



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

Citation: 2016 TMOB 149
Date of Decision: 2016-08-31

Sogrape Vinhos, S.A.

Opponent

and

Ferreira Orchards Ltd.

Applicant

**1,594,284 for QUINTA FERREIRA
ESTATE WINERY & Design**

Application

[1] On September 14, 2012, Ferreira Orchards Ltd. (the Applicant) filed an application to register the trade-mark QUINTA FERREIRA ESTATE WINERY & Design set out below (the Mark) based on use in Canada since May 7, 2007 in association with alcoholic beverages, namely: wines and operation of a vineyard and winery (the Services).



[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 2, 2013.

[3] On March 3, 2014, Sogrape Vinhos, S.A. (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

- The application does not comply with section 30(b) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) because the Applicant has not used the Mark in association with the Goods and Services since the date claimed.
- The application does not comply with section 30(i) of the Act because the Applicant could not state that it was satisfied that it was entitled to use the Mark in association with the Goods and Services, in view of the Applicant's awareness of the Opponent's prior use and making known in Canada of the Opponent's trade-mark FERREIRA PORT and trade-mark and trade-name FERREIRA in association with wines, port wine, eau-de-vie, brandies and liqueurs. Further, the Applicant should have known that use of its Mark would depreciate the goodwill associated with the Opponent's registered trade-mark FERREIRA PORT in breach of section 22 of the Act.
- The Mark is not registrable pursuant to section 12(1)(d) of the Act because it is confusing with the Opponent's registered trade-mark FERREIRA PORT (registration No. TMA532,581).
- The Applicant is not entitled to registration of the Mark pursuant to section 16(1)(a) of the Act because at the alleged date of first use, the Mark was confusing with the Opponent's trade-marks FERREIRA PORT and FERREIRA which had been previously used or made known in Canada.
- The Applicant is not entitled to registration of the Mark pursuant to section 16(1)(c) of the Act because at the alleged date of first use the Mark was confusing with the FERREIRA trade-name previously used in Canada.
- Pursuant to section 2 of the Act, the Mark is not distinctive in that it will not distinguish and is not adapted to distinguish the Goods and Services from the goods of the Opponent.

[4] The Applicant served and filed a counter statement in which it denied the Opponent's allegations.

[5] In support of its opposition, the Opponent filed the affidavits of João Manuel Lima Engrácia Antunes, Duncan R. Hobbs, and Susan Burkhardt and a certified copy of registration No. TMA532,581 for FERREIRA PORT. The parties agreed to file cross-examination transcripts of Mr. Antunes and Mr. Hobbs on essentially identical evidence in a different proceeding. Ms. Burkhardt was not cross-examined.

[6] In support of its application, the Applicant filed the affidavits of Maria Ferreira and Marie Schultz. Subsequent to filing its evidence, the Applicant was granted leave to file a second affidavit of Maria Ferreira (the Supplemental Ferreira affidavit). Neither Ms. Ferreira nor Ms. Schultz were cross-examined on their affidavits.

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

Onus and Material Dates

[8] 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].

[9] The material dates that apply to the grounds of opposition are as follows:

- sections 38(2)(a)/30(b) and (i) - the date of filing the application [see *Georgia-Pacific Corp. v Scott Paper Ltd.* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *Tower Conference Management Co. v Canadian Exhibition Management Inc.* (1990), 28 CPR (3d) 428 at 432 (TMOB)].
- sections 38(2)(b)/12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

- sections 38(2)(c)/16(1) - the claimed date of first use [see section 16(1) of the Act].
- sections 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v Stargate Connections Inc.* (2004), 34 CPR (4th) 317 (FC)].

Analysis of the Grounds of Opposition

Section 30(b) Ground of Opposition

[10] The section 30(b) ground of opposition alleges that the Applicant had not used the Mark in association with the Goods and Services as of May 7, 2007 (the date claimed in the application). There is no evidence that supports this ground of opposition and it is rejected.

