

**IN THE MATTER OF AN OPPOSITION by
George V Restauration to Application No.
1,225,610 for the trade-mark BUDDHA CAFÉ
filed by La Maison du Café (St. Denis) Inc.**

I The Proceedings

[1] On July 28, 2004 La Maison du Café (St. Denis) Inc. (the “Applicant”) filed an application to register the trade-mark BUDDHA CAFÉ (the “Mark”) based on proposed use in Canada in association with food wares, namely coffee, tea, spices (the “Wares”) and the operation of restaurants, cafes and coffee shops (the “Services”).

[2] The application was advertised on November 23, 2005 in the *Trade-marks Journal* for opposition purposes. George V Restauration (the “Opponent”) filed a statement of opposition on January 17, 2006 and the Registrar forwarded it to the Applicant on February 14, 2006.

[3] The Opponent filed the affidavit of Tarja Visan while the Applicant filed the affidavits of Micheal Stern, Cheryl Goldman and Micheal Logothetis. The Opponent filed the affidavit of Claire Cébron as reply evidence. It also filed a certified copy of registration TMA662480.

[4] Only the Opponent filed written submissions and both parties were represented at the oral hearing.

II The statement of opposition

[5] The grounds of opposition raised by the Opponent are:

1. The Application does not comply with the requirements of s. 30 of the Trade-marks Act, R.S.C. 1985 c. T-13 (the “Act”) in that the Applicant has already used the Mark or alternatively or cumulatively the Applicant never had the intention to use the Mark in Canada, in whole or in part;
2. The Application does not comply with the requirements of s. 30 of the Act in that it is falsely that the Applicant declared itself satisfied that it was entitled to use the Mark in Canada in view of the foregoing including its knowledge of the

Opponent's rights and the illegality of such use which would infringe the Opponent's rights;

3. The Mark is not registrable under s. 12(1)(d) of the Act as it is confusing with the Opponent's registered trade-mark BUDDHA-BAR, certificate of registration TMA662480 for restaurant services;

4. The Applicant is not the person entitled to registration of the Mark pursuant to the provisions of s. 38(2)(c) and 16(3)(a) of the Act because at the filing date of the application, the Mark was confusing with the trade-mark BUDDHA-BAR previously used in Canada by the Opponent or its predecessors in title in association with compact discs and entertainment services, production and musical editing, discotheque services, impresario services, sound recording rental, production of radio and television programs, band services, production of shows and the services of recording studio;

5. The Applicant is not the person entitled to registration of the Mark pursuant to the provisions of s. 38(2)(c) and 16(3)(b) of the Act because at the filing date of the application, the Mark was confusing with the trade-marks BUDDHA-BAR, application number 1148691, and BUDDHA-BAR, application number 1151620, which were previously filed in Canada;

6. Pursuant to s. 38(2)(d) and s. 2 of the Act, the Mark is not distinctive of the Wares and Services nor is it adapted to distinguish them from those of the Opponent since:

- i) In view of what has been mentioned hereinabove with respect to the adoption, use and making known of the Opponent's trade-mark;
- ii) The Applicant allowed third parties to use the Mark outside the scope of the licensed use provided for by s. 50 of the Act;
- iii) As a result of the transfer of the Mark rights subsist in two or more persons to the use of the Mark and those rights were exercised by those persons, contrary to s. 48(2) of the Act.

III General principles governing opposition proceedings

[6] The legal burden is upon the Applicant to show that its application complies with the provisions of the Act, but there is however an initial evidential onus 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. Once this initial onus is met, the Applicant has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

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[7] The relevant dates for the analysis of the grounds of opposition are:

- Compliance with the requirements of s. 30 of the Act: the filing date of the application (July 28, 2004) [See *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R. (3d) 469];
- Registrability of the Mark under s. 12(1)(d) of the Act: the date of the Registrar's decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at 424 (F.C.A.)];
- Entitlement to the registration of the Mark where the application is based on proposed use: the filing date of the application (July 28, 2004) [see s. 16(3) of the Act];
- Distinctiveness of the Mark: the filing date of the statement of opposition is generally accepted as the relevant date (January 17, 2006) [see *Andres Wines Ltd. and E & J Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)].

