



THE REGISTRAR OF TRADE-MARKS
LE REGISTRAIRE DES MARQUES DE COMMERCE

Citation: 2015 TMOB 183
Date of Decision: 2015-10-06
[UNREVISED ENGLISH
CERTIFIED TRANSLATION]

IN THE MATTER OF AN OPPOSITION

**Les Entreprises Foxmind Canada Ltée /
Foxmind Canada Enterprises Ltd
and**

Opponent

**Divertissement F2Z inc./F2Z
Entertainment Inc.**

Applicant

**1,520,873 for the trade-mark
FILOSOFIA & Design**

Application

I Introduction

[1] Les Entreprises Foxmind Canada Ltée / Foxmind Canada Enterprises Ltd. (the Opponent) opposes registration of the trade-mark FILOSOFIA & Design (the Mark) covered by application No. 1,520,873 in the name of Divertissement F2Z inc./F2Z Entertainment Inc. (F2Z).



[2] The application claims the colour as a feature of the Mark. This claim reads: "WHITE for the letters which comprise the word FILOSOFIA, for the large circle as well for the eight small semi-circles surrounding it. ORANGE for the entire background."

[3] F2Z is the corporation resulting from a merger of July 1, 2014, to which one of the parties was Filosofia Éditions inc. / Filosofia Editions Inc. (Filosofia), the corporation at the origin of the application for registration. Except where otherwise indicated, I will refer indiscriminately to F2Z and Filosofia as the Applicant.

[4] Even though the parties in the case at bar are neither related nor associated, they are not strangers to each other, in that the record shows that a dispute between the Applicant and the Opponent was referred to the Quebec Superior Court. Although this dispute has coloured the evidence and the representations of the parties, it should be noted that it is irrelevant to the sole ground of opposition raised in the case at bar. This ground of opposition alleges that the application for registration does not satisfy the requirements of section 30 of the *Trade-marks Act*, RSC 1985, c. T-13 (the Act) [TRANSLATION] "because the dates of first use indicated by FILOSOFIA in its application are false".

[5] Each party filed evidence and a written argument and was represented at the hearing. Moreover, within the context of this decision, I must rule on questions that arise from the hearing. I will discuss these questions in the context of the following reasons, for which I find it is appropriate to reject the opposition.

II The application for registration on the record

[6] The Applicant primarily applies for registration of the mark in association with different games and services related to them. Depending on the goods in question, the application is based on the use of the Mark in Canada or its proposed use; the application for registration is based on the use of the Mark in Canada in association with the services.

[7] The original application for registration was filed on March 25, 2011. Further to the examination of the application for registration by the Canadian Intellectual Property Office (CIPO), the Applicant, on October 5, 2011, amended the statement of goods and services so that

it complies with ordinary commercial terms. The details of this amended application were advertised in the *Trade-marks Journal* of March 28, 2012.

[8] During the opposition proceedings, the Registrar received two letters dated December 5, 2013 from the Applicant, proposing amendments with a view to withdrawing goods and amending the description of the services. The proposed amendments differed from one letter to the other. On February 25, 2014, the Opponent was informed that the amendment to the application for registration [TRANSLATION] "as indicated in the Applicant's letter [of December 5, 2013]" had been accepted on behalf of the Registrar.

[9] One of the questions to resolve concerns the statement of goods and services of the application for registration to be considered in the case at bar. This question arises from the Opponent's position, whereby the amendment of the application for registration after it is advertised in the *Trade-marks Journal* cannot be taken into consideration. Thus, the Opponent submits that the relevant application for registration in the case at bar is the application as advertised in the *Trade-marks Journal* on March 28, 2012.

[10] In this regard, during the hearing, the Opponent submitted that it was impossible to determine the amendments accepted by the Registrar on February 25, 2014, because the two letters of December 5, 2013 were different. Thus, the Opponent submitted that the decision to accept the amendments to the application for registration had to be considered null and void.

[11] In the contingency that would I refuse to reconsider the decision of February 25, 2014, the Opponent reiterated its written representations, whereby the Registrar should have refused the amendments because they are contrary to section 32(b) of the *Trade-marks regulations*, SOR/96-195 (the Regulations). This section provides that:

32. No application for the registration of a trade-mark may be amended, after it has been advertised in the Journal, to change [...]

(b) the date of first use or making known in Canada of the trade-mark;

[12] In its written argument, the Opponent submits that [TRANSLATION] "the suppression of dates of first use by the withdrawal of certain wares constitutes a prohibited amendment" within the meaning of section 32(b) of the Regulations. The Opponent also cites the decision in

Asset Inc v Park It & Sell It of Canada Ltd, 2007 CanLII 80801 (TMOB), in which Jill W. Bradbury, acting on behalf of the Registrar, made the following comment: "[TRANSLATION] This prohibition is necessary to protect the rights of third parties who decide or do not decide to oppose an advertised application based on the alleged date of first use."

[13] It is unnecessary for me to discuss the Applicant's oral representations on this question. Indeed, as I told the Opponent at the hearing, it did not convince me that the withdrawal of goods from the application for registration results in "suppression" or a change of the dates of first use claimed in the application for registration.

[14] Moreover, further to my remarks concerning its claim, the Opponent acknowledged that the Applicant's letters of December 5, 2013 did not propose any change of dates of first use claimed in the application. The Opponent also ultimately acknowledged that it could not cite any decision other than the aforementioned *Asset Inc* case to support its claim. The facts in the case at bar have nothing in common with those of this case in which the Applicant, through its evidence, sought to amend the application for registration to claim September 1, 2003, instead of September 1, 2000, as the date of first use of the trade-mark in question.

[15] Finally, it is unnecessary for me to rule on the value of the decision to accept the amendment to the application for registration of February 25, 2014.

[16] In reviewing the record, I found that the Applicant had filed an amended application for registration on March 26, 2014, referring to its two letters of December 5, 2013. I informed the Opponent of this situation at the hearing, acknowledging that the Applicant did not seem to have sent the Opponent a copy of the amended application for registration. Moreover, for a reason of which I am unaware, no communication was issued by the CIPO to accept the amended application of March 26, 2014 on behalf of the Registrar. To remedy this situation, I informed the parties that I would confirm the acceptance of the amended application for registration in this decision.