Section 30(i) Ground of Opposition

[11] The section 30(i) ground of opposition alleges in part that the Applicant could not have been satisfied that it was entitled to use the Mark because the Applicant was aware of the Opponent's FERREIRA PORT trade-mark and FERREIRA trade-mark and trade-name. Where an applicant has provided the statement required by section 30(i), this ground should only succeed in exceptional cases such as where there is evidence of bad faith [*Sapodilla Co v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. As this application includes the required statement and there is no allegation or evidence of bad faith or other exceptional circumstances, this part of the section 30(i) ground is rejected.

[12] The section 30(i) ground of opposition further alleges that the Applicant could not have been satisfied it was entitled to use the Mark because such use would have the effect of depreciating the goodwill of the Opponent's FERREIRA PORT registration in violation of section 22 of the Act. Neither the Registrar, nor the Federal Court has ruled on whether a section 30(i) ground of opposition based on the violation of section 22 is a valid ground of opposition [*Parmalat Canada Inc v Sysco Corp* 2008 FC 1104 (CanLII), (2008), 69 CPR (4th) 349 (FC) at paras 38-42]. Even if I found this to be a valid ground of opposition, as the Opponent has failed to adduce evidence supporting a likelihood of depreciation of goodwill [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* 2006 SCC 23 (CanLII), (2006), 49 CPR (4th) 401 (SCC) at

paras. 46, 63-68], it would have no chance of success. Accordingly, this part of the section 30(i) ground of opposition is rejected.

Section 12(1)(d) Ground of Opposition

[13] An opponent's evidential burden is met with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration relied upon by an opponent [see *Quaker Oats of Canada Ltd./La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd.* (1986), 11 CPR (3d) 410 (TMOB)]. I have exercised this discretion and confirm that the registration for the Opponent's trade-mark FERREIRA PORT remains valid. Its particulars are set out below.

Registration No.	Trade-mark	Goods
TMA532,581	FERREIRA PORT	Alcoholic beverages (except beers), namely wines, port wine, eau-de-vie, brandies and liqueurs.

[14] 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.

[15] 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. [See, in general, *Mattel, Inc. v 3894207 Canada Inc.* (2006), 49 CPR (4th) 321 (SCC) and *Masterpiece Inc. v Alavida Lifestyles Inc.* (2011), 96 CPR (4th) 361 (SCC).]

Inherent Distinctiveness

[16] The word FERREIRA is a surname. Given that the Applicant's evidence is that a search of *www.canada411.ca* shows that there are 1891 listings for individuals with this surname throughout Canada as of December 12, 2014 (Ferreira Affidavit, para 31; Exhibit O) and the Opponent's registered goods include PORT, the FERREIRA PORT trade-mark is not inherently distinctive. While the Opponent objects to the *www.canada411.ca* evidence on the basis of hearsay, given that the Registrar uses this source (see, for example, the Trade-marks Examination Manual, IV.5.11), I am giving weight to this evidence as I find it reliable and necessary given that I must evaluate the inherent distinctiveness of this component.

[17] The Mark has slightly more inherent distinctiveness due to its design elements and the use of the word QUINTA. While the Opponent's evidence is that the word Quinta means a wine-growing state in Portugal or a large house or villa in the country or the outskirts in Spain, Portugal and Latin America (see, for example, the definition in the *Canadian Oxford Dictionary*, Burkhardt affidavit, Exhibit A), I do not find this component descriptive or suggestive as there is no evidence that the average Canadian would equate this word with a winery such that the Mark would lack inherent distinctiveness. Finally, I note that the words ESTATE WINERY do not add any inherent distinctiveness to the Mark as they are descriptive of the Services and place of origin of the Goods.