IV Preliminary issues

[8] The Opponent requested leave to amend its statement of opposition after the Applicant had already filed a counter statement. The original statement of opposition did not raise registrability of the Mark under s. 12(1)(d) of the Act but included a ground of opposition based on s. 16(3)(b) as the Opponent was relying on two previously filed applications, including application 1,148,691 for the trade-mark BUDDHA-BAR. Such application matured to registration on April 11, 2006 under registration number TMA662480. Therefore on October 11, 2006 the Opponent filed a request to amend its statement of opposition to allege that the Mark was not registrable under s. 12(1)(d) as it was confusing with the aforementioned registered trade-mark. The Applicant did not oppose such leave and by decision dated January 10, 2007 the Registrar granted permission to the Opponent to add that ground of opposition. The Registrar did specify that, if the Applicant wished to amend its

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counter statement, leave would have to be sought in accordance with rule 40 of the Trade-marks Regulations (“Regulations”). The Applicant did not file a request to amend its counter statement. Therefore the Applicant has not specifically denied this new ground of opposition.

[9] The Opponent argues that in the absence of a formal denial, this ground of opposition should be deemed admitted and thus the opposition should be maintained. This position was taken at the oral hearing, as the Opponent did not elaborate at length this argument in its written argument. Therein it simply alleged that it requested leave to amend its statement of opposition and leave was granted while the Applicant failed to amend its counter statement. During the oral hearing, the Opponent made reference to 3 different decisions of the Registrar to support its contention that the failure to deny a ground of opposition is fatal to the Applicant.

[10] The Applicant argued at the oral hearing that a reading of the counter statement clearly shows that it was denying, for various reasons to be discussed in this decision, that there was a likelihood of confusion between the Mark and the Opponent’s trade-marks, including the trade-mark BUDDHA-BAR. In fact the Applicant denied the ground of opposition based on s. 16(3)(b) which specifically made reference to the application that matured to registration. Therefore the Applicant should not be put in a position where its application would be rejected on the basis of an omission to file an amended counter statement to deny the additional ground of opposition based on s. 12(1)(d) of the Act. The new ground of opposition is a logical consequence to the registration of the Opponent’s trade-mark for which an application had already been filed and alleged in support of a ground of opposition but denied by the Applicant. I agree with the Applicant. The circumstances of this case are different from those described in the Opponent’s cited cases.

[11] In *Café Mozart Ltd. v. Spillopoulos* (1987), 17 C.P.R. 447 it was apparent that the Applicant failed to deny in its counter statement the ground of opposition based on the Opponent’s allegation that it had previously used and made known its trade-mark. In our case the Applicant has denied any likelihood of confusion with the Opponent’s trade-marks, including BUDDHA-BAR that was alleged under the grounds of entitlement and

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distinctiveness. In *Especialidades Luminotecnicas, S.A. v. Rambridge Structure & Design Ltd.* (2008), 69 C.P.R. (4th) 474 the Registrar concluded that the counter statement filed did not constitute a general denial of some or all the grounds of opposition since none of the grounds had been directly or indirectly denied. In our case the Applicant did, in its counter statement, deny any likelihood of confusion with the Opponent's trade-marks no matter the ground of opposition pleaded originally (entitlement or distinctiveness). Finally the Opponent relies on *Garbo Group Inc. v. Harriet Brown & Co.* (2009) 74 C.P.R. (4th) 391. In that case there was a ground of opposition added through an amended statement of opposition. However the new ground of opposition was not related to the other grounds originally pleaded. The opponent added that the mark applied for was not registrable under s. 12(1)(a) of the Act. Moreover the Registrar noted that the applicant did not file evidence, nor a written argument and was not present at the oral hearing, which obviously showed a lack of interest on the applicant's part.

[12] I conclude that, in view of the allegations contained in the counter statement, it is obvious that the Applicant is challenging the allegation that the Mark is likely to cause confusion with the Opponent's trade-marks cited in the statement of opposition originally filed, including BUDDHA-BAR which matured to registration subsequently. I wish to add that for the purpose of this ruling I disregarded the detailed legal arguments contained in the counter statement filed by the Applicant. The fact that the Applicant is denying any likelihood of confusion between the Mark and the Opponent's trade-marks was sufficient to support my decision on this issue.

V The First Ground of Opposition

[13] There is no evidence in the file that would support the allegation that the Applicant did use the Mark prior to the filing date of its application. As for the allegation that the Applicant never intended to use the Mark, the Opponent is relying on the fact that a first application to register the Mark was filed on June 27, 2000, application 1,064,928. Such application was abandoned on June 23, 2004 for failure by the Applicant to file a declaration of use as prescribed in s. 40(3) of the Act. Shortly thereafter the Applicant filed a new application, the

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present one, but as of this date the Applicant has not yet started to use the Mark in association with the Services and the Wares. From those facts, the Opponent would like me to infer that the Applicant never had the intention to use the Mark.

