

Federal Court



Cour fédérale

Date: 20160211

Docket: T-1704-14

Citation: 2016 FC 188

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 11, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DOMAINES PINNACLE INC.

Appellant

and

LES VERGERS DE LA COLLINE INC.

Respondent

JUDGMENT AND REASONS:

I. Introduction

[1] The respondent (Vergers), a company specializing in the production and sale of apple cider and derived products, is seeking to register with the Registrar of Trade-marks (the Registrar) the trade-marks CID and CID & Dessin (collectively the CID Mark). The appellant (Pinnacle), which operates in the same sector, opposes this registration primarily on the grounds

of probable confusion between the CID Mark which Vergers is seeking to register and the CID and CID & Dessin marks (Competing Mark) it claims that it was already using in relation to its own products and services when Vergers filed its trade-mark application.

[2] After the Registrar disallowed this opposition on the grounds that Pinnacle failed to discharge its initial burden of establishing the existence of facts to support its opposition, Pinnacle appealed the decision pursuant to section 56 of the *Trade-marks Act*, RSC 1985, c. T-13 (the Act).

[3] For the reasons that follow, the appeal is dismissed.

II. Background

A. *Proceedings before the Registrar*

[4] The two trade-mark applications in dispute—application no. 1,490,127 for the brand name CID and application no. 1,490,128 for the CID & Dessin mark —were filed with the Registrar on July 26, 2010 (the Trade-Mark Application).

[5] The Trade-Mark Application is based on a proposed use associated with the following products and services:

Products: Tableware, namely cups, saucers, bottles, bottle crates, napkins and bottle openers; clothing, namely shirts, t-shirts, sweatshirts, vests, caps and hats; alcoholic beverages, namely cider; and

Services: Online retail store services in the field of tableware, clothing and cider; retail store services in the field of tableware, clothing and cider; consulting and educational services, namely seminars and workshops relating to cider, cider recipes and cider tasting (the Services)

[6] On March 25, 2011, Pinnacle filed a statement of opposition to the Trade-Mark Application. In it, Pinnacle alleged essentially that contrary to subsection 30(i), paragraph 16(3)(a) and section 2 of the Act:

- a. At the time of filing the Trade-Mark Application, Vergers could not state with confidence that it had the right to use the CID Mark in Canada in association with the products or services described in said Application insofar as Vergers was active in the same commercial space as Pinnacle and was aware that Pinnacle was already using the Competing Mark in association with products of the same nature as early as April 4, 2010;
- b. Vergers is not the person entitled to registration of the CID Mark, since on July 26, 2010, the filing date of the Trade-Mark Application, said Mark was causing confusion with at least one trade-mark previously used or made known in Canada, this being the Competing Mark used by Pinnacle since as early as April 4, 2010; and
- c. The CID Mark is not distinctive in that it cannot actually distinguish, or enable others to distinguish, the products and services in relation to which its use is intended from the products and services associated with the Competing Mark.

[7] In support of its opposition, Pinnacle submitted an affidavit from its founding president, Charles Crawford, in which Mr. Crawford states that:

- a. Pinnacle, which was founded in 2000, has built a considerable reputation across Canada and worldwide over the years in the production of ice cider;

- b. Its products are sold directly to consumers at Pinnacle's production site (in the on-site boutique) and at selected public markets as well as through various distribution channels across Canada and internationally;
- c. Its products bearing the Competing Mark have been sold in Canada since as early as April 4, 2010, in relation to cider, and that the sales of said products increased exponentially from 3,900 bottles in 2010 to 38,900 bottles in 2011; and
- d. At the time of filing the Trade-Mark Application for the CID Mark, Vergers was aware that Pinnacle was using products bearing the Competing Mark.

[8] He states that he believes that use of the CID Mark is likely to cause confusion in consumers' minds insofar as this mark is not adapted to distinguish the products and services of Vergers from those sold in association with the Competing Mark and that the products and services of the two companies (i) typically flow through the same distribution channels; (ii) target the same consumer group; and (iii) are likely to be used together.

[9] Finally, Mr. Crawford produced in support of his affidavit an invoice (exhibit CC-5) which, he claimed, was from the first sale by Pinnacle of products bearing the Competing Mark along with photos (exhibit CC-1) of a bottle of still cider and a bottle of sparkling cider, both having 11% alcohol content and bearing the CID logo.

[10] After cross-examining Mr. Crawford, Vergers produced in response to Pinnacle's opposition an affidavit from the head of its cider division and cellar master, Marc-Antoine Lasnier. After substantiating his understanding of the permits required under provincial legislation in order to produce and sell cider in Quebec, Mr. Lasnier stated that:

- a. At the time of filing the Trade-Mark Application on July 26, 2010, neither he nor any other employee or representative of Vergers was aware that Pinnacle or any other third party may be using or proposing to use in any manner any mark identical or similar to the CID Mark in association with products or services identical or similar to those proposed by Vergers;
- b. In early September 2010, Vergers began its actual use of the CID Mark at multiple points of sale in Quebec;
- c. At that time, Pinnacle had not yet filed any application with the Registrar to register the Competing Mark;
- d. Vergers was not informed for the first time until September 25, 2010, that Pinnacle was developing alcoholic beverages that it proposed to market under the Competing Mark;
- e. On performing certain basic checks, he found that no Pinnacle products bearing the Competing Mark were in fact being marketed either through the Société des alcools du Québec (SAQ) or at any of the various points of sale through which the products of Vergers were available at that time, notably restaurants, grocery stores, markets and convenience stores; and
- f. He saw a product bearing the Competing Mark being actually marketed by Pinnacle for the first time only in September 2011.

[11] With respect specifically to Pinnacle's claim to the effect that Pinnacle was already using the Competing Mark at the time of filing of the Trade-Mark Application for the CID Mark,

Mr. Lasnier states that this claim is either false or inaccurate. He adds in this regard that:

- a. It is impossible for Pinnacle to have used the Competing Mark as early as April 4, 2010, because the logo design contest for said Mark did not end until April 29, 2010;
- b. Insofar as ciders associated with the Competing Mark have an alcohol content of 11% and are marketed under the auspices of an industrial cider producer's permit, these ciders may be sold only through the SAQ in grocery stores, convenience stores and restaurants, not in private boutiques directly to consumers, as would have been the case on April 4, 2010, according to Pinnacle; and
- c. It is impossible for Pinnacle to have promoted its ciders bearing the Competing Mark on its selectionspinnacle.com website beginning in April 2010 as that domain name was not reserved by Pinnacle until August 2010;

[12] Subsequent to the filing of Mr. Lasnier's affidavit, Pinnacle produced a supplementary affidavit from Mr. Crawford on October 17, 2012, in which he states that:

- a. Pinnacle had the idea to develop and market new still cider products bearing the CID name in late 2009;
- b. A label bearing the CID logo was created in-house on March 22, 2010;
- c. Before making a major investment in large-scale commercial deployment and in accordance with its usual practice, Pinnacle first tested the new product and associated logo by selling the product in its boutique;
- d. Based on the favourable response to the new product, a contest was launched to design the "finished products" to bear the Competing Mark as well as new labels to be affixed to said products;

- e. Following this contest, the winner of which was announced on April 24, 2010, Pinnacle made a final decision on the current product label bearing the Competing Mark and began taking steps to determine whether said Mark was available in Canada and to create a website showcasing products bearing the Competing Mark; and
- f. Having acquired all appropriate authorizations, Pinnacle began marketing its products bearing the Competing Mark as early as October 18, 2010, through the SAQ and the grocery chains Sobeys (IGA), Metro and Provigo/Maxi/Loblaws.