Extent to which the Marks have Become Known

[18] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. While both the Applicant's wines and the Opponent's ports have won awards and been the subject of press (Ferreira affidavit, paras 22-23; Antunes affidavit, paras 11-12), this factor favours the Applicant as the Mark appears to be known to a greater extent than the Opponent's registered trade-mark. For example, the evidence of Ms. Ferreira, a director of the Applicant, is that between 2007-2013 the Applicant produced 573,000 bottles and had sold over \$4 million of wine (Ferreira affidavit, paras 1,16). Ms. Ferreira explains that virtually all products sold display the Mark (Ferreira affidavit, para 17). In contrast, the evidence of Mr. Antunes, a lawyer employed by the Opponent, is that in the same period the Opponent sold approximately 80,000 bottles and had sales of over \$480,000 of its FERREIRA

PORT (Antunes affidavit, paras 1, 9). Mr. Antunes' evidence on these sales figures was not impacted by his cross-examination and I accept them.

[19] At Exhibit A to his affidavit, Mr. Antunes attaches the images of two representative bottles of port sold in Canada:



I consider the uses of FERREIRA and FERREIRA PORTO to be use of the trade-mark as registered. Where a trade-mark as used deviates from the mark as registered, the question to be asked is whether the trade-mark as used did not lose its identity and remained recognizable in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade-marks) v Cie International pour l'informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see if the dominant features have been preserved [*Promafil Canada Ltée v Munsingwear Inc.*, 44 CPR (3d) 59 (FCA)]. The dominant feature of the Opponent's trade-mark is the word FERREIRA. The absence of the word PORT on the first bottle is not significant as this word is descriptive [*Bereskin & Parr v Red Carpet Food Systems, Inc* 2007 CanLii 80971 (TMOB) at para 14]. The change from PORT to PORTO on the second bottle is a minor deviation at best. In either case, the overall impression created by the Opponent's trade-mark is not lost and the public as a matter of first impression would perceive the mark used as being the trade-mark *per se* [*Nightingale Interloc Ltd.v Prodesign Ltd.* (1984), 2 CPR (3d) 535 (FCTD)].

Length of Time in Use

[20] This factor favours the Opponent as it has established use of the trade-mark FERREIRA PORT since approximately 1997 (Antunes affidavit paras 6,9, Exhibit A; see Qs24 and 84 of Mr. Antunes' cross-examination where he confirms the acquisition of A.A. Ferreira by the Opponent in 1987 and merger ten years later), whereas the Applicant has established use of the Mark since May 7, 2007 (Ferreira affidavit para 8, Supplemental Ferreira affidavit, paras 2-3).

Nature of Goods, Services or Business

[21] It is the Applicant's statement of goods and services as defined in its application versus the Opponent's registered goods that govern my determination of this factor [see *Esprit International v Alcohol Countermeasure Systems Corp.* (1997), 84 CPR (3d) 89 (TMOB)]. The parties' goods are identical with respect to wine and overlap with respect to the remaining Goods and Services which all relate to alcoholic beverages. In this regard, in response to the Applicant's submissions that it sells wines while the Opponent sells port (Applicant's written argument, para 47), port is a red or white wine to which brandy is added (Antunes cross-examination, Q 27) rendering it very closely related to wine. Further, with the exception of sales directly from a winery, the parties' channels of trade, namely, stores selling alcohol, bars and restaurants is identical.

Degree of Resemblance

[22] When considering the degree of resemblance, the law is clear that the trade-marks must be considered in their totality. It is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trade-marks. Moreover, while the first word of a trade-mark may be the most important for purposes of distinctiveness in some cases, the preferable approach when comparing trade-marks is to begin by determining whether there is an aspect of the trade-mark that is particularly striking or unique [see *Masterpiece* at para 64].

[23] I find that the striking part of the Opponent's trade-mark is FERREIRA as the evidence is that this surname is listed less than 2000 times in the directory Canada411.ca and port is not striking as it is descriptive. With respect to the Mark, I find that QUINTA FERREIRA is the

striking aspect of this trade-mark as the remainder of the trade-mark is descriptive and the design elements are relatively minimal. I find that there is a fair degree of resemblance visually and aurally owing to the component FERREIRA common to both marks. The ideas suggested by the marks also resemble each other to the extent that the component FERREIRA suggests the surname of a family that produces wine.

