

Federal Court



Cour fédérale

Date: 20220223

Docket: T-664-21

Citation: 2022 FC 248

Ottawa, Ontario, February 23, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

BLYTH COWBELLS BREWING INC.

Applicant

and

**BELLWOODS BREWERY INC. &
BELLWOODS HOLDINGS INC.**

Respondents

JUDGMENT AND REASONS

I. Introduction

[1] This is an appeal under section 56 of the *Trademarks Act*, RSC 1985, c T-13 [the “*Act*”] by the Applicant, Blyth Cowbells Brewing Inc. [“Blyth”], from a decision of the Opposition Board for the Registrar of Trademarks [the “Board”] dated February 23, 2021, rejecting the Applicant’s trademark application no. 1,755,747 [the “Decision”].

II. Background

[2] The Respondents, Bellwoods Brewery Inc. and Bellwoods Holdings Inc. [collectively, “Bellwoods”], are craft brewers in Ontario. They own three registered trademarks, two of which are at issue here:

- i. TMA859,184 [the “BELLWOODS & Bell Mark”]:



which was filed on May 10, 2011 and registered on September 4, 2013, in connection with the following goods and services:

GOODS:

- (1) Fermented beverages, namely beers, ciders, and meads; alcoholic brewery beverages; clothing, namely t-shirts and sweatshirts; stickers; and glassware

SERVICES:

- (1) Operation of a brewery; brewery services
- (2) Retail and wholesale sales of alcoholic brewery beverages; retail and wholesale sales of alcoholic beverage; retail and wholesales of fermented beverages, namely beers, ciders, and meads
- (3) Operation of a brewpub

ii. TMA878,789 [the “Bell Mark”]:



which was filed on January 2, 2013 and registered on May 27, 2014, in connection with the following goods and services:

GOODS:

- (1) Fermented beverages, namely beers; alcoholic brewery beverages
- (2) Clothing, namely t-shirts and sweatshirts; bags, namely tote bags; posters, glassware, namely pint glasses and beer tulip glasses

SERVICES:

- (1) Operation of a brewery; brewery services; wholesale sales of alcoholic brewery beverages; wholesale sales of alcoholic beverages; operations of a brewpub
- (2) Retail sales of alcoholic brewery beverages; retail sales of alcoholic beverages

[3] On November 19, 2015, the Applicant, also a craft brewer in Ontario, filed trademark application no. 1,755,747 for the registration of the following mark [the “Cowbell Mark”] [the “Application”]:



on the basis of proposed use, in association with:

GOODS:

- (1) Beer, ale, lager, stout, porter, alcoholic brewery beverages
- (2) Casual clothing, t-shirts, caps, hats, toques, scarves, sweatshirts, hooded sweatshirts, jackets
- (3) Drink coasters, beer glasses, drinking glasses, cooler bags, beer can sleeves, beer bottle sleeves, noisemakers, golf towels, golf balls, golf umbrellas, signs, bumper stickers

SERVICES:

- (1) Brewery services
- (2) Restaurant services, bar services

[4] On October 12, 2016, the Application was advertised in Volume 63, Issue 3233 of the *Trademarks Journal*.

[5] On January 5, 2017, the Respondents filed a Statement of Opposition, opposing the Applicant's Application on the following grounds:

- i. Pursuant to paragraph 38(2)(a) of the *Act*, the Application does not conform to the following requirements of section 30 of the *Act*:
 - a. Subsection 30(e) of the *Act* in that the Applicant could not have been satisfied so as to make the statement that it intended to use the Cowbell Mark in Canada in association with the proposed goods and services, in light of the Respondents' marks; and