[13] Mr. Crawford also states in this second affidavit that in May 2010, one of his employees at the time, Benoît Gosselin Piette, advised him that he had spoken to Mr. Lasnier about Pinnacle's new products bearing the Competing Mark, and asserts further that Mr. Gosselin Piette did not hide the fact that he and Mr. Lasnier were friends and in regular contact at that time. Mr. Crawford also implies that Mr. Gosselin Piette, who was hired by Vergers in August 2011, violated the confidentiality agreement he signed with Pinnacle at the time of his hiring.

[14] With the Registrar's authorization, Vergers produced a supplementary affidavit from Mr. Lasnier on November 28, 2012, in response to Mr. Crawford's supplementary affidavit. In this second affidavit, Mr. Lasnier endeavoured to demonstrate that Pinnacle did not yet have the approvals and permits required for the production, manufacture or commercial deployment of products bearing the Competing Mark, including those from the Régie des alcools, des courses et des jeux du Québec, when it filed its statement of opposition to the Trade-Mark Application concerning the CID Mark in March 2011 and that Pinnacle therefore cannot claim, as Mr. Crawford claims, to have used the Competing Mark prior to July 26, 2010, during the normal course of its business.

[15] Mr. Lasnier also denies that Mr. Gosselin Piette informed him in May 2010 of the existence of Pinnacle products bearing the Competing Mark. He reiterates that he did not learn until September 25, 2010, that Pinnacle was developing alcoholic beverages it proposed to market under the Competing Mark.

[16] Mr. Lasnier was not cross-examined by Pinnacle concerning either of his affidavits.

B. Registrar's decision

[17] On May 26, 2014, the Registrar dismissed Pinnacle's opposition to registration of the CID Mark by Vergers.

[18] At the outset, the Registrar notes that his decision is founded on the credibility of the claims put forth in the two affidavits from Mr. Crawford, whose credibility he questions partly on the basis of what he perceives as contradictions between Mr. Crawford's responses on cross-examination and the content of said affidavits and partly on the sequence in which the evidence from Pinnacle was produced. With respect to the latter, the Registrar finds that Mr. Crawford's second affidavit, notably paragraphs 4 to 15 thereof, depicts a different or enhanced version of his first concerning certain key facts, particularly the development phase for the product and the label bearing the CID logo prior to July 26, 2010. The Registrar also finds this evidence to be contrary to section 43 of the *Trade-marks Regulations*, SOR/96-195 (the Regulations), in that it is not limited, in his opinion, to "evidence strictly confined to matters in reply" as prescribed in this regulatory provision governing opposition proceedings in relation to

registration of a trade-mark. Therefore, he finds that this evidence serves as a roundabout way for Pinnacle to split its case based on the evidence that could be produced by Vergers.

[19] On this point, the Registrar says:

[TRANSLATION]

[54] In this matter, it is apparent that the Opponent submitted an initial version of the events leading up to the sale of cider associated with the CID mark on April 4, 2010, as evidence under section 41 of the Regulations. The Applicant included in its evidence under section 42 certain facts contradicting the Opponent's version or raising serious doubt as to the veracity of the facts surrounding the date of the Opponent's first use of the CID mark.

[55] The claims put forth in paragraphs 4 to 15 of Crawford affidavit 2 relate to the date of the Opponent's first use of the CID trade-mark. These claims do not in fact constitute "evidence strictly confined to matters in reply." Rather, they are new or additional evidence relating to the date of first use of the mark, which required the Registrar's permission to be entered into the court record.

[56] Therefore, paragraphs 4 to 15 inclusive of Crawford affidavit 2 will be excluded from the decision-making process in this matter.

[20] With this aspect settled, the Registrar first determines the question of the ground of opposition based on subsection 30(i) of the Act. He concludes that Pinnacle did not discharge its initial burden of proving that Vergers was aware of the use of the Competing Mark in association with the sale of cider at the date on which it stated, in support of the Trade-Mark Application for the CID Mark, that it was confident of its right to use this Mark in Canada in association with the goods and services specified in said Application. The Registrar does not give weight to the evidence submitted by Pinnacle in this regard, finding it to be either based on hearsay or too vague and imprecise.

[21] Next, the Registrar dismisses the second ground of opposition raised by Pinnacle based on paragraph 16(3)(a) of the Act and relating to prior use of the Competing Mark. He notes in this regard that the parties focused on the facts surrounding the sale that took place on April 4, 2010, because he considers this to be the only sale appearing to show use of the Competing Mark prior to July 26, 2010, the date on which Vergers filed the Trade-Mark Application for the CID Mark. In this regard, although the Registrar does not question the occurrence of a sale in the boutique on April 4, 2010, he finds that Pinnacle failed to establish that cider bearing the Competing Mark was what was sold on that date.

[22] The Registrar's conclusion on this aspect is based on his doubts concerning Mr. Crawford's version of the facts. In particular, the Registrar finds that the statements made by Mr. Crawford in his first affidavit, which he reiterated on cross-examination, to the effect that the bottle of cider sold on April 4, 2010, was identical to the one pictured in exhibit CC-1 produced in support of this affidavit, were incompatible with the fact given in evidence by Vergers that the design of the label on the bottles shown in said exhibit CC-1 was the result of a contest launched on April 23, 2010. The Registrar consequently finds it impossible for Pinnacle to have sold cider on April 4, 2010, in bottles bearing the labels shown in exhibit CC-1 since the work of designing these labels had not yet begun.

[23] The Registrar also finds not highly credible the evidence given by Mr. Crawford on cross-examination to the effect that the "Sélections Pinnacle" name had been added to the backs of the cider bottles bearing the Competing Mark and sold on April 4, 2010, to distinguish the cider products bearing the Competing Mark from Pinnacle products sold under the "Domaine

Pinnacle” name. He finds this statement incompatible with the fact, once again given in evidence by Vergers, that the “sélections pinnacle” domain name was not created until August 17, 2010, meaning that cider bearing the Competing Mark could not have been advertised on that website until after this date, and that the company name “Sélections Pinnacle” did not come into existence until October 2012.

[24] Finally, the Registrar notes that although Pinnacle supplied sales figures for cider bearing the Competing Mark for the year 2010, there is no indication as to whether any portion of these sales was posted before July 26, 2010, the sole evidence in this regard being that of the sale on April 4, 2010, which was found to be lacking.

