

Federal Court



Cour fédérale

Date: 20170502

Docket: T-1130-16

Citation: 2017 FC 436

Ottawa, Ontario, May 2, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

**THE MANUFACTURERS LIFE INSURANCE
COMPANY**

Applicant

and

**BRITISH AMERICAN TOBACCO (BRANDS)
LIMITED**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Manufacturers Life Insurance Company [Manulife] seeks judicial review of the interlocutory ruling of the Registrar of Trade-marks [the Registrar] which struck out a paragraph in Manulife's Revised Statement of Opposition to the application by British American Tobacco Brands Limited [BAT] for registration of a trade-mark in Canada. The Registrar found that subparagraph 10(a)(ii)(B) of Manulife's Revised Statement of Opposition did not give rise

to a proper ground of opposition pursuant to paragraph 30(d) of the *Trade-marks Act*, RSC 1985, c T-13 [the Act] .

I. Background

[2] BAT filed an application to registrar the mark “on and Design” in Canada on June 25, 2013. BAT relied on use in the United Kingdom and registration in the European Union (OHIM (EU) Registration No 1011959) made on July 7, 2009.

[3] BAT subsequently amended its application on December 1, 2014 to indicate that it relied on use in the United Kingdom and International Registration No 1011959 made in WIPO on the same date, July 7, 2009.

[4] Manulife filed its Statement of Opposition to the application on January 8, 2016, including several grounds of opposition based on BATs non-compliance with paragraph 30(d) of the Act.

[5] The grounds of opposition included the allegation at subparagraph 10(a)(ii)(B) that “[a] certified copy of OHIM (EU) registration No 1011959 was not filed and so the applicant’s [BAT’s] right to registration of the Trademark under Section 30(d) of the Act was not established.”

[6] BAT requested an interlocutory ruling that subparagraph 10(a)(ii)(B) be struck on the basis that it did not plead a proper ground of opposition.

[7] Manulife subsequently made two requests for leave to file a Revised Statement of Opposition.

[8] BAT pursued its request for the interlocutory ruling despite the two proposed Revised Statements of Opposition. BAT argued that, even as revised, subparagraph 10(a)(ii)(B) of the Statement did not plead a proper ground of opposition.

II. The Registrar's Decision

[9] On June 9, 2016, the Registrar granted Manulife leave to file its Second Amended (or Revised) Statement of Opposition.

[10] Manulife's amended paragraph alleged:

10(a)(ii) The application does not conform to the requirements of Section 30(d) of the Act, in that:

(B) the Application, as filed on June 25, 2013, did not set out the particulars of the corresponding foreign registration upon which the Applicant based its right to registration in Canada. In the Application, as filed on June 25, 2013, the Applicant based its right to registration in Canada on OHIM (EU) registration No. 1011959 dated July 7, 2009. However, the Applicant did not base its right to registration on this foreign registration. The Applicant did not file a certified copy of a registration reflecting these particulars, and instead, amended the Application on December 1, 2014 to base its right to registration in Canada on a different foreign registration, namely International Registration No 1 011 959 made in WIPO on July 7, 2009 (the validity of which amendment is denied).

[Emphasis in original to show the amendments]

[11] The Registrar found that the ground set out in the amended subparagraph 10(a)(ii)(B) is not a valid ground of opposition in accordance with section 30 of the Act and struck the subparagraph.

[12] The Registrar noted that compliance with section 30 requires an allegation that the application does not include the statements required by paragraph 30(d) or that the statements are not correct, citing *Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB).

[13] The Registrar found that subparagraph 10 (a)(ii)(B) did not allege that either the particulars of use by BAT in the UK or BAT's International Registration (No. 1 011 959) made in WIPO were incorrect.

[14] The Registrar stated that the ground set out by Manulife in subparagraph 10(a)(ii)(B) alleged an improper amendment by BAT of the particulars of the foreign registration. The Registrar found that this allegation does not put into question the trade-mark applicant's (i.e., BAT's) conformity with paragraph 30(d) and, therefore, cannot form the basis of a valid ground of opposition pursuant to subsection 38(2).

[15] The Registrar noted that Rules 30-32 of the *Trade-marks Regulations*, SOR/96-195 [the Regulations], do not preclude an applicant for a trademark from amending its application to change the particulars of the foreign registration it relies upon.

