

NEW HEARSAY RULES APPLIED IN TRADE-MARK OPPOSITION CASE

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A decision handed down by the Trial Division of the Federal Court of Canada has applied Canada's new law of hearsay as defined recently by the Supreme Court of Canada to a trade-mark case involving an appeal from an Opposition Board decision (*Labatt Brewing Company Limited v. Molson Breweries, a partnership*, T-646-95, May 28, 1996, Heald D.J.).

The appeal was brought against a decision of the Trade-Marks Opposition Board rejecting Labatt Brewing Company Limited's ("Labatt") application for registration of the trade-mark CLUB DESIGN WITH BORDER based on use in Canada in association with alcoholic brewery beverages since at least as early as 1957.

Labatt's application was filed on February 22, 1984. On May 8, 1985, the application was advertised for opposition purposes and a statement of opposition was filed on May 31, 1985 by Molson Breweries, a partnership ("Molson") which alleged that Labatt's application did not conform to the requirements of Section 30 of Canada's *Trade-Marks Act* (R.S.C. 1985, c. T-13) in that the applied for trade-mark had presumably not been used in Canada by Labatt (or its predecessors) since the date claimed in the application or at all; other grounds of opposition (including a ground based on confusion) were also raised in Molson's statement of opposition.

While Molson filed as evidence certified copies of its registrations for three trade-marks which it alleged were confusing with Labatt's applied for trade-mark, Labatt filed with the Registrar 8 affidavits including one from an affiant named Beasley and sworn in March 1990. Reviewing Labatt's own evidence (and the defects supposedly found therein), the Trade-Marks Opposition Board rendered its decision on January 31, 1995 whereby it refused Labatt's application for registration on the basis of Molson's first ground of opposition namely that the mark had not been used in Canada since 1957 as claimed in the application. In light of his conclusion, the Registrar did not make a finding in respect of the other grounds of opposition submitted by Molson. Labatt

appealed the Registrar's decision before the Trial Division of the Federal Court which only concerned itself with the ground of opposition based on alleged nonuse of the applied for trade-mark since 1957 in Canada.

Before the Federal Court (Heald D.J.), a debate occurred between the parties on the admissibility of evidence namely the Beasley affidavit that was filed by Labatt before the Registrar. Although the *Trade-Marks Act* permits the filing of affidavit evidence in respect of an opposition and even in an appeal from an Opposition Board decision, it does not specify the criteria for the affidavit. Reference must therefore be made to Rule 332(1) of the *Federal Court Rules* (C.R.C. 1978, c. 663) which reads as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions on which statements as to his belief with the grounds thereof may be admitted". It follows that in order for the Beasley affidavit to be admissible, the Court considered that it must come within requirements of this rule. As the matter before the Court was not a motion for interlocutory relief, Rule 332(1) would seem to require that the affidavit evidence be restricted to facts within the personal knowledge of the affiant. However, the Beasley affidavit was constituted in part of hearsay since it restated the content of a 1978 affidavit also signed by Beasley for defending a motion for an interlocutory injunction and chronicling the interviews done by Beasley of 12 Labatt employees and former employees regarding use of the applied for trade-mark going back to 1957.

In Canada, up until recently, it was the general rule (subject to specific exceptions) that hearsay evidence was inadmissible in a Court of Law. A classic formulation of what constitutes "hearsay evidence" is found in *Subramaniam v. Public Prosecutor*, (1956) 1 W.L.R. 965 (P.C.) at page 970: "Evidence of a statement made to a witness by a person who is not himself called as a witness may (...) be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement". However, this general prohibition against hearsay evidence was criticized by Canada's Supreme Court in *R. v. Khan* (1990) 2 S.C.R. 531 at page 540: "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions". The Supreme Court therefore concluded that the principles that should govern the admission of such hearsay evidence are to be the "necessity" of the evidence to prove a fact in issue, and the "reliability" of this

evidence. This approach was confirmed in the subsequent decision of *R. v. Smith* (1992) 2 S.C.R. 915.

Mr. Justice Heald took note that indeed the law relating to hearsay evidence had changed significantly in Canada following the Supreme Court of Canada decisions in *Khan* and *Smith*, two criminal cases. The impact of these two decisions on the admissibility of affidavit evidence under Rule 332(1) was reflected in the Federal Court of Appeal decision in *Ethier v. Canada (R.C.M.P.)* (1993) 2 F.C. 659 (C.A.) and the Federal Court Trial Division decision in *Lecoupe v. Canadian Armed Forces* (1994), 81 F.T.R. 91 (T.D.). Making reference to the two aforementioned decisions of the Supreme Court of Canada, Mr. Justice Hugessen in *Ethier* stated that hearsay evidence is now admissible on a principled basis, the governing principle being the reliability of the evidence and its necessity. Finally, Mr. Justice Nadon in *Lecoupe* reconciled the Supreme Court's decisions in *Khan* and *Smith* with the wording of Rule 332(1) when he stated that that rule must be read as being subject to the Common Law exceptions to the hearsay rule; in other words, in order to determine whether hearsay evidence contained in an affidavit falls within the new Common Law exceptions one must ask if the evidence which an affiant seeks to introduce is reliable and necessary.

Mr. Justice Heald consequently wrote: "Rule 332(1) is no longer to be given its clear and straightforward interpretation. An affidavit may now contain statements of the deponent that are based on information and belief, if this prima facie inadmissible hearsay evidence falls within the common law exceptions to the hearsay rule. The question to be asked is whether the evidence sought to be admitted meets the common law exceptions to hearsay, which are now governed by the criteria of necessity and reliability".

Applying the criteria of necessity and reliability, Mr. Justice Heald reviewed the Beasley affidavit which was previously judged to have been inadmissible as hearsay under a strict interpretation of Rule 332(1) of the *Federal Court Rules*. Reviewing how Beasley conducted his 1978 interviews and determining that it was not unreasonable for Labatt to rely on the 1978 affidavit (since the memories of the 12 individuals interviewed in 1978 (presuming all were still alive) would be less reliable in 1996 than they were 18 years ago), Mr. Justice Heald concluded that the evidence submitted by Beasley in his affidavit was admissible. This finding led the Court to consider evidence which supported Labatt's claim that it had used its applied for trade-mark in Canada since 1957. Mr. Justice Heald was therefore able to overturn the Registrar's finding on this point and rejected Molson's ground of opposition based on nonuse.

As the Registrar had not commented upon Molson's other grounds of opposition, the file was referred back to the Registrar for rehearing and determination on Molson's other grounds of opposition.

Mr. Justice Heald's decision is an illustration of how dramatically clarified and simplified the law of hearsay has become in Canada; as stated by Mr. Chief Justice Lamer of the Supreme Court in Canada in *Smith*, the new rules signal an end to the old categorical approach to the admission of hearsay: "What is important (...) is the departure (...) from a view of hearsay characterized by a general prohibition on the reception of such evidence, subject to a limited number of defined categorical exceptions, and a movement towards an approach governed by the principles which underlie the rule and its exceptions alike. The movement towards a flexible approach was motivated by the realization that, as a general rule, reliable evidence ought not to be excluded simply because it cannot be tested by cross-examination". Hearsay evidence can now be considered admissible provided it satisfies the test of necessity and reliability.

Published at (1996), 10 W.I.P.R. 243-244 under the title *New Hearsay Rules Applied in Trade-Mark Opposition Case*.

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