[14] I am not inclined to make such a conclusion. An intention not to use the trade-mark applied for must be clear. The failure to file a declaration of use might very well be an omission on the Applicant's part and thus it decided to file a new application. In fact the Applicant's President, Mr. Logothetis, did state in his affidavit that such failure was caused by an error and that the Applicant does have the intention to use the Mark (see par. 15 and 22 of his affidavit).

[15] The first ground of opposition is therefore dismissed.

VI Registrability of the Mark under s. 12(1)(d) of the Act

[16] The Opponent met its initial onus by filing a certified copy of registration TMA662480 for the trade-mark BUBBHA-BAR registered in association with inter alia restaurant services. I wish to point out that the Opponent has relied only on those services under this ground of opposition. In any event the wares covered by the Opponent's registration are unrelated to the Wares and Services. I shall therefore only take into consideration the Opponent's restaurant services in my analysis of this ground of opposition.

[17] I have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's registered trade-mark BUDDHA-BAR. The test to determine this issue is set out in s. 6(2) of the Act and I must take into consideration all the relevant surrounding circumstances, including those listed in s. 6(5): the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or in the ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [see *Clorox Co. v.*

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Sears Canada Inc. (1992), 41 C.P.R. (3d) 483 (F.C.T.D.) and *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)). I refer to the decision of the Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 where Mr. Justice Binnie commented on the assessment of the criteria enumerated under s. 6(5) of the Act to determine the likelihood of confusion.

[18] The Mark and the Opponent's registered trade-mark BUDDHA-BAR have the same degree of inherent distinctiveness. The first component is the same and the word "Buddha" has no suggestive meaning to the Wares and Services and the Opponent's services listed in the certificate of registration. However the addition of the words "bar" and "café" tends to suggest the type of services or wares offered or to be offered in association with those marks.

[19] The degree of distinctiveness of a trade-mark can be enhanced through use or the extent it has become known in Canada. There is no evidence of use of the Mark in Canada. A good portion of the Opponent's evidence is aimed at establishing that the trade-mark BUDDHA-BAR is known. The question is: does the evidence prove that the trade-mark BUDDHA-BAR is known in Canada? And if so, is it in association with the Opponent's services or some other wares? I shall review in detail the Opponent's evidence on this issue.

[20] Ms. Visan is the Opponent's president and General Manager as well as the manager of its subsidiary George V Records. She describes the Opponent's activities related to restaurant services in association with the trade-mark BUDDHA-BAR. She identifies four restaurants operated by the Opponent or its licensees, all located outside Canada namely in Paris, Beirut, Dubai and New York. She then provides samples of articles published in various magazines or newspapers that she claims circulated in Canada. No proof of the circulation of any of the magazines in which these articles were published has been provided. However I take judicial notice of the fact that the New York Times has some circulation in Canada [see *Northern Telecom Ltd. c. Nortel Communications Inc.*, (1987) 15 C.P.R. (3d) 540, *Milliken & Co. v. Keystones Industries (1970) Ltd.*, 12 C.P.R. (3d) 166, at 168 and *Carling O'Keefe Breweries of Canada Ltd. v. Anheuser-Busch, Inc.*, 4 C.P.R. (3d) 216, at 224)]. However it is not an advertisement to promote the Opponent's restaurant located in New York but an article on it.

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It cannot be considered as use of the Opponent's trade-mark in Canada within the meaning of s. 4(2) of the Act. Moreover, on the basis of a single article published in the New York Times, I cannot conclude that the Opponent's trade-mark BUDDHA-BAR is known in Canada in association with restaurant services.

[21] She then explains that the Opponent's subsidiary does offer for sale and sells under the trade-mark BUDDHA-BAR musical albums, the musical content reflecting the ambiance found in the Opponent's restaurants. She states that over 65,000 copies of these compact discs were sold in Canada between 2003 and 2006 and she provides the amount of money spent to promote them in Canada.

[22] From the evidence filed by the Opponent I conclude that the Opponent's trade-mark BUDDHA-BAR was known in Canada to a limited extent but only in association with musical albums and not restaurant services.

[23] There is no evidence of use in Canada of the Opponent's trade-mark BUDDHA-BAR in association with restaurant services. The application that led to the registration of the Opponent's trade-mark BUDDHA-BAR was filed on the basis of use and registration abroad. Therefore I cannot infer that there has been any use of the trade-mark in Canada. This factor does not favour either of the parties.