[17] Therefore, on behalf of the Registrar, I accept the amended application for registration filed on March 26, 2014. Thus, the goods and services and the claims of use contained in the application for registration currently of record are as follows:

Wares:

- (1) Board games, tabletop games.
- (2) Card games.
- (3) Puzzles, game books, software for educational games, virtual games, figurines.

Services:

- (1) Design, publishing, wholesale and retail and online sale and distribution of board games, card games, puzzles, tabletop games.

Claims:

Used in Canada since at least as early as May 15, 2007 in association with the wares (1).

Used in Canada since at least as early as February 22, 2007 in association with the wares (2).

Proposed use in Canada in association with the wares (3).

Used in Canada since at least as early as February 2007 in association with the services.

III The ground of opposition in the case at bar

[18] On November 28, 2012, the Opponent filed its statement of opposition, containing numerous allegations and raising three grounds of opposition.

[19] On January 25, 2013, the Applicant applied for an interlocutory decision to strike all the grounds of opposition. On February 19, 2013, the Opponent presented its observations in response to the Applicant's request.

[20] On March 13, 2013, acting on behalf of the Registrar, I accepted the Applicant's application in part, deciding to strike two of the three grounds of opposition. Therefore, only one ground of opposition remains to be considered. This ground of opposition, as argued, reads as follows:

- a) The application does not satisfy the requirements of section 30 of the *Trade-marks Act*, because the dates of first use indicated by FILOSOFIA in its application are false.

[21] In the decision *Massif Inc v Station Touristique Massif du Sud (1993) Inc*, 2011 FC 118, 95 CPR (4th) 249, the Federal Court ordered that an opposition be evaluated according to the grounds of opposition as argued. If an opponent maintains that an application contravenes a

provision of the Act due to precise circumstances, it is not permitted to refuse the application on the ground that it does not comply with this provision of the Act for reasons different from those invoked.

[22] The scope of the remaining ground of opposition is another question I must settle after the hearing, during which the Opponent made representations whereby this ground of opposition alleges that the application for registration does not satisfy the requirements of sections 30(b), 30(e) and 30(i) of the Act.

[23] The ground of opposition only alleges that the dates of first use claimed in the application are false. Therefore, I agree with the Applicant that the ground of opposition, as argued, alleges at most that the application for registration does not satisfy the requirements of section 30(b) of the Act.

IV The burden incumbent on the Parties

[24] The legal onus is on the Applicant to show that the application for registration does not contravene the provisions of the Act. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, the Opponent must discharge the initial burden of proving the facts on which it bases its allegations. The fact that an initial evidential burden is imposed on the Opponent means that a ground of opposition will be taken into consideration only if sufficient evidence exists to allow a reasonable conclusion of the existence of the facts alleged in support of this ground of opposition [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), FCA 29, 20 CPR (4th) 155; and *Wrangler Apparel Corp v The Timberland Company*, 2005 FC 722, 41 CPR (4th) 223].

V Opponent's Evidence

[25] I will discuss the Opponent's Evidence in the case at bar and, on the same occasion, rule on the questions arising from the hearing.

[26] The Opponent's Evidence filed under section 41 of the Regulations consists of:

- the Affidavit of David Capon made on November 28, 2012;
- the Affidavit of Marie-Ève Lupien made on November 27, 2012;
- the Affidavit of Guillaume Bilodeau made on November 27, 2012; and
- Exhibits O-1 to O-17 filed in support of these three affidavits.

[27] Mr. Capon, Ms. Lupien and Mr. Bilodeau were cross-examined by the Applicant. The transcripts of the cross-examinations, the responses to the undertakings, and Exhibit DC-1 to the transcript of the cross-examination of Mr. Capon are part of the record.

[28] Before reviewing the three affidavits, I must note that these affidavits and Exhibits O-1 to O-17 are presented in a spiral bound book with tabs. The affidavits are found in tabs 1 to 3 and the exhibits in tabs 4 to 20. The exhibits were not sworn. The Applicant submits that the exhibits are not admissible as evidence and requests their rejection.

[29] At the hearing, the Opponent objected to the Applicant's motion. The Opponent also requested permission to file a second affidavit by David Capon, made on June 18, 2015, including its Exhibits O-1 to O-17, as further evidence under section 44(1) of the Regulations. The Applicant objected to the granting of the permission requested.

[30] Having informed the parties that I would rule on their respective motions in my decision, I requested that their oral representations account for the possibilities that Exhibits O-1 to O-17 would be admitted and that the permission to file David Capon's second affidavit would be granted.

[31] This having been said, I conclude that Exhibits O-1 to O-17 in support of the affidavits filed under section 41 of the Regulations are inadmissible as evidence and that the Opponent must be refused permission to file Mr. Capon's second affidavit.

[32] Before proceeding any further, I will make a preliminary observation on a point that emerges from the affidavits filed by the Opponent and which I only noticed after the hearing. I then will discuss the reasons why I conclude with the rejection of Exhibits O-1 to O-17 and the refusal of the permission requested by the Opponent. I will conclude with a review of the affidavits filed by the Opponent under section 41 of the Regulations.

V.1 Preliminary Observation

[33] I noted that the title of each of the affidavits filed under section 41 of the Regulations and the title of the affidavit proposed as further evidence identify the Opponent as Les Entreprises Foxmind Canada *inc.* instead of Les Entreprises Foxmind Canada *Ltée*, as in the statement of opposition. Also, Mr. Capon identifies himself, both in his affidavit of November 28, 2012 and in his proposed affidavit of June 18, 2015, as President of Les Entreprises Foxmind Canada *inc.*

[34] It is possible that the differences in the identification of the Opponent are the result of a typographical error. Whatever the case may be, because this has no impact on the outcome of the opposition proceedings, I presume that the names "Les Entreprises Foxmind Canada *inc.*" and "Les Entreprises Foxmind Canada *Ltée*" refer to one and the same entity.

V.2 Exhibits O-1 to O-17 in support of the Opponent's three affidavits

[35] Although this is lengthy, I consider it useful to reproduce the following excerpts from the Applicant's written argument to account for its representations:

[TRANSLATED EXCEPT FOR THE QUOTATION FROM THE RULES]
105. [...] it must be recognized that these unsworn exhibits have been filed globally for each of the Opponent's three affidavits under the reference "O", potentially for "opposition".