- b. Subsection 30(i) of the *Act* in that the Applicant could not have been satisfied that it was entitled to use the Cowbell Mark in Canada in association with the goods and services described in the Application. In particular, the Applicant could not have made this statement in light of the Respondents' use, filing, and registration of the Respondents' marks;
- ii. Pursuant to paragraphs 38(2)(b) and 12(1)(d) of the *Act*, the Applicant's Cowbell Mark is not registrable because it is confusing with the Respondents' marks, which are registered;
- iii. Pursuant to paragraph 38(2)(c) and subsection 16(3) of the *Act*, the Applicant is not the person entitled to registration of the Cowbell Mark because, as of the date of filing of the Application, it was confusing with the Respondents' marks, which were previously used and made known in Canada by the Respondents, and for which an application for registration had been previously filed in Canada by the Respondents; and
- iv. Pursuant to paragraph 38(2)(d) of the *Act*, the Cowbell Mark is not distinctive within the meaning of section 2 of the *Act* because the Cowbell Mark does not actually distinguish, and is not adapted so as to distinguish, the goods and services of the Applicant from the goods or services of others, including the Respondents, in light of the Respondents' prior use, filing, and registration of the Respondents' marks.

[6] The Applicant filed and served a counterstatement denying each of the grounds of the opposition.

[7] In support of its opposition, the Respondents filed the affidavit of Michael Clark, an officer and director of Bellwoods, sworn June 12, 2017 [the “Clark Affidavit”]. The Clark Affidavit provided evidence on the history of Bellwoods; their trademarks and branding; his personal opinion that the marks at issue are confusing; and a screenshot showing alleged confusion between the marks at issue on Twitter.

[8] The Applicant’s evidence before the Board consisted of two affidavits:

- i. The affidavit of Steven Sparling, a founder of Blyth, sworn October 4, 2017 [the “Sparling Affidavit”]. The Sparling Affidavit detailed the history, sales, and advertising initiatives of the Applicant’s business as it relates to the Cowbell Mark; and
- ii. The affidavit of Melissa Docherty, a litigation paralegal, affirmed February 19, 2020 [the “Docherty Affidavit”]. The Docherty Affidavit summarized the search results from the Canadian trademark database, as well as a common law search, for the term “BELL” in association with various alcoholic beverages and associated services, for the purposes of establishing third party use of the term or design of a “BELL” in association with similar goods and services offered by the Parties.

[9] There was no reply evidence filed or cross-examinations conducted.

[10] In the Decision, the Board found that, on a balance of probabilities, the Respondents had proven that there is a reasonable likelihood of confusion between the Applicant’s Cowbell Mark

and at least the Respondents' Bell Mark, TMA878789, and the Respondents' opposition was successful.

[11] On April 19, 2021, the Applicant filed this application to appeal the Board's Decision.

The Applicant is seeking an Order:

- i. Granting this appeal;
- ii. Setting aside the Decision;
- iii. Directing the Board to grant the Applicant's Application; and
- iv. Costs of this appeal.

III. Decision Under Review

[12] As stated above, the Respondents opposed the Applicant's Application on several grounds. Before the Board, the Respondents noted that its strongest ground for opposition was under paragraphs 38(2)(b) and 12(1)(d) of the *Act*, namely that the Applicant's Cowbell Mark was confusing with the Respondents two registered trademarks, particularly its Bell Mark.

[13] The Board summarily dismissed two grounds of opposition: non-compliance (under subsections 30(e) and 30(i) of the *Act*) and non-entitlement (under paragraph 16(3)(b) of the *Act*). Three grounds of opposition remained: non-registrability (under paragraph 12(1)(d) of the *Act*), non-entitlement (under paragraph 16(3)(a) of the *Act*), and non-distinctiveness (under section 2 of the *Act*).

[14] The Board's Decision on the grounds of opposition that are the subject of the current appeal are outlined below.

A. *Non-registrability under paragraph 12(1)(d)*

[15] The Respondents claimed that the Applicant's Cowbell Mark was not registrable because it is confusing with the Respondents' two marks. The Board found that the Respondents' best chance of success to be with respect to its Bell Mark and focused its analysis on that mark.