[24] As for the nature of the parties' respective services and their channels of trade, I have to compare the Services as defined in the application with the services listed in the Opponent's certificate of registration [see *Sears Canada v. K.C. Masterpiece Products Inc.* (1990), 3 C.P.R. (3d) 489]. The Applicant put a lot of emphasis on the fact that the evidence shows that the Opponent operates an upscale Orient type of restaurant while Mr. Logothetis explains in his affidavit that the Applicant is operating cafés and coffee shops under various trade-marks. He filed a sample of a menu bearing the trade-mark BRÛLERIE ST-DENIS to support its contention that the Services would differ from those offered in the restaurants operated by the Opponent. The menu shows that the Applicant offers at its coffee shops operated under the trade-mark BRÛLERIE ST. DENIS various sandwiches, salads, soups, coffee and deserts at

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a price that is less than \$10 per item. Therefore, according to the Applicant, there would exist a difference in the nature of the parties' services and their channels of trade.

[25] As mentioned previously I must compare the Services and the Wares with the services covered by the Opponent's certificate of registration. There is no restriction in the application that would limit the Services to those being offered in association with the trade-mark BRÛLERIE ST-DENIS. This factor as well as the channels of trade favour the Opponent only in so far as the Services are concerned. I do not see any overlap between the Wares and the Opponent's services.

[26] With respect to the degree of resemblance, Mr. Justice Cattanach declared in *Beverly Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2d) 145, conf. 60 C.P.R. (2d) 70:

“Realistically appraised it is the degree of resemblance between the trade-marks in appearance, sound or in ideas suggested by them that is the most crucial factor, in most instances, and is the dominant factor and other factors play a subservient role in the over-all surrounding circumstances.”

[27] The marks in issue resemble one another phonetically and visually primarily because the first portion of each mark is identical. The first component of a trade-mark is often considered more important for the purpose of distinction [see *Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183; *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413; *Phantom Industries Inc. v. Sara Lee Corp.* (2000), 8 C.P.R. (4th) 109]. In this instance the first component is the distinctive term “Buddha”. However the Applicant is arguing that the second portion is different visually, in sound and the ideas suggested.

[28] The Opponent has introduced as reply evidence the affidavit of Claire Cébron, a student-at-law working for the Opponent's agent firm. Through her affidavit the Opponent is introducing various dictionaries' definitions for the words “bar” and “café”.

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[29] In the French dictionary Le Petit Larousse the word “bar” is defined as “Débit de boisson où l’on consomme debout, ou assis sur de hauts tabourets” while the word “café” is defined as “lieu public où l’on consomme des boissons”. There is some resemblance in the meaning of those words as they both refer to a location where beverages are served. Therefore the Mark does resemble phonetically, visually and in the ideas suggested the Opponent’s trade-mark BUDDHA-BAR. I wish to add that, even if this evidence would not be considered proper reply evidence I could use my discretion to consult dictionaries to verify the meaning of words. The end result would be the same.

[30] As additional relevant circumstances, the Applicant is raising two issues: the state of the register and the withdrawal of an opposition filed by the Opponent to an application previously filed by the Applicant for the identical trade-mark covering the same wares and services.

[31] Micheal Stern has been an associate at the Applicant’s agent firm. He was requested to perform a search of the register to locate active trade-mark applications and registrations containing the element “Buddha” without restrictions to any particular wares or services. He lists 16 citations. Only 7 of them are relevant as they cover restaurant services or the like and are owned by 5 different entities:

Trade-mark	Appl/reg number	Owner	Services
Smilin’ Buddha Cabaret	TMA480888	Robert RavinderPaul, Jir	Restaurant
Smilin’ Buddha Cabaret & Design	TMA482008	Robert RavinderPaul, Jir	Restaurant
Buddha Dog	1,316,554	Buddha Foodha Inc.	Take-out food
Buddha (man fanciful design)	1,316,751	Buddha Foodha Inc.	Take-out food
Sitting Buddha design	TMA434,872	Sara Lee, Inc.	Spices
Bodai design	TMA434,872	Bodhi Restaurant Vegetarian Restaurant Ltd	Restaurant
Budda Boom Budda Bing	TMA493,371	Prime Restaurant Licensing Inc.	Restaurant

[32] It has been ruled that if the state of the register evidence discloses a great number of trade-marks with a common element in a particular industry, it can be inferred that some of

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them are being used in Canada and as such the Canadian consumer would be able to distinguish them [See *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 and *T. Eaton Co. v. Viking GmbH & Co.* (1998), 86 C.P.R. (3d) 382]. The number of relevant citations in this case is insufficient to infer such conclusion.