Additional Surrounding Circumstance – State of the Register and Marketplace Evidence

[24] The state of the Register or marketplace evidence of the word FERREIRA provided by Ms. Ferreira is not a surrounding circumstance for the following reasons:

- With the exception of FERREIRA CAFÉ, the search of *www.canada411.ca* and website printouts of businesses featuring FERREIRA in their names attached as Exhibit P do not feature the use of FERREIRA in the alcoholic beverages field or a related field. As such, these results do not support the inference that customers in the alcoholic beverages field are used to distinguishing between trade-marks including FERREIRA.
- With respect to the FERREIRA CAFÉ listing, which Ms. Ferreira states is a registered trade-mark (Ferreira affidavit, para 33), and the product listings showing Eduardo Ferreira Licor de Anis Anisette Liquor as listed on the LCBO website and the *liquorconnect.com* website showing alcohol products available in Alberta (Ferreira affidavit, Exhibits Q and R), these references do not assist the Applicant in demonstrating that there has been widespread use of the word FERREIRA as a trade-mark in the alcoholic beverages field in Canada. In this regard, this evidence is insufficient to show that the goods referenced therein have been sold in Canada, purchased by Canadians or are otherwise known to Canadians other than to a minimal extent.

Surrounding Circumstance - Effect of Disclaimer

[25] The Applicant submits that by disclaiming the right to the exclusive use of FERREIRA in its registration, the Opponent has recognized that this word is not distinctive and since the only similarity between the marks is the word “FERREIRA”, the opposition should not succeed. I do not agree with the Applicant’s submission and prefer the comments of Member Bradbury in

Canadian Tire Corp. v Hunter Douglas Inc. (2010), 81 CPR (4th) 304 (TMOB), at para 36: “Overall, when dealing with a s. 12(1)(d) ground of opposition, a disclaimer in either the Applicant's application or the Opponent's registration is of little, if any, consequence.”

Surrounding Circumstance – Mr. Hobbs’ statements about Canadian and International reputation

[26] Mr. Hobbs is the President of Charton-Hobbs Inc. who has distributed the Opponent’s products in Canada, including FERREIRA PORT, for over 15 years (Hobbs affidavit, pars 1, 6). I am disregarding Mr. Hobb’s opinion evidence that “... FERREIRA PORT port wines enjoy a strong reputation in Canada” (para 10), “FERREIRA PORT port wines have become well-known in Canada” (para 11) and “... based on my longstanding involvement with the wine and spirit industry in Canada, I believe ordinary consumers would [associate the name FERREIRA used in the wine industry with Sogrape]” (para 11) on the basis that as a distributor of the Opponent’s products he lacks independence and cannot provide such opinion evidence [see *Black Entertainment Television, Inc v CTV Limited* (2008), 66 CPR (4th) 274 at 282 (TMOB)]. Further, I agree with the Applicant’s submissions that in view of the yearly sales of FERREIRA PORT, Mr. Hobbs statement that Charton-Hobbs spends approximately \$50,000 annually marketing and promoting FERREIRA PORT across Canada (Hobbs affidavit, para 9) is not credible.

No Sales of Opponent’s Product in BC

[27] Ms. Schultz is a Senior Business Information Officer with the British Columbia Liquor Distribution Branch (Schultz affidavit, para 1). Her evidence is that no FERREIRA PORT products are available in British Columbia with such products being “delisted” between January 31, 2007-October 1, 2012 (Exhibit B – see column with Status 4 Date). I accept her evidence over the contradictory statements of Mr. Antunes and Mr. Hobbs that the Opponent's products are available in British Columbia (Hobbs affidavit, para 7, Antunes affidavit, para 6). I, however, do not find the evidence that the Opponent’s products are not available in British Columbia to be particularly relevant since the Act provides for trade-mark registrations with a national scope of protection [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d)

272 (TMOB); see also *Masterpiece Inc, supra* at paras 28-33 which discusses that there cannot be a likelihood of confusion with another trade-mark anywhere in the country].