[16] The Registrar went on to note that in a previous decision, the Registrar had found that an application based solely on use and registration abroad can be amended to change the registration upon which it is based and that such an amendment does not render the application non-compliant with paragraph 30(d) and does not support a ground of opposition (citing *Molson Companies Limited v Schlossbrauerei Kaltenberg Irmingard Prinzessin Von Bayern KG*, [1991] T.M.O.B. No. 451, 40 CPR (3d) 543 at 545-546 [*Molson*]).

[17] The Registrar added that in *Ipex Inc v Royal Group Inc*, [2009] T.M.O.B. No. 110, 77 CPR (4th) 297 [*Ipex*], the Registrar had found that an allegation of improper amendment resulting in an improper advertisement of an application was not a proper ground of opposition.

III. The Issues

[18] The application for judicial review raises two issues: whether there are special circumstances to warrant judicial review of this interlocutory ruling of the Registrar of Trade-marks; and, if so, whether the decision of the Registrar is reasonable.

[19] As a preliminary issue, Manulife seeks leave to file a Supplementary Motion Record.

IV. The Standard of Review

[20] The parties agree that the Registrar's decision is a mixed question of fact and law and the standard of reasonableness applies.

[21] In assessing whether a decision is reasonable, the Court looks for “the existence of justification, transparency and intelligibility within the decision-making process” and considers “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. The Preliminary Issue: The Court will not grant leave to Manulife to file a Supplementary Motion Record

[22] Manulife seeks leave to file a Supplementary Motion Record to place before the Court a copy of BAT’s Revised Application for the Registration of a Trade-mark, dated December 16, 2016. The Revised Application adds a new basis for the application for registration of the mark – that of proposed use of the mark in Canada.

[23] Manulife submits that the fact that BAT seeks to add an additional basis of registration is relevant to the issue of whether the Registrar erred in striking out subparagraph 10(a)(ii)(B) of Manulife’s Revised Statement of Opposition.

[24] In *Connolly v Canada (Attorney General)*, 2014 FCA 294, the Federal Court of Appeal reviewed the principles established in the jurisprudence regarding the requirements to obtain an order under Rule 312 to file a supplementary record. The Court of Appeal provided guidance for the Court’s exercise of discretion, including the type of exceptions that could justify departure from the general principles (at paras 6 and 7). The Court of Appeal noted at paragraph 6:

[25] In *Forest Ethics Advocacy Assn. v Canada (National Energy Board)*, 2014 FCA 88, [2014] FCJ No. 356, Justice Stratas. outlined the requirements that must be satisfied to obtain an Order under Rule 312:

4 At the outset, in order to obtain an order under Rule 312 the applicants must satisfy two preliminary requirements:

(1) The evidence must be admissible on the application for judicial review. As is well known, normally the record before the reviewing court consists of the material that was before the decision-maker. There are exceptions to this. See *Gitksan Treaty Society v. Hospital Employees' Union*, [2000] 1 F.C. 135 at pages 144-45 (C.A.); *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22.

(2) The evidence must be relevant to an issue that is properly before the reviewing court. For example, certain issues may not be able to be raised for the first time on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654.

[26] In the present case, Manulife acknowledges that the Revised Application was not in existence at the time of the Registrar's decision and was, therefore, not on the record before the Registrar. The Registrar's decision was made in June 2016 and the Revised Application was submitted six months later in December 2016. The fact that BAT added a new basis for registration is not relevant to the issue of whether the Registrar erred in striking out Manulife's Amended Statement of Opposition. The requirements of Rule 312 have not been met. There is no reason to depart from the principles noted in the jurisprudence governing supplementary motion records; no exceptions have been advanced and none exist.

[27] Leave to Manulife to file a Supplementary Motion Record is, therefore, refused.

VI. Should the Court Determine this Application for Judicial Review of the Interlocutory Ruling?

A. *Manulife's Submissions*

[28] Manulife asserts that there are special circumstances to warrant the Court exercising its discretion to determine the judicial review of the Registrar's interlocutory ruling. Manulife submits that the special circumstances are that: the Registrar's decision was based on incorrect conclusions of fact and law; BAT will not suffer any prejudice because the opposition is at an early stage; and, there are no other adequate remedies available to Manulife if the application for judicial review is not determined.

