



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

**Citation: 2016 –TMOB 32**  
**Date of Decision: 2016-02-24**

**IN THE MATTER OF AN OPPOSITION**

**Triple E. Canada Ltd.**

**Opponent**

**and**

**Load King Transport Inc.**

**Applicant**

**1,571,519 for LOAD KING**

**Application**

Background

[1] On April 2, 2012, the Applicant filed application No. 1,571,519 for the trade-mark LOAD KING (the Mark). The application is based upon use in Canada since July 28, 2010, in association with the following goods and services:

GOODS:

- (1) Printed and electronic publications, namely, brochures, pamphlets, flyers, and signs.
- (2) Promotional items, namely, hats, casual clothing, bumper stickers, note pads, pencils, pens, sport water bottles, coffee mugs and fridge magnets.

SERVICES:

- (1) Freight transportation by truck, van, train, airplane and ship; Brokerage services in the field of freight transportation.
- (2) Warehouse storage services.
- (3) Rental of cargo trucks and vans.
- (4) Consulting services in the field of freight transportation.
- (5) Operating a website for tracking cargo shipments and for providing information in the field of freight transportation.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of March 6, 2013, and the application was opposed by the Opponent under section 38 of the *Trade-marks Act*, RSC 1985, C T-13 (the Act) on May 3, 2013. An amended statement of opposition was subsequently filed on July 10, 2013, in response to the Applicant's request for an interlocutory ruling on the sufficiency of the grounds of opposition.

[3] The grounds of opposition are based upon non conformity (sections 30(b) and 30(i)); non-entitlement (sections 16(1)(a) & (c)); non-registrability (section 12(1)(d)) and non-distinctiveness (sections 38(2)(d) and 2).

[4] The Applicant denied each of the allegations set out in the statement of opposition in a counter statement dated June 25, 2013.

[5] As evidence in support of its opposition the Opponent filed the affidavit of Terrance Elias, President and CEO of the Opponent, and a certified copy of the Opponent's LODE-KING trade-mark, registered in association with hopper grain trailers and flat deck hi boy trailers (registration No. TMA356,663). Mr. Elias was not cross-examined.

[6] As evidence in support of its application, the Applicant filed the affidavit of Harpreet Dhanoa, President of the Applicant. Mr. Dhanoa was cross-examined on his affidavit and the cross-examination transcript and exhibits form part of the record.

[7] Both parties filed written arguments and attended a hearing.

[8] For the reasons which follow, the opposition is successful.

### Onus

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

## Non-Conformance – Section 30(b) Ground

[10] The Opponent pleads that the application contravenes the provisions of section 30(b) of the Act in that the Applicant had not commenced use of the Mark on July 28, 2010.

[11] The issue under section 30(b) is whether the Applicant had continuously used the Mark in the normal course of trade from the alleged date of first use to the filing date of the application [see *Immuno AG v Immuno Concepts, Inc* (1996) 69 CPR (3d) 374 (TMOB); *Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD) at 262 and *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd* 2014 FC 323].

[12] There is an initial evidential burden on the Opponent to adduce sufficient evidence to support its allegation of the application's non-conformity to section 30(b) of the Act, bearing in mind that the facts regarding the Applicant's first use are particularly within the knowledge of the Applicant [see *Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1996), 10 CPR (3d) 84 (TMOB) at 89 and *Corporativo de Marcas*, supra]. The Opponent's initial burden can be met by reference not only to its own evidence but also that of the Applicant's [see *Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 230]. The Opponent may also rely upon the cross-examination of the Applicant's affiant to meet the evidential burden upon it [*Coca Cola Ltd v Compagnie Francaise de Commerce* (1991), 35 CPR (3d) 406 (TMOB)]. If the Opponent succeeds in discharging its initial evidential burden, the Applicant must then, in response, substantiate its claim of use during the material time.