[25] Subsidiarily, the Registrar finds that recognition of the evidence concerning prior use based on Mr. Crawford’s supplementary affidavit would not have altered his conclusions. More specifically, he finds that this evidence points toward [TRANSLATION] “a series of events incompatible” with Mr. Crawford’s initial version of the facts. In particular, he bases this on the fact that according to the second affidavit:

- a. The idea in late 2009 to market a new product supposedly bearing the Competing Mark was related to production of still cider, whereas on cross-examination, Mr. Crawford stated that what was sold on April 4, 2010, was sparkling cider;
- b. A label bearing the CID Mark was created in-house in March 2010, whereas Mr. Crawford made no mention of this either in his first affidavit or during cross-examination, and this contradicts the testimony given during said cross-examination to the effect that the cider bearing the Competing Mark had always been represented by the label on the bottles appearing in exhibit CC-1 of the first affidavit;

- c. The content of this label created in-house, a photo of which is submitted as exhibit CC-1 to the second affidavit, contradicts that of the labels on the bottles submitted in exhibit CC-1 of the first affidavit in terms of the company name with which the product is associated (“Domaine Pinnacle” versus “Sélections Pinnacle”) and of the product’s alcohol content (9% versus 11%).

[26] Copies of exhibits CC-1 submitted in support of Mr. Crawford’s first and second affidavits are appended hereto.

[27] Lastly, the Registrar dismisses Pinnacle’s third ground of opposition concerning the lack of distinctive character of the CID Mark based on Pinnacle’s failure to demonstrate that on the date it submitted its statement of opposition, March 25, 2011, the relevant date for purposes of analysis of this ground of opposition, the Competing Mark was known among Canadian consumers to the extent that the CID Mark could not be used to distinguish the products and services associated with it from the products and services of the Competing Mark.

[28] In particular, the Registrar states that in his opinion, the cider bearing the Competing Mark was not known to ordinary consumers on March 25, 2011, insofar as it was not yet available for sale to the general public as of that date due to lack of required authorizations. With respect to the sales apparently conducted in the boutique between April 4, 2010, and March 25, 2011, the Registrar expresses serious doubt as to the veracity of the figures supplied by Mr. Crawford and deems it necessary to construe this aspect against Pinnacle.

[29] Pinnacle maintains that the Registrar's decision should be reversed and its opposition to registration of the CID Mark upheld. To this end, Pinnacle submitted new evidence and invited the Court to undertake a *de novo* review of the merits of its opposition as prescribed in subsection 56(5) of the Act. Vergers is asking for dismissal of Pinnacle's appeal based on the record already placed before the Registrar, and in the event that the Court opts for a *de novo* review, it also has new evidence to submit.

[30] At the hearing of this appeal, Pinnacle limited its oral representations to the ground of opposition based on prior use of the Competing Mark, relying on its memorandum with respect to the ground of opposition based on the knowledge that Vergers may have had as of July 26, 2010, about Pinnacle's use of the Competing Mark. As for the ground of opposition based on the lack of distinctive character of the CID Mark, this aspect was not addressed in detail in said memorandum or during the hearing.

III. Issues in dispute

[31] In my opinion, this appeal raises the following two issues:

- a. What is the standard of review applicable to review of the Registrar's decision in light of the evidence submitted by the parties in relation to this proceeding?
- b. Did the Registrar err in dismissing Pinnacle's opposition to registration of the CID Mark to the point of justifying the Court's intervention?

IV. Analysis

A. Standard of review

[32] As a rule, where a dispute brought before the Registrar raises issues of fact and law within the range of his expertise, as in the present matter, the standard of review applicable to his decision is the standard of reasonableness (*Cyprus (Commerce and Industry) v. Producteurs laitiers du Canada*), 2010 FC 719, paragraph 28, 393 FTR 1 [*Producteurs Laitiers du Canada*]; *Molson Breweries v. John Labatt Ltd.* [2000] 3 FC 145 (CA), paragraph 51, 180 FTR 99 [*John Labatt Ltd.*]; *Restaurants La Pizzaiolle Inc. v. Pizzaiolo Restaurants Inc.*, 2015 FC 240, paragraph 41). However, where additional evidence is submitted to the Court, the latter is authorized to exercise any discretion vested in the Registrar pursuant to subsection 56(5) of the Act. In that case, the Court may come to its own conclusion and apply the standard of correctness to the Registrar's decision (*Producteurs Laitiers du Canada*, paragraph 28).

[33] However, in order to exercise its powers under subsection 56(5) of the Act, the Court must be satisfied that the new evidence submitted by the parties is substantial and adds to that produced before the Registrar. In other words, the Court must be convinced that this new evidence could have led the Registrar to draw a different conclusion had he had the opportunity to consider it. In this regard, new evidence that is merely repetitive of evidence already submitted to the Registrar and does not appear to increase the probative force of this evidence is insufficient to preclude application of the deferential standard of reasonableness to the Registrar's conclusions (*Producteurs Laitiers du Canada* paragraph 28; *John Labatt Ltd.* paragraph 51).

[34] What, then, should be made of the new evidence submitted by Pinnacle?

[35] This evidence consists of four affidavits, from Mr. Crawford and three current or former Pinnacle employees: Frédéric Boucher, director of sales; David Bérubé, then-director of production and research and development; and Sylvain Poirier, sales manager for the Quebec grocery store network.

[36] In a short (five-paragraph) affidavit, Mr. Crawford introduces two documents, one (CC-1) supposedly representing the logo affixed to bottles of cider bearing the Competing Mark as sold beginning in October 2010, and another representing [TRANSLATION] “proof of promotion of CID products.” This second document is undated but contains a reference to the 2011 Nations Cup. This presupposes that it was created subsequent to that event taking place in 2011. Lastly, Mr. Crawford states that the products bearing the Competing Mark were sold at prices ranging between \$6.26 and \$7.84 per bottle starting in April 2010. In my opinion, this affidavit does not add anything substantial to what was already before the Registrar, notably the affidavits submitted previously by Mr. Crawford. As noted with reason by Vergers, a mere assertion that products bearing the Competing Mark were sold beginning in April 2010 at prices within a given range without producing any type of receipts or other supporting documentation has no probative value, especially where the purpose is to establish prior use of said Mark. As noted by the Court in *JC Penney Co. Inc. v. Gaberdine Clothing Co. Ltd.*, 2001 FCT 1333, 213 FTR 189 [*JC Penney*], proof of prior trade-mark use requires more than a mere assertion in an affidavit; according to subsection 4(1) of the Act, it requires direct proof (*JC Penney* paragraphs 80, 83, 84 and 86; *Kamsut Inc v. Jaymei Entreprises Inc.*, 2009 FC 627, paragraph 36, 347 FTR 1).