[29] Manulife submits that the issue of whether special circumstances exist to warrant the court determining its application for judicial review cannot be isolated from the merits of the application. Manulife argues that if its ground of opposition (i.e., subparagraph 10(a)(ii)(B)) is successful, BAT's application would be refused, and, therefore, it should be permitted to pursue this.

[30] Manulife argues that, although it has raised other grounds of opposition, the ground set out at subparagraph 10(a)(ii)(B) should be considered without regard to other grounds as these may not succeed. Manulife also submits that the jurisprudence highlights that the Court must consider whether there is an alternative remedy for Manulife to pursue (*Parmalat Canada Inc v Sysco Corporation*, 2008 FC 1104 [*Parmalat*]; *Indigo Books & Music Inc v C & J Clark International Limited*, 2010 FC 859 [*Indigo*]).

[31] Manulife submits that if subparagraph 10(a)(ii)(B)) is struck out, it will have no opportunity to pursue this ground of opposition. Manulife could not rely on this ground in an appeal because section 56, which governs appeals, only permits the Court to consider issues found in the Statement of Opposition. Expungement proceedings pursuant to section 57 are also not an alternative remedy because non-compliance with paragraph 30(d) is not a basis for a trademark registration to be expunged.

B. *BAT's Submissions*

[32] BAT submits that there are no special circumstances to warrant the Court exercising its discretion to determine the judicial review.

[33] BAT acknowledges that section 56 of the Act precludes an appeal on an issue not included in the Statement of Opposition. However, BAT notes that Manulife has several other grounds of opposition alleging non-compliance with paragraph 30(d), including that the statement of the foreign registration is not correct. Therefore, striking out subparagraph 10(a)(ii)(B) of the Statement of Opposition will not impede Manulife from raising the same argument in the context of its other allegations and grounds of opposition.

[34] BAT points out that if exceptional circumstances could be found every time an allegation is struck out as an improper ground of opposition, judicial review would be available in all cases and the need to establish exceptional circumstances would be meaningless.

C. *The Court Will Determine the Application for Judicial Review*

[35] In *Parmalat*, Justice Lemieux noted the following at paragraph 21:

[21] It is settled law that, as a general rule, interlocutory judgments unless there are special circumstances should not be reviewed on appeal or in judicial review proceedings. Justice Létourneau wrote the following in *Szचेcka v. Canada (Minister of Employment and Immigration)* (1993), 116 D.L.R. (4th) 333 (F.C.A.):

... unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgement. Similarly, there will not be any basis for judicial review, specially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute.

[Emphasis in original]

[36] Justice Lemieux found that on the facts before him, exceptional circumstances had been established to justify judicial review of the decision which refused to grant leave to add a new ground of opposition. He noted at paragraphs 24 and 25:

[24] The reason for this view is that at the end of an opposition proceeding, which is an appeal to this Court, under section 56 of the Act at the first appeal level there does not exist an adequate remedy other than the course of action taken here by *Parmalat*.

[25] The jurisprudence of this Court in matters of trade-mark oppositions under the Act is to the effect the Federal Court does not have jurisdiction to deal with an issue not found in the statement of opposition. At paragraphs 16 and 17 in [1994] F.C.J. No. 638, *McDonald's Corp. v. Coffee Hut Stores Ltd.*, Justice McKeown relying on previous case law of this Court wrote:

16 In response, counsel on behalf of Coffee Hut Stores argues that this Court has held that the Trade marks Opposition Board does not have jurisdiction to deal with an issue not found in the Statement of Opposition. In *Imperial Developments Ltd. v. Imperial Oil Ltd.* (1984), 79 C.P.R. (2d) 12 (F.C.T.D.) at 21, the hearing officer rejected the application for registration on each of the grounds raised in the Statement of Opposition. He went further though and embarked on matters which were not in the pleadings but which were raised in the course of oral arguments. Muldoon J. felt that he had exceeded his jurisdiction; that once he had come to a decision which disposed of the grounds raised in the Statement of Opposition, he had fulfilled his statutory function.