106. [...] this global or collective filing of exhibits intended to serve three affidavits indiscriminately is not in compliance with the requirements of Rule 80(3) of the *Federal Courts Rules*, which provides: "*Where an affidavit refers to an exhibit, the exhibit shall be accurately identified by an endorsement on the exhibit or on a certificate attached to it, signed by the person before whom the affidavit is sworn.*"

- Rule 80(3) of the *Federal Courts Rules* (1998)

107. Moreover, the Opponent's affiants sometimes refer to the same exhibits in their respective affidavits, exhibits that are not filed individually in support of each of the affidavits but collectively in the Opponent's spiral binder.

108. In addition, several exhibits filed in the Opponent's spiral binder contain handwritten entries indicating, in particular, dates (presumably printed), Web page titles and Web page addresses, and no correlation or reference to these handwritten entries is made in the affidavits filed by the Opponent.

- See, in particular, Exhibits O-3 jointly (Tab 6), O-8 (Tab 11), O-9 (Tab 12), and O-10 (Tab 13)

109. By the way, Exhibit O-6 (Tab 9), a copy of the De Cape & D'Épée (Cloak and Dagger) game (material evidence) is not admissible as evidence because, in addition to not having been sworn, it was not filed in compliance with the Act, i.e. by filing the game box with [the CIPO] and including a photograph of said box under Tab 6 (*sic*).

110. Exhibits O-7 (Tab 10) and O-13 (Tab 16), [are, on the one hand,] inadmissible due to not having been sworn and their filing non-compliant with the requirements of the Act [...].

111. Thus, the Opponent is free to choose the manner in which it administers its evidence, but must suffer the consequences of non-compliance with the minimum and elementary standards of administration of the evidence by affidavit before the Trade-marks Opposition Board. The Applicant acknowledges the general principle that purely technical deficiencies must not prevent a party from presenting its evidence but respectfully submits that, in the case at bar, the Opponent's breaches cannot be likened to mere technical deficiencies, considering their direct impact on the origin and reliability of the exhibits and the fact of knowing whether each of the affiants really filed said exhibits.

112. Therefore, the exhibits filed collectively in support of the affidavits of David Capon, Marie-Ève Lupien and Guillaume Bilodeau do not meet the minimum and elementary standard in the matter of administration of evidence and must be rejected by the Board. [see by analogy *Perley-Robertson Panet Hill & McDougall v. Early Morning Productions Inc.* (1998) 87 CPR (3d) 347, p. 349.

[36] I note that the Applicant's representations concerning [TRANSLATION] "filing not in compliance with the requirements of the Act" of exhibits O-6, O-7 and O-13 (Tabs 9, 10 and 16) result from the fact that the indication [TRANSLATION] "This material element is available for consultation at the offices of the Opponent's counsel" appears under each tab instead of the identified game box.

[37] According to my understanding of its oral representations, the Opponent considers that the deficiencies raised by the Applicant are only technical points. As a last resort, the Opponent submits that the inadmissibility of the exhibits should not result in the inadmissibility of the affidavits themselves, because they are sworn. The Opponent's subsidiary position is not contested by the Applicant.

[38] I acknowledge that the Registrar has already mentioned that, although desirable, the compliance of evidence with the *Federal Courts Rules* is not an obligation [see *Tension 10 Inc v Tension Clothing Inc*, 2004 CanLII 71738, 45 CPR (4th) 136]. However, in the present case, I fundamentally subscribe to the Applicant's representations. Thus, I agree with the Applicant that the deficiencies of the exhibits are not mere technical deficiencies. This having been said, apart from the exhibits, I agree with the Opponent that the affidavits themselves are admissible.

[39] Consequently, the three affidavits are part of the evidence of record but not the exhibits mentioned therein. Since the exhibits are not admitted as evidence, the affidavits only contain assertions that are not corroborated by documentary evidence.

[40] I also consider that excluding the exhibits from the evidence of record has no impact on the outcome of the proceedings for the following summary reasons:

- (i) the game box (or a photograph) was not filed as Exhibit O-6 (Tab 9). Thus, the invoice filed as Exhibit O-15 (Tab 18) to prove the purchase of this game is not useful;
- (ii) apart from the fact that no game box (or photograph) was filed as Exhibit O-13 (Tab 16), this potential exhibit, as well as Exhibits O-1, O-2, O-11 and O-14 (Tabs 4, 5, 14 and 17) concern the Opponent's mark and its goods. Exhibit O-12 (Tab 15) concerns various logos that would be used in the game industry. None of these exhibits is relevant to the ground of opposition in the case at bar.
- (iii) apart from the fact that no game box (or photograph) was filed as Exhibit O-7 (Tab 10), this potential exhibit and Exhibit O-16 (Tab 19) concern scientific games. These goods are no longer in the statement of the application currently of record;
- (iv) due to the legal principles applicable in the case at bar and the Applicant's evidence as a whole, I consider that Exhibits O-3 to O-5 and O-8 to O-10 (Tabs 6 to 8 and 11 to 13), which seek to support the assertions concerning the use of the Mark, are not useful to the Opponent's case; and
- (v) none of the witnesses refers to Exhibit O-17 (Tab 20).

V.3 Request for permission to file David Capon's second affidavit

[41] Before proceeding any further, I note that the proposed affidavit contains assertions referring to game boxes that would be attached as Exhibits O-6, O-7 and O-13. However, in each case, the indication [TRANSLATION] "This material element is available for consultation at the offices of the Opponent's counsel" appears as an exhibit instead of the identified game box. At the hearing, the Opponent provided me with photographs of the *De Cape & d'Épée* (Cloak and Dagger) game box, the box Mr. Capon affirms that he files under Exhibit O-6 of the affidavit. However, even had I accepted to grant permission to file the affidavit, I would not have accepted that the photograph the Opponent provided to me at the hearing would be admitted as Exhibit O-6. The alternative was to attach these photographs to the affidavit or file them by way of a distinct affidavit, with the permission of the Registrar.

[42] Section 44(1) of the Regulations is discretionary, authorizing the Registrar to grant leave to adduce further evidence on such terms as the Registrar determines to be appropriate. The Practice entitled *Practice in Trademark Opposition Proceedings* provides that leave to adduce further evidence will be granted only if the Registrar is satisfied that it is in the interests of justice to do so having regard to all the surrounding circumstances, including: 1) the stage the opposition proceeding has reached; 2) why the evidence was not filed earlier; 3) the importance of the evidence; and 4) the prejudice which will be suffered by the other party.