[13] Mr. Dhanoa, President of the Applicant, makes the following statements regarding the use of the Mark in his affidavit:

- The Applicant operates a business in Canada which essentially provides freight transportation by truck, van, train, airplane or ship and provides brokerage services in the field of freight transportation. It offers warehouse storage services, rental of cargo trucks and vans, consulting services in the field of freight transportation and operates a website for tracking cargo shipments and providing information in the field of freight transportation (the Services). All of the Services are performed in association with the Mark and have been performed since at least as early as July 28, 2010 (para. 6).
- In addition, the Applicant sells various types of promotional items including hats, casual clothing, bumper stickers, notepads, pencils, pens, sport water bottles, coffee mugs and

fridge magnets and distributes printed and electronic publications being brochures, pamphlets, flyers and signs in association with the Mark (the Goods). The Applicant has associated its Mark with the Goods since as early as July 28, 2010 (para. 7).

- Exhibits showing the manner of use of the Mark in association with the Applicant's Goods is attached to his affidavit as Exhibit A.
- The Mark is used in association with the Goods by being stamped or printed on the product or packaging of the container in which the product is sold (para. 3).
- The Mark is clearly marked on the Applicant's trucks and is also prominently displayed on all the trip reports services reports and clearance reports (para. 14 and Exhibit B).
- Attached as Exhibits C & D are printouts from a Google Search engine showing a company named Load King Trailer Rentals and Load King Trailer Rentals Limited which use the Mark LOAD KING in association with their businesses. Mr. Dhanoa does not explain what the relationship is between the Applicant and either of these entities.
- The Mark is used in association with Services "in such a manner as to give notice of the purchaser of the Services or the user of the Services that the trade-mark LOAD KING of the Applicant is associated with the performance of such Services" (para. 5).
- Since July 28, 2010, the Applicant has sold the Goods in Canada totaling in excess of \$250,000 (paras. 9-10; Exhibit A).
- Since July 28, 2010, the Applicant has sold the Services in Canada totaling in excess of \$12,455,000 (para. 11; Exhibit B).

[14] On cross-examination, the Opponent's agent sought to elicit some additional information from Mr. Dhanoa relating to the Applicant's claimed date of first use and the extent and manner of the Applicant's use with respect to each of its goods and services.

[15] With respect to the Goods, Mr. Dhanoa revealed the following on cross-examination:

- all of the various promotional items listed in the application had been given away to customers for promotional purposes; when asked to produce any invoice associated with the sale of the Goods, Mr. Dhanoa took the request under advisement but never produced an invoice [Qs. 392-397];
- the printed material and signage were simply distributed for promotional purposes free of charge [Qs. 420-425]; and
- the sales figures listed in paragraph 9 of his affidavit actually represented the cost to the Applicant to purchase such promotional goods, rather than any revenues derived from the

sales of such products rather than any revenues derived from the sales of such products [Qs. 426-427].

[16] Mr. Dhanoa was also unable to confirm whether there were any accounting records showing that the Applicant had actually bought or sold any of the Goods listed in its application - such questions were taken under advisement and the Applicant did not provide answers to those questions (Q. 413). Further, he was unable to answer whether the Applicant had a price list for any of the Goods, or whether there were any printed catalog pages or any documents displaying the Goods (Qs. 414-419). Mr. Dhanoa was able to confirm, however, that such products were not sold via the Applicant's website.

[17] Use of a trade-mark in association with goods is defined in section 4(1) of the Act as follows:

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

[18] In this case, I consider that the Opponent has met its evidential burden under this ground with respect to the Goods as a consequence of the cross-examination of the Applicant's affiant Mr. Dhanoa. As noted by the Opponent, distributing marked goods for promotional purposes is not use of the Mark in association with the Goods within the meaning of section 4(1) of the Act [see *Cordon Bleu International Ltd v Renaud Cointreau & Cie* (2000), 188 FTR 29 and *Canadian Institute of Bookkeeping Inc v Canadian Institute of Professional Bookkeepers*, 2013 TMOB 14]. In view that the remainder of the Applicant's evidence does not positively establish its claimed date of first use pursuant to section 4(1) of the Act with respect to any of the Goods, the section 30(b) ground succeeds with respect to the Goods.