[16] The Board found that the probability of confusion between the marks at issue was evenly balanced between a finding of confusion and of no confusion based on the following:

- i. The Cowbell Mark and the Bell Mark bear a fair degree of resemblance in terms of their appearance and the suggested idea because they are both bell designs.
- ii. Both marks are inherently distinctive primarily because the design of a bell has no meaning with respect to brewed beverages or related services. The distinctiveness of the Applicant's Cowbell Mark is inherently stronger because of its unique clapper design.
- iii. The Respondents' Bell Mark has become known to a slightly greater extent in Canada than the Applicant's Cowbell Mark.
- iv. The Respondents did not file any evidence of use of its Bell Mark in association with its goods, and any use shown in association with its services was limited. The Board found that this factor did not benefit either Party.

- v. Both Parties offer similar goods and services and their channels of trade overlap. The Board found that this factor favoured the Respondents.
- vi. The Applicant's evidence was not sufficient to conclude that a bell design is widely used in the alcoholic beverages and restaurant industry, such that the average Canadian consumer is accustomed to distinguishing these marks. Therefore, the Board found that the Applicant's state of the register and marketplace evidence did not assist the Applicant in a meaningful way.
- vii. The Board was not prepared to give much weight to the single purported instance of confusion put forward by the Respondents' Clark Affidavit.
- viii. The Board found they could not find an adverse inference concerning the likelihood of confusion because there was no evidence of extensive concurrent use.
- ix. The Board distinguished the present case from *San Miguel Brewing International Limited v. Molson Canada 2005*, 2013 FC 156. Though both cases consider the likelihood of confusion between design marks for beer, in the present case goods and services are at issue other than beer and the evidence on the state of the register and marketplace was found insufficient.

[17] Given that the burden is on the Applicant to establish that, on a balance of probabilities, its Cowbell Mark was not confusing with the Respondents' Bell Mark, the Board found that the Respondents' ground of opposition under paragraph 12(1)(d) of the *Act* was successful.

[18] Based upon the evidence before them and having considered all of the relevant surrounding circumstances in this case, the Board found it is likely that the ordinary consumer, somewhat in a hurry, who sees the Applicant's Cowbell Mark, when they have no more than an imperfect recollection of the Respondents' Bell Mark, as a matter of first impression, and without pause to give the matter any detailed consideration or scrutiny, would be likely to believe that the goods and services associated with the Applicant's Cowbell Mark originated from the same source as the Respondents.

B. *Non-entitlement under paragraph 16(3)(a)*

[19] The Respondents claimed that the Applicant is not the person entitled to registration pursuant to paragraph 16(3)(a) of the *Act* on the basis that the Applicant's Cowbell Mark is confusing with the Respondents' Bell Mark previously used and made known in Canada by the Respondent.

[20] The Board applied its findings under the ground of opposition based on non-registrability under paragraph 12(1)(d) of the *Act* and this ground of opposition was also successful.

IV. Issues

[21] There are two issues in the current matter:

1. What is the appropriate standard of review?
2. Is the Applicant's Cowbell Mark likely to be confusing with the Respondents' marks, particularly its Bell Mark?

V. Analysis

A. *What is the appropriate standard of review?*

[22] Section 56 of the *Act* provides for a right of appeal from a decision of the Board to this Court. On appeal, evidence in addition to that adduced before the Board may be presented and the Court may exercise any discretion vested in the Board.

[23] Where new evidence presented on the appeal would have materially affected the Board's findings of fact or exercise of discretion, the Federal Court must come to its own conclusion as to the correctness of the Board's decision. Otherwise, the standard of review is the appellate standard of correctness (for questions of law) and palpable and overriding error (for questions of fact or mixed fact and law) [*Caterpillar Inc. v. Puma SE*, 2021 FC 974 at paragraphs 32 to 35; *Miller Thomson LLP v. Hilton Worldwide Holding LLP*, 2020 FCA 134 at paragraphs 47 to 48].

[24] To determine whether the new evidence is sufficient to warrant a *de novo* review of the Board's Decision, the Court will assess the nature, significance, probative value, and reliability of the new evidence, in the context of the record, and determine whether it would have enhanced or otherwise clarified the record in a way that might have influenced the Board's conclusions on a finding of fact or exercise of discretion, had it been available at the time of the Decision.