[43] According to my understanding of the Opponent's oral representations, it alleges that the Applicant would not suffer any prejudice because Mr. Capon's affidavit made on June 18, 2015, including its duly sworn Exhibits O-1 and O-17, is essentially identical to its affidavit filed as section 41 of the Regulations. The Opponent requests permission to file this affidavit to correct the [TRANSLATION] "technical deficiencies" of the exhibits in support of Mr. Capon's first affidavit. Further to my previous discussion, it is now self-evident that I do not subscribe to the Opponent's position regarding the nature of the deficiencies in question.

[44] According to my understanding of the Applicant's oral representations, it does not contest that the assertions contained in Mr. Capon's second affidavit are essentially the same as those contained in his first affidavit. However, the Applicant submits that the proposed affidavit could

have been filed earlier, since its representations on Exhibits O-1 to O-17 had been formulated in a written argument.

[45] First of all, the proposed evidence seems to have some materiality, because Exhibits O-1 to O-17 filed under section 41 of the Regulations are now excluded from the evidence. This having been said, in view of my opinion that the exclusion of these exhibits has no impact on the outcome of the proceedings, I conclude that refusing the requested permission does not cause any prejudice to the Opponent. However, if it were to happen that any exhibit attached to the proposed affidavit had an impact on the outcome of the proceedings, it is my opinion that granting permission to file Mr. Capon's second affidavit without cross-examination of Mr. Capon on this affidavit would be potentially prejudicial to the Applicant.

[46] Finally, needless to say, permission was requested at a very advanced stage of the proceedings and the Opponent could have filed the proposed evidence after receipt of the Applicant's written arguments that the Registrar sent to the Opponent on July 24, 2014, more than 11 months before the hearing.

[47] In view of the circumstances of the case at bar, more specifically the advanced stage of the proceedings, the fact that the Opponent did not explain why the evidence had not been filed earlier, and the potential prejudice for the Applicant, I consider that it is not in the interests of justice to accept the Opponent's request.

[48] Therefore, Mr. Capon's affidavit made on June 18, 2015, including its Exhibits O-1 and O-17, is not part of the evidence of record.

V.4 Affidavits filed under section 41 of the Regulations

[49] I will review the affidavits of Mr. Capon, Ms. Lupien and Mr. Bilodeau. In so doing, I will refer to passages from their respective cross-examinations, to the extent I find they are relevant regarding the evidence and the representations of the parties, including those of the Applicant on the absence of credibility of the Opponent's witnesses. It should be noted that at the hearing, the Opponent specified that it left the question of the credibility of the witnesses to my assessment.

Affidavit of David Capon

[50] Mr. Capon is the Opponent's President. He affirms that the Opponent, which began its activities in 2003, operates a game manufacturing and marketing business and holds a registration in Canada for the [TRANSLATION] "Canadian word mark Foxmind" [paragr. 1-4].

[51] Mr. Capon's affidavit is divided into three parts, respectively entitled: 1) FOXMIND's change of logo; 2) FILOSOFIA's change of logo; and 3) FILOSOFIA's scientific games.

[52] The evidence presented in the first part is irrelevant to the ground of opposition because this evidence concerns the Opponent's logo, whereas the ground of opposition concerns the use of the Applicant's Mark. Also, because the term "jeux scientifiques" (scientific games) is no longer found in the statement of goods and services of the application for registration of record, the evidence presented in the third part is of no practical interest. Ultimately, only the evidence presented in the second part is relevant to the ground of opposition.

[53] Mr. Capon affirms that the Applicant's [TRANSLATION] "emblematic mark" is the one illustrated in paragraph 16 of its affidavit. I note that the mark in question corresponds to the Mark, apart from the colour of the square, described by Mr. Capon as red. In this regard, Mr. Capon affirms that the emblematic mark [TRANSLATION] "is recognizable by its red fill colour, the table and the term filosofia in white and because it is in 3D relief on the game boxes" [paragr. 17].

[54] I essentially repeat below Mr. Capon's assertions concerning [TRANSLATION] "Filosofia's change of logo" [paragr. 19-25]:

- apart from the game boxes, before April 2011, the mark used by Filosofia was only the table and the term filosofia with the colour white;
- to its knowledge, the first use of the square logo on Filosofia's website dates from the end of April 2011;
- towards the end of April 2011, he observed that Filosofia had started using its square logo indiscriminately and alternatively with the colour red or the colour orange for advertising;

- in May 2011, he noticed that the logo was also found on the email signatures of Filosofia's employees. Until April 2011, these signatures did not include an orange or red square, but only the table and the term filosofia in white on [TRANSLATION] "a multi-coloured background"; and
- to the best of his knowledge, beginning in April 2011, Filosofia modified its website to display a logo analogous to the Mark by using the colour red and not the colour orange. Previously, Filosofia's website used a logo consisting of a game table with the term filosofia, without any red or orange square.

[55] According to Mr. Capon's assertion, on the date of his affidavit, the logo used by Filosofia on its game boxes, other than scientific games, had always been, and continued to be, the emblematic mark [paragr. 26].

[56] Under cross-examination, Mr. Capon acknowledged that, due to game box printing results, it is relatively frequent in the game industry and a logo undergoes slight colour variations that cannot be controlled by the game publisher [page 50, Q204-Q207]. Mr. Capon confirmed that he observed "*No radical changes*" of the logo used on the Applicant's game boxes [page 51, Q212].

[57] I find it unnecessary to discuss the parts of the cross-examination which, according to the Applicant, not only show the contradictory and ambivalent nature of Mr. Capon's position regarding the colour used for the Mark, but that Mr. Capon adjusts his testimony to attempt to strengthen the Opponent's case, depending on whether it is the case of these proceedings or the one before the Quebec Superior Court. Indeed, in the absence of documentary evidence, it is my opinion that very little probative force can be granted, in any case, to the mere assertions found in Mr. Capon's affidavit.