17 It was then submitted that this Court has no jurisdiction to entertain issues that were not raised before the Registrar. In *S.C. Johnson & Son Inc. v. Esprit de Corp.* (1986), 13 C.P.R. (3d) 235 (F.C.T.D.) at 242, Cullen J. remarked that, although it is open to the parties to introduce new evidence, it is not open to them to introduce new issues; that although the appeal is treated as a trial de novo, it is still an appeal and the Court is limited to those issues raised before the Registrar. I agree with these submissions.

[Emphasis in original]

[37] In *Indigo*, Justice O’Keefe applied the same principles but reached a different conclusion.

Justice O’Keefe noted the rationale for requiring exceptional circumstances before permitting judicial review of an interlocutory decision, at paragraph 33:

[33] The exercise of the Court’s supervisory jurisdiction is discretionary. Courts will often refuse to entertain requests for judicial review of interim or interlocutory decisions because such proceedings have the effect of fragmenting and protracting administrative proceedings. Refusal is also justified on the grounds that the completion of the administrative process may render the matter moot (see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, [1995] S.C.J. No. 1 (QL), paragraphs 34 to 36,

Brown, D. J. M., and J. M. Evans. *Judicial Review of Administrative Action in Canada*, 1998 (loose-leaf ed. updated September 2009), at pp. 3:4300).

[38] Justice O’Keefe acknowledged that Indigo could not seek review of the ground of opposition at issue in an appeal pursuant to section 56 if the ground is not set out in the Statement of Opposition. However, Justice O’Keefe found, at paragraph 44, that on the facts of that case, there were two appropriate and realistic alternative remedies for Indigo pursuant to sections 22 and 57.

[39] The issue in the present application for judicial review focuses on the Statement of Opposition. As acknowledged by BAT, if the Registrar’s decision stands, the ground at issue will not be included in Manulife’s Statement of Opposition. As a result, the argument Manulife seeks to advance cannot be the subject of an appeal under section 56. Nor can Manulife rely on section 57.

[40] Although Manulife has raised other grounds of opposition that question the correctness of statements, these other grounds of opposition would not provide an alternative remedy to review the Registrar’s decision regarding the allegations in subparagraph 10(2)(ii)(B).

[41] As a result, the Court has considered the merits of the application for judicial review, but has found, as explained below, that the Registrar’s decision to strike the subparagraph is reasonable.

VII. Is the decision of the Registrar to strike out subparagraph 10(a)(ii)(B) of Manulife's Amended Statement of Opposition Reasonable?

A. *Manulife's Submissions*

[42] Manulife submits that the same principles apply to striking out a ground of opposition as to striking out a pleading. In other words, the ground of opposition should only be struck if it is “plain and obvious” that the pleading discloses no reasonable cause of action or that it has no reasonable chance of success, and novel arguments should be allowed to proceed (citing *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980 [*Hunt*]; and *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 21 [*Imperial Tobacco*]).

[43] Manulife submits that it has raised a novel argument which is not doomed to fail and which should be considered by the Registrar at the hearing of the Opposition.

[44] Manulife submits that in *Thymes Ltd v Reitmans (Canada) Ltd*, 2013 FC 127 [*Thymes*], the Court found that the date for assessing compliance with section 30 is the date of filing the application.

[45] Manulife submits that BAT filed its trademark application on June 25, 2013 only on the basis of its EU registration dated July 7, 2009. BAT then amended its application on December 1, 2014 to rely on the WIPO filing. Manulife argues that BAT abandoned the June 25, 2013 filing basis.

[46] In subparagraph 10(a)(ii)(B) of its Revised Statement of Opposition, Manulife pleads that the BAT's original trademark application did not set out particulars of the foreign registration that BAT based its right to registration in Canada upon. Manulife argues that BAT failed to meet a statutory requirement. The date of assessing compliance is June 25, 2013 and BAT did not comply on this date as it did not "perfect" its application.

[47] The gist of Manulife's argument is that BAT amended its application to rely on a different foreign registration after having previously relied on an earlier foreign registration. By doing so, BAT would receive the advantage of the earlier entitlement date. Manulife argues that this would have an impact on other third parties that may have wanted to register a trademark in that period and it is, therefore, unfair to permit Manulife to have such an advantage. Manulife argues that by amending the application, BAT abandoned its earlier filing date and now has no basis to support its foreign use as set out in its amended application.

[48] Manulife argues that the Registrar erred in determining that this ground of opposition had no reasonable prospect of success. This novel ground should be determined at the hearing of the Trade Marks Opposition Board [TMOB].