[25] The materiality assessment is a preliminary assessment of the new evidence on appeal to determine if this Court will have to reassess the evidence on a given issue, it does not involve a determination of whether the new evidence would ultimately change the result or outcome. In

other words, it does not necessarily follow from a finding that new evidence is material that this Court cannot come to the same conclusion as the Board [*AIL International Inc. v. Canadian Energy Services L.P.*, 2019 FC 795 at paragraph 21].

[26] In support of this appeal, the Applicant filed two new affidavits:

- i. The affidavit of Fanqui (Grace) Wang, affirmed on May 19, 2021 [the “Wang Affidavit”].

The Wang Affidavit seeks to provide further evidence of the state of the register and the marketplace by providing search results showing third parties’ similar or identical design trademarks related to alcoholic beverages and associated services. Additionally, the Wang Affidavit includes articles and peer reviewed publications relating to the behavior and sophistication of craft beer consumers.

- ii. The affidavit of Natasha Fritzley, the Applicant’s Chief Operating Officer, affirmed on May 19, 2021 [the “Fritzley Affidavit”].

The Fritzley Affidavit provides samples of the Applicant’s advertising using its Cowbell Mark in Canada since at least as early as 2016, as well as information on its sales. The Fritzley Affidavit also allegedly attests to the significant goodwill acquired under the Cowbell Mark through its online presence, number of direct visitors to its brewery, and third-party accolades.

[27] The Respondents filed two new affidavits on appeal:

- i. The affidavit of Luke Pestl, an officer and director of Bellwoods, sworn June 18, 2021 [the “Pestl Affidavit”].

The Pestl Affidavit provides:

- Further examples of alleged consumer confusion: i) when an LCBO customer confused the affiant’s shirt bearing the Bell Mark with the Applicant’s Cowbell Mark; ii) hearsay evidence of an employee, Gord Simpson, who, when working at the Respondents’ retail store, assisted customers who said they had purchased the Respondents’ beer at the LCBO previously but had actually purchased the Applicant’s beer (the Respondents’ products were not available at the LCBO at that time); and iii) hearsay evidence of an employee, Stephen Cleary, identical to that provided in Mr. Cleary’s affidavit outlined below;
 - Reports of online discussions, consisting of the personal opinions of third parties relating to the within dispute and discussing their opinions on confusion of the marks at issue;
 - Statistics on their sales, revenue, advertising expenses, and ratings; and
 - Evidence of early use of the Respondents’ marks since 2011 in response to the Board’s finding of insufficient evidence in this regard.
- ii. The affidavit of Stephen Cleary, an employee of the Respondents, sworn June 18, 2021 [the “Cleary Affidavit”].

Mr. Cleary led the initial sales efforts of the Respondents' products in the LCBO in November 2019. He states that he had to clarify the differences between the Parties and their respective products when communicating with LCBO managers and staff, including when he wore Bellwoods Brewery merchandise.

[28] No cross-examination was conducted of the affidavit evidence submitted for this appeal.

[29] Both Parties argue that their new evidence materially affects certain factors in the confusion analysis, and therefore I must decide on the materiality of the new evidence on the Board's Decision and must undertake a *de novo* determination of the likelihood of confusion. My review and analysis is as follows.

(1) Inherent distinctiveness and the extent to which they have become known

[30] As outlined above, the Board was only able to conclude that the Respondents' Bell Mark has become known to a slightly greater extent in Canada than the Applicant's Cowbell Mark, based on the evidence furnished. In response, both Parties submitted evidence regarding sales and public exposure of their marks in the Fritzley Affidavit and the Pestl Affidavit.

[31] I find that the new evidence in the Fritzley and Pestl Affidavits submitted regarding the extent to which the Parties' marks have become known could have materially affected the Board's conclusion regarding paragraph 6(5)(a) of the *Act*, as each Party has put forward evidence which addresses evidentiary gaps highlighted by the Board.