[58] Finally, I will not take a position one way or another on the Applicant's representations whereby various elements of record show that Mr. Capon [TRANSLATION] "deliberately omitted" to respond transparently to the questions regarding the hiring by the Opponent of Guillaume Bilodeau, a former employee of Filosofia. It is sufficient to say that the questions regarding Mr. Bilodeau's hiring ultimately have no impact on these opposition proceedings.

Affidavit of Marie-Ève Lupien

[59] Ms. Lupien worked for the Opponent from September 2010 to August 2012. When she started in her position with the Opponent, David Capon entrusted her with [TRANSLATION] "the task of modernizing the company's image, logo and brand" [paragr. 1 and 4].

[60] The evidence presented in the first of the two parts of the affidavit concerns the Opponent's change of logo and is therefore irrelevant to the ground of opposition.

[61] The evidence presented in the second part of the affidavit concerns the [TRANSLATION] "FILOSOFIA's change of logo".

[62] Like the evidence presented by Mr. Capon, the evidence regarding the Applicant's scientific games is of no practical interest [paragr. 26-27]. Regarding Ms. Lupien's other assertions, apart from the one whereby Guillaume Bilodeau informed her on April 10, 2011 that Filosofia [TRANSLATION] "had decided to change the red colour of its emblematic logo to an orange colour identical to that of Foxmind's new logo", her assertions are analogous to those of Mr. Capon, discussed previously [paragraphs 53 to 55 of my decision]. Under cross-examination, Ms. Lupien confirmed that she never observed any changes to the logo used in the Applicant's game boxes [pages 82-83, Q366].

[63] I find it is unnecessary to discuss the Applicant's representations whereby Ms. Lupien's testimony is purely self-interested, of little objectivity and devoid of credibility. Indeed, in the absence of documentary evidence, it is my opinion that very little probative force can be granted, in any case, to the mere assertions found in Ms. Lupien's affidavit [paragraphs 18, 19, 21-25, 28 and 29]. Moreover, since Guillaume Bilodeau is a witness for the Opponent, the probative force of Ms. Lupien's assertion concerning the formation he communicated to her has no impact in the case at bar.

[64] Finally, for the same reasons as in the case of the cross-examination of Mr. Capon, I will not rule on the Applicant's representations whereby various elements of record show that Ms. Lupien did not testify transparently regarding the circumstances surrounding Mr. Bilodeau's departure from Filosofia and his hiring by the Opponent.

Affidavit of Guillaume Bilodeau

[65] Mr. Bilodeau affirmed that he worked at Filosofia as a project manager in relation to France from February 21, 2011 to June 15, 2011 [paragr. 1]. He has been familiar with the FILOSOFIA mark for eight years [paragr. 3].

[66] Like the Opponent's other two witnesses, Mr. Bilodeau reproduces the Applicant's [TRANSLATION] "emblematic mark" in his affidavit [paragr. 3 of the affidavit]. He affirms that to the best of his knowledge, this mark is the only one used on the game boxes marketed by the Applicant [paragr. 5].

[67] According to Mr. Bilodeau's assertions, Filosofia's emblematic mark [TRANSLATION] "is recognizable due to its wine red colour and because it is in 3D relief on the game boxes" [paragr. 4 of the affidavit]. The wine red colour [TRANSLATION] "may be lighter or darker from one game box to another due to production, but the graphic charter of Filosofia's emblematic mark clearly determined the colour red as the only colour to be used, at least up to spring 2011" [paragr. 6].

[68] According to his assertions, Mr. Bilodeau witnessed change in the emblematic mark in April 2011 [paragr. 7-15]. To summarize, Mr. Bilodeau affirms that:

- on April 20, 2011, he heard Mr. Tremblay, a senior executive of Filosofia, ask the company's graphic designer [TRANSLATION] "to change the wine red colour of the emblematic mark to an orange colour". Subsequently, he also saw the graphic designer present several sketches of the new logo to Mr. Tremblay, who [TRANSLATION] "answered him in these terms: 'Orange it'";
- on or about April 20, he saw Mr. Tremblay and the graphic designer testing colours for Filosofia's [TRANSLATION] "future new logo" by comparing it with the Opponent's new logo, with which he had been familiar since mid-March 2011. According to Mr. Bilodeau, this comparison sought to make the colour of Filosofia's logo identical to that of the Opponent's logo; he saw [TRANSLATION] "printouts" presenting the two logos in question to

[TRANSLATION] "test the colours of FILOSOFIA's future new logo to Mr. Tremblay's satisfaction";

- on or about April 20, he was informed, like all the other employees, to stop using the email signatures, which were varied at that time with different colours and did not contain an orange or red square logo;
- on or about April 23, the employees received a directive from the employer to use only standard new email signatures, all containing the [TRANSLATION] "new orangey square logo"; and
- he learned that Filosofia had started using the new orangey square logo in its communications and advertising on or about April 23, the date when he also noticed the use of this logo on the website, on the Internet, for advertisements or on advertising banners.

[69] According to Mr. Bilodeau's different assertions [paragr. 16-18]:

- before April 2011, Filosofia did not use the orangey square logo on the Internet and for its advertising, but only the table and the term Filosofia;
- on the date of his affidavit, Filosofia was still using [TRANSLATION] "its red emblematic logo in 3D relief" on its game boxes; and
- in the days preceding the signing of his affidavit, he observed in some stores that the logo of the Filosofia games was still the emblematic mark.

[70] Mr. Bilodeau confirmed under cross-examination that he never observed any changes in the logo used on the Applicant's game boxes [page 122, Q554]. He also confirmed he had no training in graphic design [page 9, Q15]. In the course of his duties at Filosofia, he was not involved, in the production, design and publishing of the games, and was not involved in development of the Filosofia mark and its printing on the games [pages 12-13, Q31-Q37].

[71] When questioned about his assertions regarding the colour tests performed by Mr. Tremblay and the graphic designer, Mr. Bilodeau acknowledged the possibility that they occurred [TRANSLATION] "in the context of an analysis of the dispute between Filosofia and

the Opponent" [page 120, Q548]. Mr. Bilodeau also acknowledged the possibility that the email signature changes were the result of Filosofia's intention to harmonize the electronic and marketing uses of the logo with the use of the logo on the game boxes [pages 123-124, Q561-Q562].