[37] Subsection 4(1) of the Act stipulates as follows:

Marginal note: When deemed to be used

4 (1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

Note marginale : Quand une marque de commerce est réputée employée

4 (1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

[38] Mr. Boucher states that the idea for the Competing Mark, which emerged in the fall of 2009, came from Mr. Poirier, and that said Mark was developed and marketed initially in the boutique and then via major grocery chains in Quebec. He claims further that he “heard” in July 2010 that Vergers knew that Pinnacle was selling a product bearing the mark “CID” and was planning to bring to market a product bearing a similar mark regardless. Once again, this affidavit is repetitive with respect to the evidence submitted to the Registrar and constitutes hearsay evidence in view of the ground of opposition concerning the knowledge that Vergers may have had about use of the Competing Mark at the time of filing of the Trade-Mark Application for the CID Mark. Producing hearsay evidence repeatedly does not make it any more admissible or probative.

[39] Mr. Bérubé's affidavit, meanwhile, focuses for all intents and purposes on Mr. Gosselin Piette, although what he seeks to demonstrate remains unclear. Is he trying to show that Mr. Gosselin Piette informed Vergers prior to July 26, 2010, of the fact that Pinnacle had begun developing products bearing the Competing Mark, or perhaps to insinuate that Mr. Gosselin Piette knowingly sabotaged an entire year of ice cider production and distribution by Pinnacle under the Signature name before going to Vergers? In the first scenario, this evidence is purely speculative. In the second, in addition to being highly speculative, its relevance is far from clear. In my opinion, Mr. Bérubé's evidence, which is full of vague conjecture and more or less reiterates Mr. Crawford's statements in paragraphs 18 to 25 of Mr. Crawford's supplementary affidavit submitted to the Registrar, has no more probative force than Mr. Crawford's evidence, which the Registrar disregarded on the grounds that it was hearsay. In short, it would not have altered the Registrar's conclusions.

[40] Finally, Mr. Poirier's affidavit offers nothing new; in it, Mr. Poirier reiterates Mr. Boucher's claims relating to the development and commercial deployment of the Competing Mark and repeats Mr. Bérubé's insinuations concerning Mr. Gosselin Piette.

[41] Overall, I find that the evidence produced by Pinnacle in support of this appeal does not increase the probative force of the evidence submitted to the Registrar and is consequently insufficient to preclude application of the standard of reasonableness to the conclusions drawn by the Registrar in the present matter. As a result, the Court will limit its analysis to the evidence given before the Registrar. This means that it will also give no further consideration to the new evidence produced by Vergers.

[42] In accordance with the standard of reasonableness, the Court will intervene only if the Registrar's decision is "clearly wrong" (*Producteurs Laitiers du Canada* paragraph 28). From the perspective of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], this means that the Court must show deference concerning the conclusions drawn by the Registrar and consequently intervene only where these conclusions do not show the existence of justification, transparency and intelligibility or do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir* paragraph 47).

B. Registrar's decision is reasonable

[43] Under subsection 16(3) of the Act, any applicant who has filed an application for registration of a proposed trade-mark that is registrable is entitled to secure its registration in respect of the goods or services specified in the application, unless at the date of filing of the application it was confusing with (a) a trade-mark that had been previously used in Canada or made known in Canada by any other person; (b) a trade-mark in respect of which an application for registration had been previously filed in Canada by any other person; or (c) a trade-name that had been previously used in Canada by any other person.

[44] In addition, pursuant to section 12 of the Act, a trade-mark is registrable if it is not "confusing with a registered trade-mark," that is, pursuant to section 2 of the Act, a trade-mark that is on the register established under section 26 of the Act, which is not the case with respect to the Competing Mark.

[45] Section 30 of the Act, meanwhile, sets out the basic procedural and substantive requirements to be met when filing an application for the registration of a trade-mark. As prescribed in subsection 30(i), these requirements include provision of a statement that the applicant is satisfied that he is entitled to use the trade-mark in Canada in association with the goods or services described in the application.

[46] According to subsections (1) and (2) of section 38 of the Act, any person may, within the prescribed time period, oppose a trade-mark application on the grounds (i) that the application does not conform to the requirements of section 30; (ii) that the trade-mark for which registration is sought is not registrable within the meaning of section 12; (iii) that the applicant is not the person entitled to registration of the trade-mark under the requirements of section 16; or (iv) that the trade-mark is not distinctive.

[47] Copies of the statutory provisions I have cited above are also appended hereto.

[48] In the present matter, as we have seen, Pinnacle opposes registration of the CID Mark on the grounds (i) that Vergers's application does not conform to the requirements of subsection 30(i) of the Act; (ii) that Vergers is not the person entitled to registration of the CID Mark under the requirements of paragraph 16(3)(a) of the Act, given that on July 26, 2010, the filing date of the Trade-Mark Application, this Mark was causing confusion with a trade-mark previously used or made known in Canada; and (iii) that said Mark is not distinctive from the Competing Mark within the meaning of section 2 of the Act. The last ground of opposition, I note again, is not addressed by Pinnacle in the present appeal.

[49] It has been clearly established that although the onus falls ultimately on the applicant for registration of the trade-mark to convince the Registrar, on a balance of probabilities, that the mark is registrable, an opponent to this registration bears an initial burden to produce sufficient evidence to substantiate, at least *prima facie*, its grounds of opposition. Only after this requirement has been met does the burden of proof shift to the applicant (*John Labatt Ltd. v. Molson Co.* (1990), 30 CPR (3d) 293, 36 FTR 70, affirmed on appeal (1992), 42 CPR (3d) 495, 57 FTR 159; *Republic of Cyprus (Commerce and Industry) v. International Cheese Council of Canada*, 2011 FCA 201, paragraphs 25-28, leave to appeal to SCC refused, 34430 (April 12, 2012)).

[50] In the present matter, the Registrar found that Pinnacle failed to discharge its initial burden of proof concerning each of its grounds of opposition. The Registrar consequently dismissed Pinnacle's opposition to registration of the CID Mark. After reviewing the record as it was brought before the Registrar and the representations made by the parties in relation to this appeal, I do not see cause to intervene and quash the Registrar's decision as Pinnacle has asked.

(1) Prior use of Competing Mark

[51] Pinnacle maintains that the Registrar erred in concluding that Pinnacle failed to discharge its initial burden of proof to show that it had used the Competing Mark in association with cider prior to July 26, 2010. While conceding that it did not hold the government authorizations required to market its cider bearing the Competing Mark, Pinnacle maintains specifically that nothing prevented it from selling this cider in its boutique and that by recognizing that sales did in fact take place before July 26, 2010, the Registrar was obliged to conclude in its favour

concerning prior use of the Competing Mark. According to Pinnacle, this was the sole possible outcome in respect of the facts and the law.

[52] It argues in this regard that the evidence in the record before the Registrar, supplemented by the new evidence produced on appeal to address the Registrar's refusal to consider paragraphs 4 to 15 of Mr. Crawford's second affidavit, leaves no doubt as to prior use of the Competing Mark.

[53] There is a problem with Pinnacle's position in this regard on three levels.