(2) Length of time the marks have been in use

[32] The Board found that, though the Respondents' marks had purportedly been in use for a longer period of time than the Applicant's Cowbell Mark, the Respondents had not filed evidence of use of its trademarks in association with its goods, and any use shown in association with its services was limited.

[33] In response, the Pestl Affidavit provides evidence of early use of its marks to 2011.

[34] I find that portions of the new Pestl Affidavit evidence submitted regarding the extent to which the Respondents' marks have become known could have affected the Board's conclusion regarding paragraph 6(5)(b) of the *Act*, as the Respondent has put forward evidence which addresses evidentiary gaps highlighted by the Board.

(3) State of the register and state of the marketplace evidence

[35] The Board found that the Applicant's evidence was not sufficient to conclude that a bell design is widely used in the alcoholic beverages and restaurant industry such that the average Canadian consumer is accustomed to distinguishing these marks.

[36] In the Wang Affidavit, the Applicant seeks to provide further evidence of the state of the register and the marketplace by providing search results showing third parties' similar or identical design trademarks related to alcoholic beverages and associated services. None of these third party marks relate to a bell design for use in connection with craft beer and/or related

services. Additionally, the Wang Affidavit includes articles and peer reviewed publications relating to the behavior and sophistication of craft beer consumers.

[37] I do not find that the Applicant's new evidence on the state of the register provided in this regard to be material. The evidence regarding other registrations does not provide assistance in reaching a decision about the likelihood of confusion with respect to the two marks at issue. As stated above, the marks cited from the register in the Wang Affidavit are not similar to those at issue. In addition, there is no evidence on the circumstances of their registration, *i.e.* whether the examiner or an opposition decision ever considered whether the marks were confusing. Further, there is no confirmatory evidence of the actual use of these marks in Canada and the state of the register alone is not persuasive. Each application must be judged on its own merits.

[38] However, the articles relating to peer reviewed publications on behaviour and sophistication of craft beer consumers are relevant to the issue of confusion and are allowed.

[39] Of the eleven articles submitted with the Wang Affidavit, five are peer-reviewed publications. These publications appear to focus on how to penetrate and expand what is currently a niche market, the growth of what once was a niche market, and sensory experiences of consumers of beer (and wine). These do not appear relevant to the current case. The marks at issue are associated with goods and services that are sold and provided to the public, not solely sophisticated or niche consumers. In addition, it would appear that a portion of the publications put forward by the Applicant provide research on how to expand a niche craft beer market to the general public.

(4) Evidence of actual confusion

[40] The Board cited hearsay issues with the evidence provided by the Respondents and gave little weight to the one purported instance of confusion put forward in the Clark Affidavit.

[41] Both of the affidavits filed by the Respondents in this appeal allegedly provide evidence of further instances of confusion. However, the Cleary Affidavit offers no proof of actual confusion based on the use of the Parties' bell design marks, includes hearsay, and should be disregarded. The Pestl Affidavit at paragraphs 10 to 15, dealing with alleged actual confusion, is based for the most part on hearsay and is not reliable or necessary and is given no weight.

[42] I find that the new evidence submitted regarding instances of actual confusion, based on hearsay evidence, would not have materially affected the Board's conclusion.

(5) Conclusion on new evidence

[43] The new evidence before this Court, in the Applicant's Fritzley Affidavit and the Respondents' Pestl Affidavit, could have led the Board to a different conclusion with respect to the extent to which the marks at issue have become known; the length of time the marks have been used; as well as the overall surrounding circumstances regarding the likelihood of confusion. As a result, I will undertake a *de novo* review of the evidence with the allowed new evidence in mind, and assess the overall balancing of the subsection 6(5) factors and the surrounding circumstances related to the likelihood of confusion.