[19] With respect to the Services, the Opponent asked Mr. Dhanoa to produce various documents to corroborate the Applicant's claimed date of first use because all of the supporting documentation attached to Mr. Dhanoa's affidavit associated with the launch of the Applicant's freight and transportation business post-dates the claimed date of first use of the Mark. For example, a copy of the Applicant's Commercial Vehicle Operator's Registration Certificate

(CVOR) issued by the Government of Ontario was apparently issued on August 9, 2010 (Dhanoa, Exhibit B). As explained by Mr. Dhanoa on cross-examination, the CVOR was required for the Applicant to apply for the issuance of a certificate of insurance, which was not obtained until September 5, 2010 (Dhanoa, Qs. 311-Q316; Exhibit B).

[20] Mr. Dhanoa attempted to explain the apparent inconsistency by stating that the CVOR and certificate of insurance were only required for the Applicant to operate its business with its own trucks or tractors. He claimed that the Applicant was still able to operate its business in association with its trailers prior to the issuance of a CVOR and certificate of insurance. In this regard, he stated that the Applicant's LOAD KING trailers were used together with trucks or tractors provided by another company called Sun Noor Logistics beginning on July 28, 2010, until the Applicant's CVOR and insurance was obtained later that year (Dhanoa, Qs. 266-283).

[21] Mr. Dhanoa was also asked on cross-examination to produce the first invoice issued by the Applicant, identify the first customer of the Applicant, and also produce the invoice that shows the first use of one of the Applicant's trailers with the LOAD KING logo on it (if that invoice was different from the first invoice issued by the Applicant). These questions were taken under advisement but the Applicant did not provide any answers to these questions. The earliest invoice attached to Mr. Dhanoa's affidavit is dated October 13, 2010 (Dhanoa, Exh. B; Qs.294-Q307, Q330).

[22] With respect to warehouse services, Mr. Dhanoa was not able to produce an invoice showing the first warehousing services provided under the Mark (Q. 356). While he did state on cross-examination that he has been providing warehousing services (Qs. 355-356), he did not provide any evidence showing how the Mark appears in association with the advertisement or performance of these services.

[23] Mr. Dhanoa confirmed on cross-examination that all of the invoices appended to his affidavit related only to freight transportation services by truck (Q. 340). He was then asked to produce invoices showing use of the Mark in association with the services identified as (1) freight transportation by ... van, train, airplane and ship; brokerage services in the field of freight transportation; (2) warehouse storage services; and (3) rental of cargo trucks and vans. The

affiant took all of these requests under advisement, and then did not provide any response or produce any of the documents without explanation (Dhanoa, Qs.350-356; and Q377).

[24] With respect to the services “(5) Operating a website for tracking cargo shipments and for providing information in the field of freight transportation”, Mr. Dhanoa was unable to confirm the date when the Applicant’s domain name *www.loadkingtransport.com* was obtained or the date when the website hosted at that domain name was first published. Both questions were taken under advisement but the Applicant did not provide any response to these questions (Dhanoa, Q.243-Q.251). Similar deficiencies arose with respect to the services listed as “(4) consulting services in the field of freight transportation”.

[25] The Opponent submits that I should draw a negative inference from the Applicant’s failure to provide so many documents about his company’s activities in Canada. I agree. Although a witness is under no obligation to answer questions that were merely taken under advisement [see *Bruno v Canada (Attorney General)*, 2003 FC 1281 at para. 5], I find that in this case, it should have been a simple matter for Mr. Dhanoa, who is President of the Applicant, to have either provided the documents or at the very least an explanation as why he was not able to produce them. I am therefore of the view that Mr. Dhanoa’s cross-examination and failure to answer questions taken under advisement put the Applicant’s claimed date of first use with respect to its Services into issue.