[54] First, I have already decided that the new evidence produced by Pinnacle to support the present appeal was insufficient to justify a *de novo* review of the grounds of opposition raised by Pinnacle before the Registrar in that the new evidence in no way increases the probative force of the evidence previously submitted. Second, inasmuch as the purpose of this new evidence was to reverse the Registrar's treatment of paragraphs 4 to 15 of Mr. Crawford's second affidavit, Pinnacle fails to mention the fact that the Registrar, in addressing the possibility that its decision to exclude this evidence could be wrong, took this evidence into consideration in his analysis regardless and found that its recognition would not alter his conclusion with respect to the ground of opposition based on the claim of prior use of the Competing Mark.

[55] The Registrar's analysis on this point is detailed and merits reiteration here:

[TRANSLATION]

[70] In the event that I am wrong to exclude from the record the content of paragraphs 4 to 15 of Crawford affidavit 2, even taking

them into consideration leads me to the same conclusion for the following reasons.

[71] First, it was only after the submission of Lasnier affidavit 1 that the Opponent sought to adjust its stance by producing Crawford affidavit 2. In it, Mr. Crawford describes a series of events incompatible with his original version of the facts.

[72] Mr. Crawford claims in Crawford affidavit 2 that in late 2009, the Opponent conceived the idea to bring new products to the still cider market. I note that Mr. Crawford does not mention sparkling cider, yet the first sale dated April 4, 2010, was for sparkling cider according to his version of the facts supplied during cross-examination concerning Crawford affidavit 1.

[73] The Opponent claims that it consequently decided to test-sell its new products in its boutique. Therefore, on March 22, 2010, the Opponent apparently designed a label for these products in-house. Mr. Crawford produced a photo of this label (exhibit CC-1 to Crawford 2), but no documentation was produced to support this date of March 22, 2010.

[74] The label in exhibit CC-1 to Crawford 2 bears the following markings:

- Cidre Tranquille-Still Cider
- Domaine Pinnacle
- 9% alc./vol.

[75] Although this label does bear the “CID” marking, all of the other information provided above contradicts Mr. Crawford’s original version of the facts. First, he had stated that the first bottle sold was of “sparkling cider.” Mr. Crawford failed to produce a label for this type of cider. The “Domaine Pinnacle” marking contradicts his claim that he wanted to dissociate cider bearing the CID Mark from the Domaine Pinnacle company name. Moreover, the reference to “9% alc./vol.” contradicts his assertion that the alcohol content of cider bearing the CID Mark has always been 11%.

[76] Lastly, on cross-examination, Mr. Crawford was very clear in stating that cider bearing the CID Mark has always been labelled as shown in the photos submitted as exhibit CC-1 to Crawford affidavit 1. At no time during cross-examination did he make reference to the use of any label produced in-house in relation to artisanal sales conducted on the premises where these

ciders were produced. Only after the submission of Lasnier affidavit 1, questioning the veracity of use of the labels depicted in the photos in exhibit CC-1 to Crawford affidavit 1, did Mr. Crawford disclose facts relating to the use of another label bearing the CID Mark.

[77] Another fact undermining Mr. Crawford's credibility is his assertion in Crawford affidavit 2 that the Opponent held all necessary authorizations for the sale of products bearing the CID Mark [paragraph 16 and exhibit CC-3 in support of Crawford affidavit 2]. Meanwhile, in Lasnier affidavit 2, Mr. Lasnier produced a copy of an application submitted by the Opponent to the RAJQ on February 23, 2011, and amended on March 28, 2011 [exhibit I-2 to Lasnier 2]. The Opponent's declarations in this application contradict Mr. Crawford's assertions. In paragraph 3 of this application, the Opponent claims:

[TRANSLATION]

[The Opponent] holds two alcohol permits in the categories of 'small-scale cider production permit' and 'cider maker' permit and may not sell its products in Quebec without approval from the SAQ... (my underlining).

[78] Therefore, it appears that at the time of filing this application with the RAJQ, the Opponent did not yet have authorization from the SAQ to market cider products bearing the CID Mark.

[79] Collectively, these anomalies, contradictions and clarifications following cross-examination and the submission of documents by the Applicant raise serious doubts as to the veracity of the facts surrounding the first sale of cider associated with the CID Mark by the Opponent presumed to have occurred on April 4, 2010. Since the documentary evidence refers only to this single sale prior to July 26, 2010, I find that the Opponent did not discharge its initial burden to prove the use of the CID Mark prior to July 26, 2010.

[80] For all these reasons I consequently dismiss the ground of opposition under subsection 16(3) of the Act.

[56] Third, and foremost, I do not see in the Registrar's decision any form of recognition whatsoever that Pinnacle sold any cider bearing the Competing Mark prior to July 26, 2010, the date of filing of the Trade-Mark Application for the CID Mark. Paragraph 60 of the Registrar's

decision, on which Pinnacle is relying for support of this claim, does not have the scope that Pinnacle would assign to it.

[57] For one, this paragraph is based on an assumption put forward by the Registrar that sales of cider bearing the Competing Mark occurred prior to July 26, 2010. This is not a fact acknowledged by the Registrar as having been established to his satisfaction. Next, this paragraph relates to a discussion of the ground of opposition based on subsection 30(i) of the Act. It therefore does not relate directly to the ground of opposition based on the claim of prior use of the Competing Mark. However, where the ground of opposition based on paragraph 16(3)(a) of the Act is addressed later in his decision, the Registrar notes from the outset that the sole evidence of sales prior to July 26, 2010 produced by Pinnacle was a cash register receipt dated April 4, 2010, and an internal form showing an inventory of products sold in that transaction. Although the Registrar acknowledges that a boutique sale did occur on April 4, 2010, he finds that Pinnacle did not demonstrate that this sale was of cider bearing the Competing Mark.

[58] In this regard, the Registrar points out a number of shortcomings and anomalies in the evidence submitted by Pinnacle. He notes specifically the absence of any reference to the Competing Mark on the cash register receipt or the internal form related to the transaction of April 4, 2010. He also notes the contradictions in the evidence given by Mr. Crawford. On this point, he notes the fact that in Mr. Crawford's first affidavit and on cross-examination, Mr. Crawford stated that the bottle of cider sold on April 4, 2010, was identical to the one pictured in exhibit CC-1 submitted to support that affidavit, whereas based on the evidence on

record, the task of designing the label on the bottles shown in exhibit CC-1 had not been started by that date.

[59] The Registrar also notes that on cross-examination, Mr. Crawford asserted that the backs of the cider bottles bearing the Competing Mark and sold on April 4, 2010, bear the “Sélections Pinnacle” name; however, this assertion is incompatible with the fact that the “*sélectionspinnacle*” domain name and “Sélections Pinnacle” company name made their commercial appearance at Pinnacle well after July 26, 2010. Finally, he notes that although Pinnacle supplied figures on its sales of cider bearing the Competing Mark for the year 2010, there is no indication as to whether any portion of these sales was posted before July 26, 2010.

[60] For discussion purposes, even if one were to accept that evidence of a single sale were sufficient in any circumstances to establish prior trade-mark use, this evidence would still have to reach the minimum threshold of the burden of proof placed on an opponent to registration of a trade-mark.