[72] In conclusion, I will address the question of the credibility of Mr. Bilodeau's testimony, but summarily. Indeed, because the Opponent chose not to make representations on this question, I will limit my remarks to expressing the opinion that there is merit to the Applicant's position whereby an aspect of Mr. Bilodeau's cross-examination shows that his perception of the colour of the Filosofia logo, and thereby of the Mark, is particularly questionable and dubious [paragr. 157-162 of the Applicant's written argument]. Therefore, I am not disposed to grant probative force to Mr. Bilodeau's assertions, especially since my review of the Applicant's evidence will show that its witnesses contradict Mr. Bilodeau's assertions concerning the events that occurred in April 2011.

[73] I must specify that, in my consideration of the credibility of Mr. Bilodeau's testimony, I disregard the Applicant's claims that he [TRANSLATION] "lied" during his cross-examination [TRANSLATION] "by omitting and refusing to explain his actions when he was employed" by Filosofia. I reiterate that the circumstances regarding his departure from Filosofia and his hiring by the Opponent are irrelevant in the case at bar.

VI Applicant's Evidence

[74] The Applicant's Evidence consists of affidavits by Martin Tremblay, including his Exhibits MT-1 to MT-20, and Philippe Guérin, including his Exhibits PG-1 to PG-6, both made on December 6, 2013.

[75] I will review the evidence presented by Messrs. Tremblay and Guérin, who were not cross-examined.

Affidavit of Martin Tremblay, including its Exhibits MT-1 to MT-20

[76] Mr. Tremblay is Vice-President and General Manager of Filosofia. He is in charge of the day-to-day management of the company, which operates in the field of publishing,

conceptualization and setup of board games and other games of a similar nature [paragr. 1 and 3].

[77] Exhibit MT-1 attached to Mr. Tremblay's affidavit, namely a copy of the CIDREQ Report from the Québec Enterprise Register, confirms his assertion that Filosofia was constituted under the *Canada Business Corporations Act* [paragr. 4]. According to the CIDREQ Report, Filosofia was constituted on January 17, 2006.

[78] Mr. Tremblay is a co-founder of Filosofia and its related company Filosofia Distribution Inc. (Filosofia Distribution) [paragr. 5]. According to Mr. Tremblay's assertions, Filosofia Distribution is the distributor of Filosofia in Canada and sells its goods and services to consumers through its network of stores or directly during game events open to the public. Filosofia and Filosofia Distribution are domiciled at the same address, are operated by the same officers, have the same employees and are active in the same sector. Filosofia controls, directly or indirectly, the features or the quality of the goods and services, and the use, advertising or exposure of the Mark by Filosofia Distribution [paragr. 6-8].

[79] Mr. Tremblay affirms that the Mark [TRANSLATION] "has been used constantly and continuously in accordance with the dates claimed in the application for registration, subject to the usual colour variations in the printing industry" [paragr. 10]. He describes the Mark as consisting [TRANSLATION] "essentially of a centred white game design displaying a wheel with semi-circles, all on the background of an orange square, with the word 'filosofia' also in white at the bottom" [paragr. 11]. He affirms that, contrary to the claims of the Opponent's witnesses, the Mark does not contain any three-dimensional element [paragr. 39].

[80] I thus summarize as follows Mr. Tremblay's assertions concerning the use of the Mark in association with the goods and services identified in the application for registration, including the exhibits attached to his affidavit in support of his assertions:

- the services are advertised in association with the Mark:
 - since at least February 2007, on Filosofia's website, at *www.filosofiagames.com*. Website pages for the years 2007 to 2013 from

the *www.archive.org* website are attached to the affidavit [paragr. 13, Exhibit MT-4];

- since 2009, via promotional leaflets intended for specialty store buyers. Promotional leaflets are attached to the affidavit [paragr. 14, Exhibit MT-5]; and
- since the beginning of 2011, via game cards distributed in about a hundred stores distributing board games; these cards are consulted by consumers in the stores. The game card catalogue is attached to the affidavit [paragr. 17, Exhibit MT-8].
- the services and goods are also advertised in association with the Mark in catalogues distributed in the course of annual game events attended by consumers; in the course of several information and animation activities in day camps and schools; and in various daily newspapers and magazines. The catalogues for the years 2009 to 2013 and excerpts from magazines are attached to the affidavit [paragr. 15-16, Exhibits MT-6 and MT-7];
- the Mark has been used in association with board games and tabletop games constantly and continuously since at least May 15, 2007 [paragr. 20].

Mr. Tremblay attaches to his affidavit:

- the first edition of the board or tabletop game named *Colons de Catane* (Settlers of Catan) distributed between May 2007 and the year 2011, before the release of the second edition in April 2010; the second edition of the game, named *Catane* (Catan); a copy of the invoice for the first sale of the game *Colons de Catane* (Settlers of Catan) on January 5, 2005; and copies of invoices filed jointly concerning sales of the game *Colons de Catane* (Settlers of Catan) or its second edition *Catane* (Catan) [paragr. 21-25, Exhibits MT-9 to MT-12]. I note that the invoices filed jointly cover the years 2005 to 2013 and were issued by Filosofia Distribution, just like the invoice of January 5, 2005; and

- the game *Les Piliers de la Terre* (Pillars of the Earth); a copy of the invoice for the first sale of this game on June 6, 2007; and copies of invoices filed jointly concerning the sale of this game [paragr. 26-28, Exhibits MT-13 to MT-15]. I note that the invoices were issued by Filosofia Distribution, those filed jointly covering the years 2007 to 2013;
- the Mark has been used in association with card games constantly and continuously since at least February 22, 2007 [paragr. 29]. Mr. Tremblay attaches to his affidavit: the card game *Colons de Catane – Jeu de Cartes pour 2 joueurs* (Settlers of Catan Card Game for 2 Players); and copies of invoices filed jointly concerning the sale of this game [paragr. 30-32, Exhibits MT-16 to MT-18]. I note once again that the invoices filed jointly cover the years 2005 to 2013 and were issued by Filosofia Distribution, just like the invoice of January 5, 2005; and
- at the time the application was filed, Filosofia intended to use the Mark in association with puzzles, game books, software for educational games, virtual games and figurines [paragr. 34].

[81] Mr. Tremblay, who studied the Opponent's evidence, affirms that the Mark was never modified in April 2011 or at any other time, contrary to the claims of the Opponent's witnesses [paragr. 35].