B. *Is the Applicant's Cowbell Mark likely to be confusing with the Respondents' Marks, particularly the Bell Mark?*

[44] Paragraph 12(1)(d) of the *Act* provides that a trademark is registerable if it is not confusing with a registered trademark. The material date for assessing confusion under this provision is the date of the trier of fact's decision. Where new evidence filed on appeal is material, such that a *de novo* review is to be conducted, the material date is the date of this Court's judgment.

[45] Subsection 6(2) of the *Act* outlines what constitutes confusion:

(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[46] The test for confusion was outlined by Justice Rothstein in *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27 at paragraph 40 [*Masterpiece*]:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark], at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[47] Subsection 6(5) of the *Act* sets out a non-exhaustive list of factors to be considered when applying the test for confusion.

[48] The degree of resemblance is the statutory factor often likely to have the greatest effect on the confusion analysis. If the marks do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. As such, the other factors become significant only once the marks are found to be identical or very similar [*Masterpiece* at paragraph 49].

[49] The burden of proof in an opposition proceeding rests on the trademark applicant to show on a balance of probabilities that there is no likelihood of confusion [*Mattel Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 at paragraph 54]. An opponent has the initial evidentiary burden to prove the facts on which it bases its allegations.

(1) Degree of resemblance

[50] When considering the degree of resemblance between trademarks, the trademarks must be considered in their totality and not a side-by-side comparison. The test to be applied is a matter of first impression in the mind of a casual consumer, somewhat in a hurry, who sees the mark at a time when they have no more than an imperfect recollection of the trademarks, 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 Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23 at paragraph 20].

[51] The Board found that the Parties' marks bear a fair degree of resemblance in terms of their appearance and suggested idea because they are both bell designs. The Applicant submits

that the Board erred in its finding and that more weight should have been afforded to the “fanciful oversized hop clapper.”

[52] The Applicant’s Cowbell Mark and the Respondents’ Bell Mark are both bells depicted in a cut-out black design encompassing a handle, a bell, and a ringer:



[53] The Applicant’s Cowbell Mark does include a unique hop clapper. However, that is but one aspect of the overall Bell design, which predominates both marks.

[54] When examined in their totality, I find that the marks at issue bear a fair degree of resemblance and that the difference between them could lead to a likelihood of confusion as to source by a causal consumer as a matter of first impression, having an imperfect recollection of the marks.

(2) Length of time the marks have been in use

[55] The Board found that the Respondents had not provided evidence to support the claimed use of its marks since 2012. As stated above, the Respondents have provided evidence of the use of its marks to as early as 2011 in the Pestl Affidavit in reference to its services and its goods, and while the evidence is not clear on the full extent of the use and sales of beer and merchandise

bearing the Bell Mark, there is evidence of use and sales of beer using that mark on i) beer bottles; ii) signage, and iii) the brewery, since at least as early as 2012.

[56] As such, I find that the paragraph 6(5)(b) factor favours the Respondents.

(3) Nature of the goods, business, and trade

[57] There is no question that the Parties sell similar goods and offer similar services. The Parties also both operate their craft breweries in Ontario. There is clear overlap in this case. These factors favour the Respondents.

(4) Inherent distinctiveness and the extent to which they have become known

[58] The Board found that both marks are inherently distinctive, primarily because the design of a bell has no meaning with respect to brewed beverages or related services. Further, the Board found the distinctiveness of the Applicant's Cowbell Mark is inherently stronger because of its unique clapper design.

[59] That said, the Applicant adopted the Cowbell Mark, notwithstanding their previous knowledge of the Respondent's registered Bell Mark – they chose a similar bell design as used by their competitor, in the same Ontario market, for essentially the same wares and services – eyes wide open they chose to take that risk. Neither Party disputes this finding and the new evidence does not affect this factor in my consideration of the likelihood of confusion.