[61] Here, Pinnacle has sought to prove prior use of the Competing Mark through a single transaction, conducted on April 4, 2010, and in this regard has produced minimal and unsatisfactory documentary evidence, which is somewhat surprising in light of the nature of the product in question and Pinnacle’s claim that it was gauging consumer interest at that time before investing further in this new product. Pinnacle attempted to supplement this evidence with the testimony of its founding president, Mr. Crawford. However, the Registrar found that when

assessed against all the other evidence, this testimony contained inconsistencies and contradictions and, ultimately, was not highly credible.

[62] In my opinion, the analysis conducted by the Registrar was comprehensive, transparent and intelligible, and the conclusions arising therefrom were reasonable in that I find they fell within the range of possible, acceptable outcomes in respect of the facts and the law. As I had the opportunity to indicate previously, I also find that the new evidence produced by Pinnacle to support this appeal would not have altered the Registrar's conclusions in this regard. It adds nothing substantial to what was placed before the Registrar.

[63] On this point, I would add that the evidence produced by Pinnacle before both the Registrar and this court to the effect that the idea to produce cider bearing the Competing Mark was under gestation and development beginning in late 2009 is entirely inadequate insofar as this evidence does not meet the requirements of section 4 of the Act, which prescribes that for a trade-mark to be deemed to be used in association with goods, transfer of the property in or possession of said goods must occur. It is to be noted that the evidence of transfer of property in cider bearing the Competing Mark prior to July 26, 2010, was not found by the Registrar to be credible. It is also to be noted that this conclusion is reasonable.

(2) Ground of opposition based on subsection 30(i) of the Act

[64] Pinnacle maintains that the Registrar imposed an excessive burden of proof upon it concerning this ground of opposition. Based on the decision rendered by the Registrar in *Canadian National Railway Co. v. Schwauss* (1991), 35 CPR (3d) 90 (TMOB) [*Canadian*

National], Pinnacle maintains that the burden applicable to non-conformity of a trade-mark application is relatively light. Regardless, it contends that it has addressed the gaps identified in the Registrar's decision through production of the evidence submitted to support this appeal.

[65] I have already indicated that the new evidence produced by Pinnacle in the present matter adds nothing substantive to that produced before the Registrar in relation to this ground of opposition. This new evidence is speculative, and certain key aspects thereof continue to depend on hearsay. As for the Registrar's treatment of the evidence brought before him concerning this point, I cannot state that it is unreasonable, even when using the burden of proof from *Canadian National, supra*, presuming that it is entirely applicable to the ground of opposition based on subsection 30(i) of the Act.

[66] As mentioned previously, the Registrar observed that all of the evidence given before him by Pinnacle concerning Vergers's supposed knowledge of its use of the Competing Mark, with the exception of the alleged meeting between Mr. Crawford and the president of Vergers, Michel Lasnier, prior to July 26, 2010, is based on hearsay. In my opinion, this finding is the only one available to the Registrar in the circumstances.

[67] With respect to the supposed meeting between Mr. Crawford and Mr. Lasnier, the Registrar deemed the evidence given by Mr. Crawford to be vague and imprecise and, therefore, assigned it no probative value. In this regard, he noted that on cross-examination, Mr. Crawford had been unable to provide the date or place of this meeting with Michel Lasnier or the name of the trade show at which he allegedly spoke to him about the new Pinnacle cider bearing the

Competing Mark. The Registrar found it inconceivable that Mr. Crawford's memory should fail concerning an event of such importance when he retained clear memories of certain other meetings with representatives from Vergers. This strictly factual conclusion was, in light of the evidence on record, within the scope of the Registrar's assessment. It is noted that the evidence before the Registrar included that from Vergers to the effect that Vergers only learned for the first time in September 2010 that Pinnacle was developing alcoholic beverages it proposed to market under the Competing Mark. In the end, I see no reason to intervene in respect of this finding of fact.

[68] I would add that the Opposition Board has also found that grounds of opposition based on subsection 30(i) of the Act are generally admitted only where bad faith on the part of the applicant is shown (*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 CPR (2d) 152, page 155 (TMOB)). This appears to be the stance taken by the Court in *Advance Magazine Publishers Inc. v. Farleyco Marketing Inc.*, 2009 FC 153, paragraph 121, 342 FTR 224. From this viewpoint, it was necessary to supply much more than hearsay evidence and vague conjecture to establish, even *prima facie*, that Vergers's declaration in support of the Trade-Mark Application to the effect that it has a right to use the CID Mark was made in bad faith.

[69] This leads me to the conclusion that Pinnacle's appeal must fail and that Pinnacle shall bear the costs. On this point, Vergers maintains that it should be awarded solicitor-client costs due to the generally unbelievable nature of the grounds of opposition and the fact that Pinnacle disclosed its evidence in bits and pieces and withheld the fact that it did not have the authorizations required to market its products bearing the Competing Mark prior to May 2011.

[70] In this case, I do not see justification for awarding solicitor-client costs. Initiating unfounded proceedings does not in itself provide a basis for awarding these costs. It must be demonstrated that there has been reprehensible, scandalous or outrageous conduct on the part of the losing party (*Young v. Young*, [1993] 4 SCR 3, paragraph 255, 108 DLR (4th) 193; *Abdelrazik v. Canada (Minister of Foreign Affairs)*, 2009 FC 816, paragraph 23, 180 ACWS (3d) 34). In the present matter, although Pinnacle was possibly reckless, I cannot conclude that its conduct justifies the awarding of solicitor-client costs. However, I do find that this recklessness justifies that costs be assessed under column IV of the table to Tariff B in accordance with rule 400(5) of the *Federal Courts Rules*, SOR/98-106.

JUDGMENT

THE COURT RULES that the appeal is dismissed with costs.