[49] Manulife further submits that subparagraph 10(a)(ii)(B) should be considered in the context of the other grounds in the Statement of Opposition in which Manulife clearly alleges that the particulars are incorrect; in other words, it can be read as alleging incorrect statements, which is a proper ground of opposition.

[50] Manulife also argues that the Registrar erred by relying on *Molson* and *Ipex*. These cases did not deal with a motion to strike a pleading and they do not establish any general proposition that improper amendments to particulars of a foreign registration can never form the basis of a valid ground of opposition.

B. *BAT's Submissions*

[51] BAT submits that the sufficiency of a Statement of Opposition is governed by section 38 of the Act. The Registrar has the authority to strike out any part of a Statement of Opposition that does not comply with section 38.

[52] BAT submits that the test to be applied is whether, assuming the facts alleged are true, the impugned paragraph establishes that the opponent has an arguable case (*1772887 Ontario Ltd v Canada (Registrar of Trade-marks)*, 2010 FC 645 at para 9 [*Where Canada*]).

[53] BAT notes that subsection 38(2) sets out an exhaustive list of the grounds of opposition, which includes that the application does not conform to the requirements of section 30. BAT submits that compliance with section 30, which governs the content of an application, is determined with regard to two questions: whether the application on its face includes the statements required by section 30; and, whether the statements are correct (*Black Dog Tavern Co v 533737 Alberta Ltd*, [2000] T.M.O.B. No. 163).

[54] BAT argues that subparagraph 10(a)(ii)(B) does not allege facts which call into question conformity with paragraph 30(d) of the Act nor does it allege that the facts are incorrect.

[55] The Registrar's reference to Rules 30-32 further supports her decision. Amendments to change the particulars of a foreign registration are not prohibited and, therefore, cannot constitute a valid ground of opposition. BAT submits that the amendment to its application was a permitted amendment and cannot give rise to a valid ground of opposition.

[56] BAT further submits that Manulife mischaracterizes the decision in *Thymes*. In *Thymes*, the Court dismissed an appeal of the Registrar's refusal of an application for a trademark because the applicant (*Thymes*) had not used it in the United States at the date of filing. The Court, at paragraphs 18-20, found that there must be use in the foreign jurisdiction at the date of filing. BAT submits that *Thymes* did not address an amendment to the particulars of the foreign registration; it is not analogous.

C. *The Registrar's Decision is Reasonable*

[57] Whether the test is described as an "arguable case" – the standard applied in the context of trademark applications and statements of opposition, as noted by BAT – or a "reasonable prospect of success" – the standard applied to strike out pleadings in other civil cases, as proposed by Manulife – the result would be the same in the present case.

[58] In *Where Canada*, Justice Martineau found at paragraph 9:

[9] In determining whether there is a substantial issue for decision, the jurisprudence is clear that the Registrar is not to assess whether the opponent has a likelihood or probability of success, rather, the Registrar is to ask whether "assuming the truth of all the allegations of fact in the statement of opposition, the opponent had an arguable case". No evidence must be considered in determining the issue; the Registrar must limit his consideration

to the application itself and the allegations contained in the opposition. See *Koffler Stores Ltd. v. Canada (Registrar of Trade Marks)*, [1976] 2 F.C. 685, at paragraph 3; *Canadian Tampax Corp. v. Canada (Registrar of Trade Marks)* (1975), 24 C.P.R. (2d) 178, [1975] F.C.J. No. 1110 at paragraph 20 (F.C.T.D.) (QL) citing *Pepsico Inc. v. Canada (Registrar of Trade Marks)*, [1976] 1 F.C. 202 at paragraph 12 (F.C.T.D.).

[59] In *Hunt*, the Supreme Court described the test for striking out pleadings in civil cases more generally, at page 980, as, “assuming that the facts as stated in the statement of claim can be proved, is it ‘plain and obvious’ that the plaintiff’s statement of claim discloses no reasonable cause of action?” The Supreme Court added that “[o]nly if the action is certain to fail because it contains a radical defect . . . should the relevant portions of a . . . claim be struck out. . .”