Surrounding Circumstance – Use and Registration of FERREIRA PORT Outside of Canada

[28] Mr. Antunes provides evidence regarding use and registration of the Opponent's trade-mark outside of Canada (Antunes affidavit, paras 3-5), however, this is not relevant in this proceeding. It is the trade-mark's reputation in Canada that is relevant.

Conclusion

[29] Having considered all of the surrounding circumstances, I find that the Applicant has established, on a balance of probabilities, that confusion is not likely between the Mark and the Opponent's trade-mark FERREIRA PORT as of today's date.

[30] It is difficult to monopolize surnames such as FERREIRA. While acknowledging that the Opponent has acquired a reputation in association with FERREIRA PORT, this is the sort of mark that is typically not given a broad scope of protection, with small differences being sufficient to distinguish a similar mark. In view of the Applicant's greater reputation in association with the Mark and the differences in the Marks themselves, I find that the Applicant has met its legal onus of providing that there is no reasonable likelihood of confusion. The section 12(1)(d) ground of opposition accordingly fails.

Section 16(1)(a) Ground of Opposition

[31] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark as it is confusing similar with the Opponent's trade-marks FERREIRA PORT and FERREIRA. In order to meet its initial burden with respect to its section 16(1)(a) ground, the Opponent must show that it used or made known the trade-marks FERREIRA PORT or FERREIRA prior to May 7, 2007 and had not abandoned such use or making known as of October 2, 2013 (see section 16(5)).

Opponent's Evidential Burden to Prove Use or Making Known

[32] The Opponent meets its evidential burden with respect to the allegation that it has used its trade-mark FERREIRA as of the material date and had not abandoned it as of the date of advertisement of the application (see sections 16(1) and 16(5) of the Act). Mr. Antunes' evidence of the photographs of labels featuring the trade-mark FERREIRA at Exhibit A along with his statement that the presence and prominence of FERREIRA on the bottle labels has remained consistent since FERREIRA brand port wine was sold by Sogrape along with his evidence of yearly sales in Canada from 1997 to 2013 (Antunes affidavit paras 6,9; see Qs 24 and 84 of Mr. Antunes' cross-examination) is sufficient to meet the Opponent's burden that it had used the Mark as of the material date and had not abandoned it as of the date of advertisement.

[33] While I have found that the Opponent has met its burden with respect to use, it does not meet its evidential burden with respect to the making known of its trade-marks FERREIRA or FERREIRA PORT in accordance with section 5 of the Act. The making known requirements set out in section 5 require a finding that the trade-mark has become well known in Canada by reason of the distribution or advertising of the Opponent's goods in association with the trade-mark in Canada. The Opponent has not shown that its mark is well known in Canada such that a substantial area of Canada knows its trade-mark as required [*Marineland Inc. v Marine Wonderland and Animal Park Ltd.* (1974), 16 CPR (2d) 97 (FCTD)].

Has the Applicant met its legal burden?

[34] The Applicant's position is less strong under this ground than under the section 12(1)(d) ground of opposition.

[35] Ms. Ferreira's evidence is that the Applicant started producing wines in 2005 under the name Quinta Ferreira Estate Winery and after aging wine in barrels, began selling those wines on May 7, 2007 in association with the Mark and opened a winery bar under this name (Ferreira affidavit para 8, Supplemental Ferreira affidavit, paras 2-3). As such, and different from the analysis under the section 12(1)(d) ground of opposition, a consideration of the length of time that the marks had been in use and the extent to which each had become known by the material date for this ground necessarily favours the Opponent.