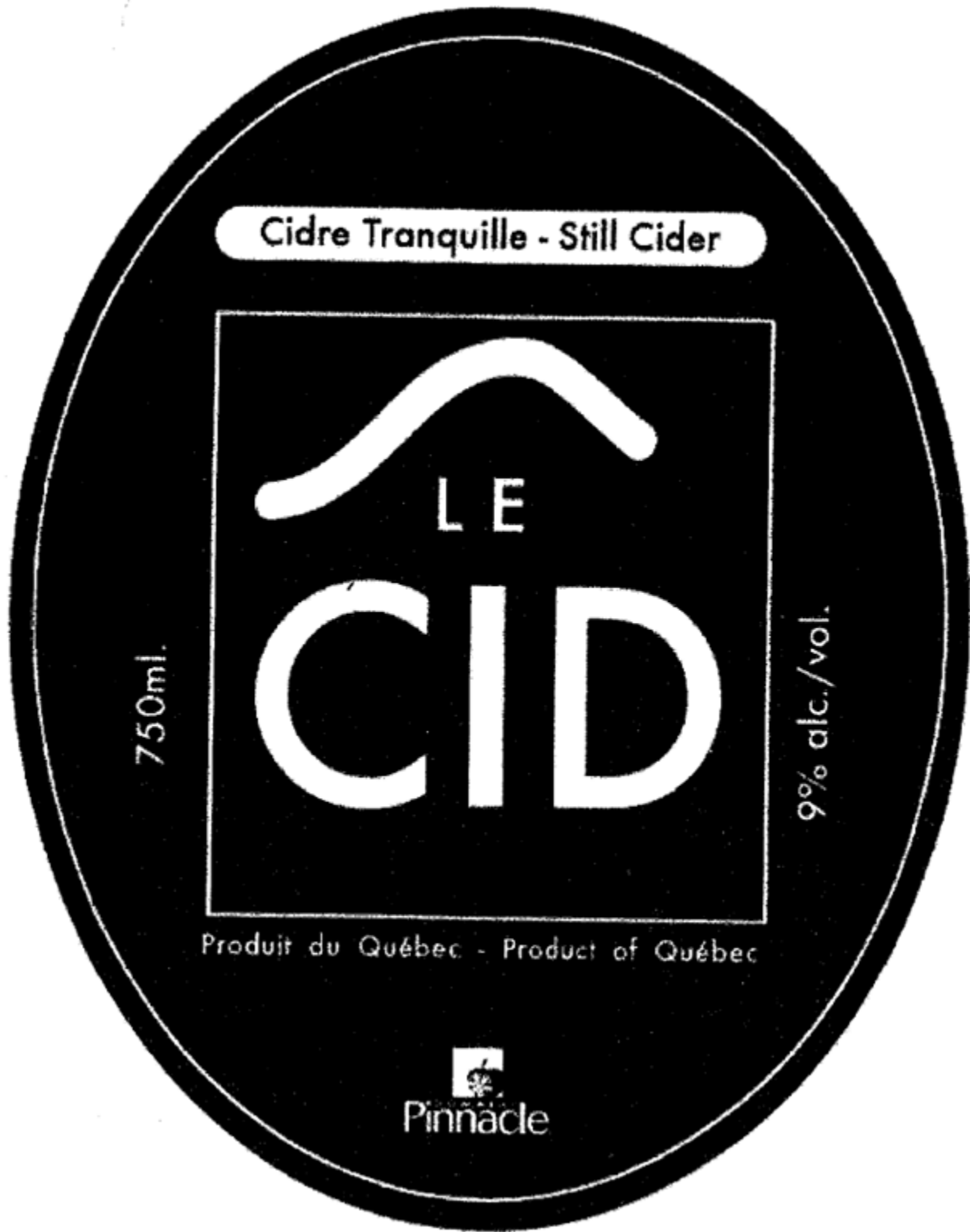
“René LeBlanc”

Judge

APPENDIX A

Exhibit CC-1: Affidavit from Charles Crawford – October 7, 2011





APPENDIX B

R.S.C., 198, c. T-13

L.R.C., 1985, ch. T-13

*An Act relating to trade-marks
and unfair competition*

*Loi concernant les marques de
commencer et la concurrence
déloyale*

[...]

[...]

Definitions

Définitions

2. Proposed trade-mark means a mark that is proposed to be used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others;

2. Marque de commerce projetée Marque qu'une personne projette d'employer pour distinguer, ou de façon à distinguer, les produits fabriqués, vendus, donnés à bail ou loués ou les services loués ou exécutés, par elle, des produits fabriqués, vendus, donnés à bail ou loués ou des services loués ou exécutés, par d'autres.

[...]

[...]

When trade-mark registrable

Marque de commerce enregistrable

12 (1) Subject to section 13, a trade-mark is registrable if it is not

12 (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :

(a) a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years;

a) elle est constituée d'un mot n'étant principalement que le nom ou le nom de famille d'un particulier vivant ou qui est décédé dans les trente années précédentes;

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| <p>(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;</p> | <p>b) qu'elle soit sous forme graphique, écrite ou sonore, elle donne une description claire ou donne une description fausse et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des produits ou services en liaison avec lesquels elle est employée, ou en liaison avec lesquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou de leur lieu d'origine;</p> |
| <p>(c) the name in any language of any of the goods or services in connection with which it is used or proposed to be used;</p> | <p>c) elle est constituée du nom, dans une langue, de l'un des produits ou de l'un des services à l'égard desquels elle est employée, ou à l'égard desquels on projette de l'employer;</p> |
| <p>(d) confusing with a registered trade-mark;</p> | <p>d) elle crée de la confusion avec une marque de commerce déposée;</p> |
| <p>(e) a mark of which the adoption is prohibited by section 9 or 10;</p> | <p>e) elle est une marque dont l'article 9 ou 10 interdit l'adoption;</p> |
| <p>(f) a denomination the adoption of which is prohibited by section 10.1;</p> | <p>f) elle est une dénomination dont l'article 10.1 interdit l'adoption;</p> |
| <p>(g) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a wine not originating in a territory indicated by the geographical indication;</p> | <p>g) elle est constituée, en tout ou en partie, d'une indication géographique protégée et elle doit être enregistrée en liaison avec un vin dont le lieu d'origine ne se trouve pas sur le territoire visé par l'indication;</p> |

(h) in whole or in part a protected geographical indication, where the trade-mark is to be registered in association with a spirit not originating in a territory indicated by the geographical indication; and

(i) subject to subsection 3(3) and paragraph 3(4)(a) of the Olympic and Paralympic Marks Act, a mark the adoption of which is prohibited by subsection 3(1) of that Act.

Idem

(2) A trade-mark that is not registrable by reason of paragraph (1)(a) or (b) is registrable if it has been so used in Canada by the applicant or his predecessor in title as to have become distinctive at the date of filing an application for its registration.

[...]

Proposed marks

16 (3) Any applicant who has filed an application in accordance with section 30 for registration of a proposed trade-mark that is registrable is entitled, subject to sections 38 and 40, to secure its registration in respect of the goods or services specified in the application, unless at the date of filing of the application

h) elle est constituée, en tout ou en partie, d'une indication géographique protégée et elle doit être enregistrée en liaison avec un spiritueux dont le lieu d'origine ne se trouve pas sur le territoire visé par l'indication;

i) elle est une marque dont l'adoption est interdite par le paragraphe 3(1) de la Loi sur les marques olympiques et paralympiques, sous réserve du paragraphe 3(3) et de l'alinéa 3(4)a) de cette loi.

Idem

(2) Une marque de commerce qui n'est pas enregistrable en raison de l'alinéa (1)a) ou b) peut être enregistrée si elle a été employée au Canada par le requérant ou son prédécesseur en titre de façon à être devenue distinctive à la date de la production d'une demande d'enregistrement la concernant.

[...]

Marques projetées

16 (3) Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce projetée et enregistrable, a droit, sous réserve des articles 38 et 40, d'en obtenir l'enregistrement à l'égard des produits ou services spécifiés dans la demande, à moins que, à la date de production de la

it was confusing with

(a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;

(b) a trade-mark in respect of which an application for registration had been previously filed in Canada by any other person; or

(c) a trade-name that had been previously used in Canada by any other person.