[60] As outlined above, the Board was only able to conclude that the Respondents' Bell Mark has become known to a slightly greater extent in Canada than the Applicant's Cowbell Mark based on the evidence furnished. In response, both Parties submitted evidence regarding sales and public reach of their marks in the Fritzley Affidavit and the Pestl Affidavit. The evidence can be summarized as follows:

- i. The Respondents have been in business and using their marks for approximately five years longer than the Applicant;
- ii. Both Parties have comparable gross sales, with the Respondents grossing approximately \$4 million more in 2021;
- iii. Both Parties are highly rated and have appeared in multiple publications;
- iv. The Applicant provided further evidence on Google and social media reach, which was not provided by the Respondents; and
- v. The Applicant spends about double the amount on advertising than the Respondents, while the Respondents claim to depend mostly on word of mouth.

[61] I find that the inherent distinctiveness is evenly balanced, while the Respondents are known to a greater extent over a longer period of time. As such, this factor favours the Respondents.

(5) Other surrounding circumstances

(a) *State of the register and the marketplace*

[62] As stated above, the Applicant's Wang Affidavit regarding the state of the register and marketplace is not material to this appeal. Even if it was allowed as new evidence, it would be given no weight.

[63] As such, I agree with the Board that the Applicant's evidence was not sufficient to conclude that a bell design is widely used in the alcoholic beverages and restaurant industry such that the average Canadian consumer is accustomed to distinguishing these marks and this evidence does not assist the Applicant.

(b) *Evidence of actual confusion*

[64] The Respondents have provided two further first-hand accounts of confusion of its marks with the Applicant's Cowbell Mark, as well as hearsay evidence from another employee who allegedly experienced confusion of the marks and discussions of confusion on social media channels and blogs.

[65] I find that the Respondents' hearsay evidence of the experiences of its employee, Gord Simpson, in the Pestl Affidavit, are inadmissible. No exception to the hearsay rule was sought and there is no reason that the evidence could not have been provided by direct evidence. Similarly, the Cleary Affidavit is of no value on appeal as outlined above.

[66] As such, there is essentially no permissible evidence of actual confusion.

(6) Conclusion on confusion analysis

[67] The question before the Court is whether, based on the relevant factors outlined in subsection 6(5) of the *Act* and the surrounding circumstances, and as stated by the Supreme Court of Canada in *Masterpiece*, there is a sufficient degree of resemblance between the Parties' marks, such that as a matter of first impression, the casual consumer, somewhat in a hurry and with an imperfect recollection of the Respondents' Bell Mark, would likely be confused as to the source of the goods and services sold and provided by the Applicant [*Masterpiece* at paragraph 41].

[68] I find that there is a likelihood of confusion at the material date. The subsection 6(5) factors when considered individually and as a whole, together with the surrounding circumstances, are either neutral or weigh in favour of a finding of a likelihood of confusion:

- There is a fair degree of resemblance between the marks at issue;
 - The Respondents have been using their mark for a greater length of time;
 - There is an overlap in the nature, goods, and trade favouring the Respondents;
 - The Respondents' Bell Mark and Applicant's Cowbell Mark are both distinctive, but the Respondents' marks are known to a greater extent;
 - The state of the register and marketplace evidence does not assist the Applicant;
- and

- The evidence of actual confusion is of no consequence and is given little or no weight.

[69] The above supports a finding that there is a likelihood of confusion and, as a result, the Applicant's Cowbell Mark is not registerable pursuant to paragraph 12(1)(d) of the *Act*.

[70] In light of my findings above, the Applicant is not entitled to registration of the Cowbell Mark pursuant to section 2 and paragraph 16(2)(a) of the *Act*.

[71] For the reasons above, this application is dismissed. Costs to the Respondents.

JUDGMENT in T-664-21

THIS COURT'S JUDGMENT is that

1. This appeal is dismissed.
2. Costs to the Respondent to be assessed in accordance with Column III of Tariff B.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-664-21

STYLE OF CAUSE: BLYTH COWBELLS BREWING INC. v.
BELLWOODS BREWERY INC. & BELLWOODS
HOLDINGS INC.

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: FEBRUARY 14, 2022

JUDGMENT AND REASONS: MANSON J.

DATED: FEBRUARY 23, 2022

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