[82] Mr. Tremblay further explains that the computer file containing the Mark, and from which the game proofs are printed, is unchanged since June 21, 2006 (CMYK code bearing number C-3 M-84 Y-92 K-12). Filosofia provides the printers with the specifications for printing of the first game order before printing. Some game orders nonetheless may exhibit certain minor variations due to factors that are not Filosofia's responsibility, including the types of ink and equipment used by the printers. These minor variations, inherent to the printing process, in no way alter the use of the Mark [paragr. 36-40].

[83] Mr. Tremblay affirms that the events described in paragraphs 6 to 10 of Mr. Bilodeau's affidavit never occurred and that his perception of the events related in paragraphs 9 to 18 of his

affidavit does not reflect reality [paragr. 45]. To summarize, according to Mr. Tremblay's assertions [paragr. 46-51]:

- he never requested on April 20, 2011, or at any other time, that the Mark be modified; nor did he ask the graphic designer to change the colour of the logo;
- it is false to affirm that he asked the graphic designer to design a "new logo"; the Mark is the only one that has been used with Filosofia's goods and services;
- in April 2011, further to the launch of the Opponent's new trade-mark, the production team met to discuss the fact that this mark seemed to be patterned on the Mark. To facilitate the discussion, Philippe Gu  rin, Filosofia's graphic designer, prepared a comparative image of the two marks to evaluate the similarities and the differentiation factors of the two trade-marks. Contrary to Mr. Bilodeau's claims, the two logos were never posted; and
- further to the filing of the application for registration, he standardized Filosofia's business and marketing practices by ensuring that the electronic signatures are in compliance with the constant and continuous use of the Mark on Filosofia's goods.

[84] Mr. Tremblay concludes his affidavit by affirming that Marie-  ve Lupien was never employed by Filosofia; she has no direct knowledge of Filosofia's internal processes nor of the constant and continuous use of the Mark [paragr. 55].

[85] Due to the Applicant's representations, I am ending my review of Mr. Tremblay's affidavit by returning to the invoices of January 5, 2005, although summarily because the Opponent did not make any representations in response to those of the Applicant [Exhibits MT-11 and MT-17].

[86] I accept that these invoices corroborate Mr. Tremblay's assertions concerning the first sales of the board or tabletop game *Colons de Catane* (Settlers of Catan) and the card game *Colons de Catane – Jeu de Cartes pour 2 joueurs* (Settlers of Catan Card Game for 2 Players). However, I am not prepared to conclude that the first use of the Mark in association with these games dates back *de facto* to February 5, 2005, as suggested by the Applicant in its written

argument. In this regard, it is sufficient to recall that according to the CIDREQ Report, Filosofia was constituted on January 17, 2006 [Exhibit MT-1]. I therefore find it reasonable to conclude that if the Mark were actually used on February 5, 2005, this use, although possibly that of Filosofia Distribution, could not be that of Filosofia.

[87] However, I would add that if I had concluded that the Applicant's Evidence shows a date of first use previous to the dates claimed in the application, I would have subscribed to the Applicant's oral representations of inconsequentiality in the case at bar. It is sufficient to say that Judge Cattanaach's decision in *Marineland Inc v Marine Wonderland & Animal Park Ltd*, (1974) 16 CPR (2d) 97, p 106 (FCTD) enshrines the principle that an applicant who used his trade-mark before filing his application may, "out of a super abundance of caution", claim a date subsequent to the actual date of first use. Consequently, it cannot be said that an application claiming a date subsequent to the actual date of first use is not in compliance with section 30(b) of the Act.

Affidavit of Philippe Guérin, including its Exhibits PG-1 to PG-6

[88] Mr. Guérin obtained a Diploma of College Studies in graphic design from Collège d'Ahuntsic in 2007. He has worked as a graphic designer at Filosofia since November 27, 2007. [paragr. 1-2].

[89] According to his assertions, as a designer, Mr. Guérin looks after the design and visual and graphic development of games and game content. He also prepares all the material elements used in promotion of Filosofia's services and goods, i.e. advertising, catalogues, promotional cards and product cards [paragr. 5]. Ever since he started at Filosofia, he has direct knowledge of Filosofia's printing, print job ordering, print order approval and goods and services development processes, particularly concerning the use of the Mark [paragr. 6].

[90] In the first part of his affidavit, Mr. Guérin presents evidence to show the constancy and continuity in the use of the Mark. To summarize, according to Mr. Guérin assertions:

- it appears clear to him that the Mark features an orange square and is the Mark affixed to Filosofia games [paragr. 7];

- since his arrival at Filosofia, the Mark has been affixed Filosofia goods and is exposed to consumers in advertising and marketing campaigns [paragr. 8]. Mr. Guérin attaches to his affidavit different game banners featuring the Mark, which were used in the course of certain game fairs in 2008 and 2009 [paragr. 9-11, Exhibits PG-2 and PG-3];
- the master file containing the Mark has been used since at least June 21, 2006 and has not been modified. In support of this affirmation, Mr. Guérin attaches to his affidavit the screen shot of his computer for the master file [paragr. 12, Exhibit PG-4];
- in the printing process, each colour corresponds to one equivalent in the colour coding system generally used in the industry. This system, known as "quadrichrome" or CMJN (in English, CMYK) is a printing process allowing reproduction of a broad colour spectrum from three base colours, to which the colour black is added. The four colours of the CMYK process are: cyan, magenta, yellow, black (key) [paragr. 19-20];
- the colours of the Mark, as used in association with the goods and services claimed in the application for registration, correspond to the specification CMYK "C-3 M-84 Y-92 K-12" [paragr. 21]. This specification corresponds to the colour orange for the square of the Mark. The screen shot attached to his affidavit in Exhibit PG-5 illustrates this specification [paragr. 22]; and
- in the printing field, it is very difficult to obtain identical results for each printing when the CMYK process is used. There are sometimes certain minor variations, particularly depending on the nature of the printing paper, the temperature of the presses, and the inks used by the printers. Filosofia cannot eliminate or control the variation in the printing results after approval of a game proof at a printer [paragr. 25-28].