[26] As the Opponent has met its initial burden, the onus shifts to the Applicant to positively establish its claimed date of first use. I agree with the Opponent that the Applicant has not met this onus with respect to the following services: (1) freight transportation by van, train, airplane and ship; (2) Warehouse storage services. (3) Rental of cargo trucks and vans; (4) Consulting services in the field of freight transportation; and (5) Operating a website for tracking cargo shipments and for providing information in the field of freight transportation. I am satisfied, however, that the Applicant has met this onus with respect to its freight transportation by truck services and brokerage services in the field of freight transportation for reasons that will be explained below.

[27] Section 4(2) of the Act states that a trade-mark is deemed to be used in association with services if it used or displayed in the performance and advertising of those services. The

services do not necessarily have to have been performed or sold for there to have been use, so long as they are offered to prospective customers in association with the Mark and the services are available to be performed [*Modis Inc v Modis Communications Inc*; 2004 CarswellNat 4627 (TMOB) at para 24; *Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 at 25 (TMOB)].

[28] Sales of the Applicant's Services were stated to have generated in excess of \$12,455,000 in revenue since 2010 [Dhanoa, para. 11]. While this sales figure was not broken down by service, I consider it fair to infer that these services include the Applicant's freight transportation services by truck in view that all of the invoices attached to Mr. Dhanoa's affidavit relate to these services (Q. 340).

[29] Specimens showing the use of the Mark in association with the Applicant's freight transportation services by truck were attached as Exhibit B to Mr. Dhanoa's affidavit. In addition to invoices, there is at least one copy of a photo that shows the display of the Mark on a trailer attached to a truck. During cross-examination, Mr. Dhanoa stated that although the first invoice attached to his affidavit is dated October 13, 2010, the Applicant invoiced a customer for use of the LOAD KING trailer in association with trucking services prior to that [Qs. 300 - 302]. Although asked to provide this invoice, the Applicant did not do so, nor give any reasons to support its failure to provide this invoice.

[30] While there may be a negative inference that could be drawn from this, the Applicant's failure to produce its first invoice does not result in the Applicant's evidence not supporting its first use claim, because an actual sale is not required in order for there to be use in association with services. Further, while some of the exhibits attached to Mr. Dhanoa's affidavit show that the commercial vehicle operator's registration certificate was not obtained until August 9, 2010 [Dhanoa, Exhibit A], and the insurance certificate was not obtained until September 5, 2010 [Dhanoa, Exhibit B], Mr. Dhanoa explained that these documents were only required to operate his trucks under the Mark. He explained that he could still provide his freight transportation by truck services by using another company's tractors in association with its LOAD KING trailers before it was legally authorized to operate its own trucks under the Mark [Qs. 266-296]. I have no reason to question this statement. I therefore find that the Applicant was able to perform its



freight transportation by truck services as of the claimed date of first use pursuant to section 4(2) of the Act.

[31] With respect to the Applicant's brokerage services in the field of freight transportation, Mr. Dhanoa stated the following on cross-examination:

Q. 292: So when did you first put trailers on the road with your LOAD KING transport logo on them?

A: July 28.

Q. 293: In those situations where you first put the trailers on the road, you explained to me that the tractors would actually have been from other business?

A: Other business I can use any ABC company to move the freight. I can hire any company to move the trailers who have the authority. I'm doing brokerage, right. I'm doing brokerage so I can call you, call Mike, call anybody to move my trailer to freight, to deliver, shipment.

[32] The Applicant submits that when the Applicant arranges for another company to move a customer's freight with the Applicant's trailer, this can constitute a brokerage service. In view of Mr. Dhanoa's evidence, I am prepared to find that the Applicant was also available to perform brokerage services in the field of freight transportation as of the claimed date of first use.