[60] In *Imperial Tobacco*, the Supreme Court of Canada reiterated that striking a pleading should be done with caution, recognizing that the law continues to evolve, noting, at paragraph 21, that the Court’s approach should be “generous and err on the side of permitting a novel but arguable claim to proceed to trial.” However, the Court added at paragraph 25 that in determining whether the claim has a reasonable chance of success, the court should consider the context, noting, “[t]he question is whether, considered in *the context of the law and the litigation process*, the claim has no reasonable chance of succeeding” [emphasis in original].

[61] More recently, in *Teva v Gilead*, 2016 FCA 176, the Federal Court of Appeal cited *Imperial Tobacco* and further explained at paragraph 30:

[30] The standard of “reasonable prospect of success” is more than just assessing whether there is just a mathematical chance of success. In deciding whether an amendment has a reasonable prospect of success, its chances of success must be examined in the

context of the law and the litigation process, and a realistic view must be taken: *Imperial Tobacco*, above at para. 25.

[62] Manulife argues that its amended ground of opposition raises a novel argument that should proceed to be determined by the TMOB.

[63] BAT, on the other hand, submits that the grounds of opposition set out at subsection 38(2) are the only grounds of opposition provided in the Act. As a result, Manulife's ground of opposition could not possibly succeed.

[64] In my view, even if Manulife's argument is novel, it has no reasonable prospect of success when viewed realistically in the context of the applicable law. Similarly, applying the approach described in *Where Canada*, the opponent, Manulife, does not have an arguable case.

[65] The Registrar set out the reasons for her decision (as set out above) with reference to the Act. The Registrar did not err in also relying on *Molson* to support her decision.

[66] In *Molson*, the applicant for the trademark filed the application relying on registration in Germany and use of the trademark in the United States. The applicant then amended the application to change the registration number it had obtained in Germany and to rely on use in Germany. The opponent alleged that the application did not comply with section 29 (now section 30) in that it was not used and registered in Germany in association with beer as alleged. The opponent also raised additional grounds of opposition.

[67] On the ground of non-compliance with section 30, the TMOB noted that the opponent had alleged that the applicant did not submit an affidavit setting out why it changed its registration number. The TMOB found that neither the Act nor Regulations requires this. Moreover, the Rules (Regulations) do not preclude an applicant from amending its trademark application to change the foreign registration being relied on. The TMOB concluded that the ground of opposition was not supported.

[68] Although *Molson* was decided in 1991, no case has been brought to my attention by either party to cast doubt on its applicability. Clearly the TMOB dealt with a very similar ground of opposition in *Molson*, albeit after a hearing. The decision in *Molson* buttresses the Registrar's finding that the ground of opposition in subparagraph 10(a)(ii)(B) has no reasonable prospect of success as it is not one of the grounds of opposition set out in the *Act* and there is nothing in the *Act* or *Regulations* that prohibits an applicant from making an amendment of the type made in the present case.

[69] In *Thymes*, Justice Manson found that the Registrar did not err in finding that use of the applicant's mark in the United States was required as of the filing date of the application in Canada in order to make a valid application in Canada. Justice Manson stated at paragraph 18:

[18] . . . There is no doubt a proper reading of that section requires that, at the time of filing the application, if an applicant relies on registration or application and use abroad pursuant to that section, there must have been use of the trade-mark at the time of the application to rely on this section as a valid basis to obtain registration in Canada.

[70] *Thymes* did not address the issue that Manulife raises in the present case regarding the amendment of the application by BAT. I fail to see how *Thymes* has cast doubt on *Molson* or has caused any other uncertainty in the applicable law, as argued by Manulife. In *Molson*, the Registrar found that an allegation of improper amendment to a trademark application is not a proper ground of opposition. The Registrar reached a consistent conclusion in the present case.

[71] The Registrar made no reviewable error in her interpretation of and application of the statutory provisions. The Registrar's determination that subparagraph 10(a)(ii)(B) should be struck is reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. Leave to the Applicant, Manulife, to file a Supplementary Motion Record is refused.
2. The Application for Judicial Review is dismissed.
3. Based on the agreement of the parties, the Respondent shall have its costs in the amount of \$4,000.

"Catherine M. Kane"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1130-16

STYLE OF CAUSE: THE MANUFACTURERS LIFE INSURANCE
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(BRANDS) LIMITED

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: FEBRUARY 13, 2017

JUDGMENT AND REASONS: KANE J.

DATED: MAY 2, 2017

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