Contents of application

30 An applicant for the registration of a trade-mark shall file with the Registrar an application containing

(a) a statement in ordinary commercial terms of the specific goods or services in association with which the mark has been or is proposed to be used;

demande, elle n'ait créé de la confusion :

a) soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;

b) soit avec une marque de commerce à l'égard de laquelle une demande d'enregistrement a été antérieurement produite au Canada par une autre personne;

c) soit avec un nom commercial antérieurement employé au Canada par une autre personne.

Contenu d'une demande

30 Quiconque sollicite l'enregistrement d'une marque de commerce produit au bureau du registraire une demande renfermant :

a) un état, dressé dans les termes ordinaires du commerce, des produits ou services spécifiques en liaison avec lesquels la marque a été employée ou sera employée;

(b) in the case of a trade-mark that has been used in Canada, the date from which the applicant or his named predecessors in title, if any, have so used the trade-mark in association with each of the general classes of goods or services described in the application;

(c) in the case of a trade-mark that has not been used in Canada but is made known in Canada, the name of a country of the Union in which it has been used by the applicant or his named predecessors in title, if any, and the date from and the manner in which the applicant or named predecessors in title have made it known in Canada in association with each of the general classes of goods or services described in the application;

(d) in the case of a trade-mark that is the subject in or for another country of the Union of a registration or an application for registration by the applicant or the applicant's named predecessor in title on which the applicant bases the applicant's right to registration, particulars of the application or registration and, if the trade-mark has neither been used in Canada nor made known in Canada, the name of a country in which the trade-mark has been used by

b) dans le cas d'une marque de commerce qui a été employée au Canada, la date à compter de laquelle le requérant ou ses prédécesseurs en titre désignés, le cas échéant, ont ainsi employé la marque de commerce en liaison avec chacune des catégories générales de produits ou services décrites dans la demande;

c) dans le cas d'une marque de commerce qui n'a pas été employée au Canada mais qui est révélée au Canada, le nom d'un pays de l'Union dans lequel elle a été employée par le requérant ou ses prédécesseurs en titre désignés, le cas échéant, et la date à compter de laquelle le requérant ou ses prédécesseurs l'ont fait connaître au Canada en liaison avec chacune des catégories générales de produits ou services décrites dans la demande, ainsi que la manière dont ils l'ont révélée;

d) dans le cas d'une marque de commerce qui est, dans un autre pays de l'Union, ou pour un autre pays de l'Union, l'objet, de la part du requérant ou de son prédécesseur en titre désigné, d'un enregistrement ou d'une demande d'enregistrement sur quoi le requérant fonde son droit à l'enregistrement, les détails de cette demande ou de cet enregistrement et, si la marque n'a été ni employée ni révélée au Canada, le nom d'un pays où le requérant ou son

| | |
|---|--|
| <p>the applicant or the applicant's named predecessor in title, if any, in association with each of the general classes of goods or services described in the application;</p> | <p>prédécesseur en titre désigné, le cas échéant, l'a employée en liaison avec chacune des catégories générales de produits ou services décrites dans la demande;</p> |
| <p>(e) in the case of a proposed trade-mark, a statement that the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use the trade-mark in Canada;</p> | <p>e) dans le cas d'une marque de commerce projetée, une déclaration portant que le requérant a l'intention de l'employer, au Canada, lui-même ou par l'entremise d'un licencié, ou lui-même et par l'entremise d'un licencié;</p> |
| <p>(f) in the case of a certification mark, particulars of the defined standard that the use of the mark is intended to indicate and a statement that the applicant is not engaged in the manufacture, sale, leasing or hiring of goods or the performance of services such as those in association with which the certification mark is used;</p> | <p>f) dans le cas d'une marque de certification, les détails de la norme définie que l'emploi de la marque est destiné à indiquer et une déclaration portant que le requérant ne pratique pas la fabrication, la vente, la location à bail ou le louage de produits ou ne se livre pas à l'exécution de services, tels que ceux pour lesquels la marque de certification est employée;</p> |
| <p>(g) the address of the applicant's principal office or place of business in Canada, if any, and if the applicant has no office or place of business in Canada, the address of his principal office or place of business abroad and the name and address in Canada of a person or firm to whom any notice in respect of the application or registration may be sent, and on whom service of any proceedings in respect of the application or registration may be given or served with the same effect as</p> | <p>g) l'adresse du principal bureau ou siège d'affaires du requérant, au Canada, le cas échéant, et si le requérant n'a ni bureau ni siège d'affaires au Canada, l'adresse de son principal bureau ou siège d'affaires à l'étranger et les nom et adresse, au Canada, d'une personne ou firme à qui tout avis concernant la demande ou l'enregistrement peut être envoyé et à qui toute procédure à l'égard de la demande ou de l'enregistrement peut être signifiée avec le même effet</p> |

if they had been given to or served on the applicant or registrant himself;

que si elle avait été signifiée au requérant ou à l'inscrivant lui-même;

(h) unless the application is for the registration only of a word or words not depicted in a special form, a drawing of the trade-mark and such number of accurate representations of the trade-mark as may be prescribed; and

h) sauf si la demande ne vise que l'enregistrement d'un mot ou de mots non décrits en une forme spéciale, un dessin de la marque de commerce, ainsi que le nombre, qui peut être prescrit, de représentations exactes de cette marque;

(i) a statement that the applicant is satisfied that he is entitled to use the trade-mark in Canada in association with the goods or services described in the application.

i) une déclaration portant que le requérant est convaincu qu'il a droit d'employer la marque de commerce au Canada en liaison avec les produits ou services décrits dans la demande.

[...]

[...]

Statement of opposition

Déclaration d'opposition

38 (1) Within two months after the advertisement of an application for the registration of a trade-mark, any person may, on payment of the prescribed fee, file a statement of opposition with the Registrar.

38 (1) Toute personne peut, dans le délai de deux mois à compter de l'annonce de la demande, et sur paiement du droit prescrit, produire au bureau du registraire une déclaration d'opposition.

Grounds

Motifs

(2) A statement of opposition may be based on any of the following grounds:

(2) Cette opposition peut être fondée sur l'un des motifs suivants :

(a) that the application does not conform to the requirements of section 30;

a) la demande ne satisfait pas aux exigences de l'article 30;

(b) that the trade-mark is not registrable;

b) la marque de commerce n'est pas enregistrable;

(c) that the applicant is not the person entitled to registration of the trade-mark; or

(d) that the trade-mark is not distinctive.

c) le requérant n'est pas la personne ayant droit à l'enregistrement;

d) la marque de commerce n'est pas distinctive.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1704-14

STYLE OF CAUSE: DOMAINES PINNACLE INC. v. LES VERGERS DE
LA COLLINE INC.

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: SEPTEMBER 2, 2015

JUDGMENT AND REASONS: LEBLANC J.

DATED: FEBRUARY 11, 2016

APPEARANCES:

Rachid Benmokrane

FOR THE APPELLANT

Sébastien Roy

FOR THE RESPONDENT

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Fasken Martineau
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FOR THE RESPONDENT