[33] In view of the above, the section 30(b) ground of opposition succeeds with respect to the following goods and services:

GOODS:

- (1) Printed and electronic publications, namely, brochures, pamphlets, flyers, and signs.
- (2) Promotional items, namely, hats, casual clothing, bumper stickers, note pads, pencils, pens, sport water bottles, coffee mugs and fridge magnets.

SERVICES:

- (1) Freight transportation by van, train, airplane and ship.
- (2) Warehouse storage services.
- (3) Rental of cargo trucks and vans.
- (4) Consulting services in the field of freight transportation.
- (5) Operating a website for tracking cargo shipments and for providing information in the field of freight transportation.

[34] The section 30(b) ground fails with respect to freight transportation by truck and brokerage services in the field of freight transportation.

#### Grounds of Opposition Based Upon Likelihood of Confusion

[35] The grounds of opposition pleaded under sections 12(1)(d), 16(1)(a), 16(1)(c), and 2 of the Act are all premised on an allegation that there is a reasonable likelihood of confusion between the Mark and the Opponent's LODE-KING trademark or Lode-King Industries trade-name.

[36] The material date for assessing each of the aforementioned grounds of opposition varies as follows:

- section 12(1)(d) – the date of the decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and the Registrar of Trade-marks* (1991), 37 CPR (3) 413 (FCA)];
- section 16 – the claimed date of first use (unless a section 30(b) ground was successfully challenged by the Opponent which would result in the material date becoming the Applicant's filing date – *Everything for a Dollar Store (Canada) Inc v Dollar Plus Bargain Centre Ltd* (1998), 86 CPR (3d) 269 (TMOB)); and
- section 2 – the date of filing of the statement of opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4<sup>th</sup>) 317 (FC)]

[37] The Opponent's case regarding confusion is strongest under its section 12(1)(d) ground of opposition because the later material date allows all of the Opponent's evidence concerning its reputation to be considered. If the Opponent is not successful under this ground, then it will not be successful under its section 16 and section 2 grounds of opposition.

[38] I will therefore focus my confusion analysis on the section 12(1)(d) ground of opposition.

#### Section 12(1)(d) – Non-registrability

[39] The Opponent has pleaded that the Mark is not registrable under section 12(1)(d) of the Act because it is confusing with the Opponent's trade-mark LODE-KING which is the subject of registration No. TMA356,663. As noted above, this mark is registered in association with hopper grain trailers and flat deck hi boy trailers.

[40] The Opponent has filed a certified copy of its registration as part of its evidence and I have exercised my discretion to check the register to confirm that it is extant [*Quaker Oats of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial burden with respect to this ground. As the Opponent's evidential burden has been satisfied, the Applicant must establish on a balance of probabilities that there is no reasonable likelihood of confusion between the Mark and the Opponent's trade-mark.

[41] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[42] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [*Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)].

*Section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which they have become known*

[43] When sounded, neither party's mark is inherently strong. In this regard, the component LODÉ in the Opponent's mark is the phonetic equivalent of the word LOAD. Therefore, both marks, when used in association with the parties' respective goods and services, suggest the same idea of high quality or superior load carrying abilities.

[44] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use.

[45] Although the Applicant's Mark is based on use since July 28, 2010, for the reasons set out above with respect to the section 30(b) ground of opposition, the only use that the Applicant can rely on as of that date is the use shown in association with its freight transportation by truck services and brokerage services in the field of freight transportation. From the Applicant's evidence, including sales in excess of \$12,455,000 between 2010 and the date of Mr. Dhanoa's affidavit (i.e. February 14, 2014) [Dhanoa, para. 11], and promotional expenses of about \$250,000 [Dhanoa, Qs. 426-427], I am able to conclude that the Mark has become known to some extent in Canada.

[46] The Opponent's mark, on the other hand, has been used for over 30 years and the Opponent has had sales revenues of over \$775 million in Canada since 2000 [Elias, para 7, 12-13, Exh. 2]. The Opponent's extensive use of its mark has been supported with extensive advertising and promotional efforts including printed promotional materials, an extensive online presence, and associated efforts to promote the LODE-KING trade-mark and products by the Opponent's network of authorized dealers.