[91] The evidence presented by Mr. Guérin in the second part of his affidavit concerns the assertions found in Mr. Bilodeau's affidavit, which Mr. Guérin studied. Mr. Guérin contradicts Mr. Bilodeau's assertions, particularly by indicating his disagreement with Mr. Bilodeau's

assertion that the Mark's graphic charter determined red as the only colour to be used [paragr. 32].

[92] Concerning Mr. Guérin's other assertions, it is sufficient to say that he corroborates Mr. Tremblay's testimony regarding the meeting of the production team in April 2011. Mr. Guérin attaches to this affidavit the comparative image of the Mark and the Opponent's trade-mark, which he had prepared so that the production team could be better able to evaluate the similarities and the differentiation factors between the trade-marks, not to design a new logo for the Mark [paragr. 36]. He affirms that Mr. Tremblay never gave directives regarding the design of a new logo and never intervened on April 20, 2011 or at any other time to order that the Mark be modified [paragr. 38-39].

VII Analysis of the ground of opposition

[93] The relevant date for assessment of the ground of opposition whereby the application does not satisfy the requirements of section 30(b) of the Act is the filing date of the application for registration, i.e. March 25, 2011.

[94] To the extent that an applicant has easier access to the facts, the initial burden incumbent on an opponent regarding the ground of opposition based on non-compliance with section 30(b) of the Act is less heavy [see *Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB)]. An opponent may rely on the applicant's evidence to discharge this burden, in which case the opponent must show that the applicant's evidence involves the date of first use claimed in the application for registration [see *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323, paragr. 30 to 38]. In this regard, section 30(b) of the Act requires the Mark to have been used continuously since the claimed date [see *Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD)].

[95] At this time, I must recall the Opponent's position that the application for registration relevant to the case at bar had to be the one advertised in the *Trade-marks Journal*. This position undoubtedly explains why a portion of the Opponent's representations in its written argument is devoted to goods withdrawn from the application for registration current of record. Yet all these representations were reiterated by the Opponent at the hearing, even after it was reminded of the

acceptability of the amended application for registration filed on March 26, 2014. Consequently, it is sufficient to say that the Opponent's representations concerning the goods "educational games", "scientific games" and "dice games" are of no practical interest.

[96] Moreover, I remind the parties that the goods and services identified in the application for registration regarding which the ground of opposition must be considered are:

Wares:

- (1) Board games, tabletop games.
- (2) Card games.

Services:

- (1) Design, publishing, wholesale and retail and online sale and distribution of board games, card games, puzzles, tabletop games.

Claims:

Used in Canada since at least as early as May 15, 2007 in association with the wares (1).

Used in Canada since at least as early as February 22, 2007 in association with the wares (2).

Used in Canada since at least as early as February 2007 in association with the services.

[97] Further to my consideration of the Opponent's Evidence, I conclude that it cannot meet its initial burden on the ground of opposition alleging that [TRANSLATION] "the dates of first use indicated by FILOSOFIA in its application are false".

[98] On this subject, I remind the parties that I indicated I am not disposed to grant probative force to Mr. Bilodeau's assertions, especially since his testimony concerning the events that occurred in April 2011 is contradicted by the Applicant's witnesses. I also indicated that, in my opinion, very little probative force can be granted to the mere assertions of Mr. Capon and Ms. Lupien.

[99] Moreover, further to my consideration of the Applicant's Evidence, for the following reasons, I conclude that the Opponent cannot rely on it to call into question the dates of first use claimed in the application for registration and thus discharge its burden. In a similar vein, I would add that if it had to be concluded that the mere assertions of the Opponent's witnesses

allowed it to meet its light burden on the ground of opposition, it should be concluded that the Applicant's Evidence is amply sufficient to discharge its ultimate onus of proving that the application for registration satisfies the requirements of section 30(b) of the Act.

[100] Indeed, not only do I have no reason to call into question Mr. Tremblay's assertion regarding the constant and continuous use of the Mark in accordance with the dates claimed in the application for registration, but his assertions are supported by the documentary evidence. In this regard, I note that in addition to the game boxes displaying the Mark attached to his affidavit and the invoices concerning the sales of the games in question during the relevant period, games displaying the Mark are illustrated by other exhibits attached to Mr. Tremblay's affidavit. Regarding the documentary proof concerning the services, it is sufficient to note that the Mark appears on promotional leaflets intended for specialty store buyers [Exhibit MT-5 of Mr. Tremblay's affidavit and on the banners used at game fairs [Exhibits PG-2 and PG-3 attached to Mr. Gu erin's affidavit].

[101] Ultimately, I conclude that the Applicant's Evidence is amply sufficient to show, on March 25, 2011, its continuous use of the Mark since the dates of first use claimed in the application for registration in association with the goods and services in question.

[102] Moreover, during the hearing, the Opponent ultimately accepted that the Applicant's Evidence was sufficient to support the dates of first use claimed in the application for registration. However, the Opponent vigorously defended its position that the square in the Mark, as used, is red and not orange. In this regard, the Opponent relied on the screen shot attached as Exhibit PG-5 to Mr. Gu erin's affidavit.

[103] With all due respect for the Opponent, I have no reason to call into question Mr. Gu erin's assertions that the colours of the Mark correspond to the CMYK specification "C-3 M-84, Y-92 K-12"; that this specification corresponds to the colour orange for the square of the Mark; and that Exhibit PG-5 attached to his affidavit illustrates the specification in question [paragr. 21-22 of Mr. Gu erin's affidavit]. Whatever the case may be, not only do I not subscribe to the Opponent's claim regarding the colour of the square of the Mark, but it is my opinion that the Applicant's Evidence establishes that the square of the Mark, as used, is orange. Once again, the

clear and unequivocal assertions of Messrs. Tremblay and Gu erin regarding the colour the square are supported by the Applicant's documentary evidence.

[104] Finally, I acknowledge that the evidence shows slight variations in the colour of the square of the Mark. However, I agree with the Applicant that the colour of the square constantly remains in orange tones. I also agree with the Applicant that the orange tone variations are clearly insufficient to conclude that the Mark as used differs substantially from the Mark that is the object of the application [see *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[105] I therefore reject the one and only ground of opposition raised against the application for registration.

VIII Decision

[106] In exercising the authority delegated to me pursuant to section 63(3) of the Act, I reject the opposition in application of section 38(8) of the Act.

C line Tremblay
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Certified true translation
Arnold Bennett

Date of hearing: 2015-06-18

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