's evidence establishes that the trademark BLIZZARD was promoted and used in Canada since the 1960s and at least the late 1980s, respectively, in association with skis. I also accept that this trademark has become fairly well known in Canada in association with such goods (due to the sales, advertising and promotional information provided by Mr. Trentin with respect to BLIZZARD-branded skis outlined above). The Applicant on the other hand has not demonstrated any use of the Mark.

Nature of the goods or business and nature of the trade

[24] These factors favour the Applicant. While the parties' goods (snow brooms vs skis) are both for use on or in association with snow and may conceivably be used by the same consumers, they are not similar or significantly related in nature. There is also no evidence of an overlap in the parties' channels of trade.

Degree of resemblance

[25] As noted by the Supreme Court in *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, "the degree of resemblance, although the last factor listed in [section] 6(5) [of the Act], is the statutory factor that is often likely to have the greatest effect on the confusion analysis [...]".

[26] This factor favours the Opponent as the marks at hand are identical.

Conclusion regarding the likelihood of confusion

[27] As mentioned above, the Applicant has the legal onus of establishing, on a balance of probabilities, that there is not a reasonable likelihood of confusion as to the source of the parties' goods. This means that if a determinate conclusion cannot be reached after all the evidence is in, then the issue must be decided against the Applicant [*John Labatt*].



[28] In view of my conclusions above—particularly in view of the resemblance between the marks and the extent known of the registered trademark, notwithstanding the differences between the covered goods and the lack of evidence as to an overlap in the channels of trade, and in the absence of additional surrounding circumstances favouring the Applicant—I find myself in a state of doubt as to the probability of confusion between the Mark and the BLIZZARD Registration. As the onus is on the Applicant to show, on a balance of probabilities, that there is no reasonable likelihood of confusion, I must resolve that doubt against it.

[29] Therefore, the Opponent's non-registrability ground of opposition succeeds.

[30] I would add that I may perhaps have found differently with the benefit of evidence and/or representations from the Applicant.

Section 2 – Non-distinctiveness

[31] Having regard to the provisions of section 2 of the Act, the Opponent pleads that the Mark is not distinctive of the Applicant in that it does not actually distinguish, nor is it adapted to distinguish, the goods of the Applicant from the goods of the Opponent, in view of the extensive prior use and reputation of the Opponent's BLIZZARD Registration and its common law trademarks listed below:

Trademarks	Goods
BLIZZARD	Skis, ski bindings, ski poles, snowboards, snowboard bindings and bags especially designed for skis and snowboards.
	Sports bags, travelling bags and rucksacks; Protective helmets, in particular ski helmets; sunglasses and ski goggles;
	Skiwear and snowboard wear, ski shoes and snowboard shoes, ski caps and snowboarding caps.

[32] To meet its evidential burden in respect of this ground, the Opponent must show that any one of the trademarks it relies upon in its pleadings had become sufficiently known in Canada, as of the filing date of the statement of opposition, so as to negate the distinctiveness of the Mark [*Motel 6, Inc v No. 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD)].

[33] In that regard, I find that the change of ownership regarding the Opponent's relied-upon registration does not affect the assessment of this ground of opposition as it took place after the material date relating to same.

[34] So, to the extent that the section 2 ground also turns on a determination of the likelihood of confusion between the Mark and the BLIZZARD Registration, the Opponent's evidence discussed above is sufficient to meet its corresponding burden. While the material date differs, the Applicant's position is no stronger and my conclusions above under the section 12(1)(d) ground also apply to this ground of opposition. I therefore reach the same result respecting it and the non-distinctiveness ground, too, succeeds.

Remaining grounds of opposition

[35] As I have already refused the application under two grounds, I will not address the remaining grounds of opposition.

DISPOSITION

[36] 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.

Iana Alexova
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

No hearing held

AGENTS OF RECORD

For the Opponent: FINLAYSON & SINGLEHURST

For the Applicant: BCF S.E.N.C.R.L./BCF LLP