[47] The Applicant submits that none of the exhibits filed by the Opponent show its trade-mark as registered. Instead, they show a trade-mark with a crown design which is a different trade-mark than the trade-mark registered by the Opponent. In my view, the Opponent's use of LODE-KING & Design constitutes use of its registered word mark LODE-KING. In this regard, the use of a word mark can be supported by the use of a composite mark featuring the word mark and other elements [see for example *Stikeman, Elliot v Wm Wrigley Jr Co* (2001), 14 CPR (4th) 393]. I therefore conclude that the Opponent's mark has become known to a considerable extent in Canada.

[48] In view of the above, I find that, overall, this factor favours the Opponent.

*Section 6(5)(b) – the length of time each has been in use*

[49] According to the Opponent's registration and Mr. Elias, the Opponent has been using its trade-mark LODE-KING in association with its services since at least as early as 1980. This pre-dates both the Applicant's claimed date of first use of July 28, 2010 and the filing date of the application.

*Sections 6(5)(c) and (d) – the nature of goods, services or business and trade*

[50] When considering sections 6(5)(c) and (d) of the Act, it is the statement of goods and services in the application for the Mark and the statement of goods in the Opponent's registration that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. Those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. Evidence of the parties' actual trades is useful in this respect [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB); and *American Optical Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[51] The Applicant's freight transportation services overlap with the Opponent's hopper grain trailers and flat deck hi boy trailers. In this regard, the Opponent's hopper grain trailers and flat deck hi boy trailers are used by those in the freight and shipping industries to haul or transport cargo throughout Canada [Elias, paras. 8 & 19]. As both parties' goods and services are targeted to purchasers in the freight and transport industry, I consider it likely that the parties' channels of trade could also overlap.

*Section 6(5)(e) - the degree of resemblance between the trade-marks*

[52] In *Masterpiece Inc v Alavida Lifestyles Inc*, *supra* at para 49, the Supreme Court of Canada indicates that the factor amongst those listed under section 6(5) of the Act with the greatest effect on the confusion analysis is the degree of resemblance between the parties' trade-marks.

[53] In this case, the parties' trade-marks LOAD KING and LODE-KING closely resemble one another in appearance, sound and connotation.

*Other Surrounding Circumstances*

*Similarity in Manner of Use*

[54] The Opponent submits that the Applicant has used the LOAD KING mark in a format which closely mirrors that has long been in use by the Opponent. In this regard, as shown below, both parties' marks that have been in use feature a blue coloured, italicized font, together with a similar crown design element.



[55] The Opponent further submits that members of the public would be exposed to both parties' marks in similar formats in the same way. In this regard, as shown below, both parties' marks are marked on the sides of the freight and truck trailers sold by the Opponent and those operated by the Applicant.



Elias Affidavit at Ex 3



Dhanoa Cross-examination at Ex 2

[56] It is true that there is no inherent restriction on how a word mark may appear once registered (for example with respect to size, style of lettering, colours or design features) [*Masterpiece* para 55; and *Les Restaurants La Pizzaiolle Inc v Pizzaziolo Restaurants Inc*, 2015 FC 240 (FC)]. In my view, it follows that evidence of the actual use of an applied for word mark that is the same or very similar to a competing word mark is relevant to the confusion analysis. I therefore find in this case that the Applicant's use of the applied for Mark in a similar format as the Opponent's use of its registered mark is a factor that favours the Opponent.

### *Lack of Instances of Actual Confusion*

[57] The Applicant submits that assuming the Opponent has used its trade-mark since 1980 and since the Applicant has used its Mark since at least 2010, there has been at least 5 years of concurrent use with no actual instances of confusion. Since no such evidence was presented by the Opponent, the Applicant submits that there is no support for the allegation that the use of the Mark would cause a reasonable likelihood of confusion.