[36] Further, the evidence of the listings for individuals with the last name FERREIRA postdates the material date under this ground by seven years and so is of no avail to the Applicant. Given the length of time between the material date and the directory listings, I decline to speculate on how common the Ferreira surname was at the material date.

[37] 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 the Mark in association with the Goods and Services at a time when he or she has no more than an imperfect recollection of the Opponent's FERREIRA trade-mark used in association with port, and does not pause to give the matter any detailed consideration or scrutiny [*Veuve Clicquot*, supra at para 20]. 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 goods or services are somehow approved, licensed or sponsored by the Opponent [*Big Apple Ltd v BAB Holdings Inc* (2000), 8 CPR (4th) 252 (TMOB) at 259].

[38] Having considered all of the surrounding circumstances, I find that as of May 7, 2007 that the balance of probabilities weighs equally for both parties on whether there is a likelihood of confusion and that there is an equal chance as not that a consumer upon seeing the Mark would be likely to infer that the Goods and Services associated with this Mark are somehow approved, licensed or sponsored by the Opponent. As such, the Applicant has not met its legal burden of proving that there is no reasonable likelihood of confusion. I reach this conclusion because while the trade-mark FERREIRA is not inherently distinctive and is not the type of mark that is typically afforded a broad scope of protection and there are differences between the trade-mark FERREIRA and the Mark, only the Opponent had acquired a reputation in association with its trade-mark as of May 7, 2007, and the goods of the parties are extremely related. As the legal burden is on the Applicant to establish, on a balance of probabilities, that the Mark is not confusing with the Opponent's trade-mark and it has not done so, the section 16(1)(a) ground of opposition succeeds.

[39] In so finding, I acknowledge that the equities with respect to this ground of opposition may favour the Applicant whose owners have the last name Ferreira (Ferreira affidavit, paras 4-

6). The Registrar, however, is a creature of statute, has no inherent jurisdiction and section 38 which delineates the Registrar's powers with respect to opposition do not include any reference to equity, nor direct the Registrar to consider it [see the discussion in *Molson Canada 2005 v Anheuser-Busch, Incorporated*, 2010 FC 283 at para 66].

Section 16(1)(c) Ground of Opposition

[40] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark as it is confusingly similar with the Opponent's FERREIRA trade-name. In order to meet its initial burden with respect to its section 16(1)(c) ground of opposition, the Opponent must show that it used its trade-name FERREIRA prior to May 7, 2007 and had not abandoned such use as of October 2, 2013 (see section 16(5)). The Opponent's evidence is insufficient to meet this burden as its evidence does not show that it had not abandoned the use of the trade-name as of October 2, 2013. In particular, the trade-name FERREIRA does not appear on the images of the representative bottles (Antunes affidavit, Exhibit A), nor on any of the invoices (Antunes affidavit, Exhibit B). As such, this ground of opposition is rejected.

Section 2 Distinctiveness Ground of Opposition

[41] The Opponent has pleaded that the Mark is not distinctive of the Goods because it is confusing with the Opponent's FERREIRA PORT trade-mark and FERREIRA trade-mark and trade-name. The Opponent has met its initial burden since its evidence establishes that its FERREIRA PORT trade-mark had, at the date of filing of the statement of opposition, acquired a reputation in Canada that was sufficient to affect the distinctiveness of the Applicant's Mark [see *Bojangles' International LLC v Bojangles Café Ltd* (2006), 2006 FC 657, 48 CPR (4th) 427 (FC) at paras 33-34]. In the circumstances of this case, nothing turns on the earlier material date for considering this ground of opposition as compared to the section 12(1)(d) ground of opposition. Therefore the outcome of the distinctiveness ground is the same as the outcome of the section 12(1)(d) ground and this ground of opposition is rejected.

Disposition

[42] 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.

Natalie de Paulsen
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE: April 19, 2016

APPEARANCES

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