[58] Absence of evidence of actual confusion over a relevant period of time, despite an overlap in the parties' goods and services, and their channels of trade, may entitle the Registrar to draw a negative inference about the likelihood of confusion [see *Mattel* 348 N.R. 340, *supra* at p 347.] Nevertheless, the Opponent is under no obligation to submit evidence of instances of actual confusion. Moreover, the absence of such evidence does not necessarily raise any presumptions unfavourable to the Opponent for the burden is on the Applicant to demonstrate the absence of likelihood of confusion.

[59] In the present case, it would appear that both parties have been offering goods and services in the freight transportation industry for at least five years. In view that the Applicant has been offering its services from a single location in Vaughn, Ontario, the absence of any instances of actual confusion to date is not surprising. I therefore do not consider the absence of evidence of instances of confusion to be a significant surrounding circumstance in this case.

### *Conclusion*

[60] The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the LOAD KING trade-mark in association with the Applicant's freight transportation services at a time when he or she has no more than an imperfect recollection of the Opponent's LODE-KING trade-mark used in association with hopper grain trailers and flat deck hi boy trailers, and does not pause to give the matter any detailed consideration or scrutiny [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée, supra*]. Section 6(2) of the Act states that there is a likelihood of confusion if the use of both trade-marks in the same area would likely lead to the inference that the goods associated with those trade-marks are manufactured, sold or leased by the same person. Confusion will also be found if consumers

believe that the Applicant's services are somehow approved, licensed or sponsored by the Opponent [*Big Apple Ltd v BAB Holdings Inc* (2000), 8 CPR (4th) 252 (TMOB) at para 13].

[61] Due to the similarity between the trade-marks and the overlap in the nature of the goods and services and the channels of trade, I find that a consumer upon seeing the Mark would be likely to infer that the services associated with this Mark are somehow approved, licensed or sponsored by the Opponent. I therefore find that the Applicant has failed to prove, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's trade-mark LODE-KING. As the Applicant has not met its legal onus, the section 12(1)(d) ground of opposition therefore succeeds.

#### Section 16(1)(a) – Non-entitlement

[62] As noted above, the relevant date for the section 16(1)(a) ground is generally the date of first use alleged in the application for registration (i.e. July 28, 2010). The relevant date for this ground for the services “freight transportation by truck and brokerage services in the field of freight transportation” will therefore be that date.

[63] In view that the section 30(b) ground of opposition was accepted for the Goods and the remaining services, the relevant date will be the filing date of the application for registration (i.e. April 2, 2012).

[64] I am satisfied that the Opponent has discharged its evidentiary burden to show prior use and non-abandonment of its trade-mark both prior to the Applicant's date of first use and the Applicant's filing date. Assessing each of the section 6(5) factors as of these dates, rather than as of today's date, does not significantly impact my previous analysis under section 12(1)(d) of the surrounding circumstances of this case.

[65] Accordingly, for reasons similar to those expressed in relation to the section 12(1)(d) ground of opposition, the 16(3)(a) ground of opposition is successful.



## Non-distinctiveness – Section 2

[66] The Opponent has pleaded that the Mark does not distinguish and is not adapted to distinguish the goods and services of the Applicant from those of the Opponent.

[67] I am satisfied that the Opponent has met its evidentiary burden to establish that its LODÉ-KING trade-mark had become known sufficiently in Canada as of April 22, 2013 to negate the distinctiveness of the Mark [see *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

[68] Assessing each of the section 6(5) factors as of April 22, 2013, does not significantly impact my analysis of the surrounding circumstances of this case. Thus, for reasons similar to those previously expressed under the section 12(1)(d) ground, the non-distinctiveness ground of opposition is successful.

## Remaining Grounds of Opposition

[69] In view that I have found the Opponent successful under three grounds of opposition, I do not consider it necessary to review the remaining grounds of opposition.

## Disposition

[70] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(8) of the Act.

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Cindy R. Folz  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** 2015-10-14

**APPEARANCES**

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