[33] There remains the content of Cheryl Goldman's affidavit. She has been an articling student with the Applicant's agent firm. She conducted a search on the Internet using Google and Yahoo search engines to locate web sites using the term "Buddha". She also tried to locate web sites wherein the trade-marks listed in Micheal Stern's affidavit would appear. I presume that the Applicant through such evidence is trying to establish that those marks are in use in Canada. The fact that a trade-mark appears on a web page does not necessarily mean that it is being used in Canada in association with services. Out of the 7 citations listed above, I was able to locate Buddha (man fanciful design), application number 1316751, on exhibit E to Ms. Goldman's affidavit but there is only an illustration of the trade-mark and no text to provide us with information on the nature of the services being offered in Canada in association with such trade-mark. Finally there are only two other relevant citations: Buddha's Veggie Restaurant (exhibit I to Ms. Goldman's affidavit) and Smiling Buddha Bar (exhibit P to Ms. Goldman's affidavit).

[34] She also conducted a search on the web site of the Yellow Pages. She claims to have located 10 citations wherein "Buddha" is a component of the trade-name or trade-mark used in association with restaurant services. There is no evidence that those restaurants are in operation and there are only a couple of them that seems to be the same as those found on the register.

[35] Even if I was to consider such evidence as proper evidence of use of those trade-marks or trade-names in Canada, the number of relevant citations on the register and what was located through Internet searches do not enable me to infer that there are numerous restaurants in Canada operating under a trade-mark or trade-name that comprises the word "Buddha" such that Canadian consumers would be used to see that common feature and thus would be able to distinguish them.

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[36] As for the withdrawal of the Opponent's opposition to the registration of the identical trade-mark in application 1064928 filed by the Applicant, I do not consider such act to be an admission against interest on the part of the Opponent in this file. We have no information on the grounds of opposition raised by the Opponent in the other file. In any event the withdrawal occurred before any evidence was filed. We cannot speculate on the reasons as to why the Opponent withdrew its opposition.

[37] From this analysis I conclude that the Applicant has not discharged its burden to prove, on a balance of probabilities, that there would be no likelihood of confusion between the Mark and the Opponent's registered trade-mark BUDDHA-BAR in so far as the Services are concerned. My conclusion is based on the fact that the Services are identical to those covered by certificate of registration TMA662480; the channels of trade would be the same and there is a degree of resemblance between the marks in issue. With respect to the Wares, I conclude in favour of the Applicant as the dissimilarity between the Wares and the Opponent's services is sufficient to negate any likelihood of confusion.

[38] I therefore maintain in part the third ground of opposition only with respect to the Services and dismiss this ground in so far as the Wares are concerned.

VII Entitlement under s. 16(3)(a) of the Act

[39] As described previously, there is evidence of use of the trade-mark BUDDHA-BAR in Canada in association with compact discs. There is no evidence of use of the trade-mark BUDDHA-BAR in association with the services listed under the fourth ground of opposition, namely: entertainment services, production and musical editing, discotheque services, impresario services, sound recording rental, production of radio and television programs, band services, production of shows and the services of recording studio. Therefore the Opponent met its initial onus by proving prior use of its trade-mark BUDDHA BAR in Canada in association with compact discs.

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[40] I have to assess the criteria listed in s. 6(5) of the Act to determine if the Mark would likely cause confusion with the Opponent's trade-mark BUDDHA-BAR.

[41] My analysis would be similar to the one I did under the registrability of the Mark save and except for these important differences. In so far as the nature of the Wares and Services compared to the Opponent's wares (compact discs) there is no overlapping. In her affidavit Ms. Visan does state that the music on the compact discs is the type of music played in the restaurants operated under the trade-mark BUDDHA-BAR, and as such there is an association between the Opponent's restaurant services and the compact discs. There is no evidence of use of the trade-mark BUDDHA-BAR in Canada in association with restaurant services. I already ruled that the evidence filed does not enable me to conclude that BUDDHA-BAR is known in Canada in association with restaurant services. Therefore I fail to see how an average Canadian consumer would make such association. Ms. Visan refers in her affidavit to a Brazilian airline magazine advertising duty-free products including the Opponent's compact discs wherein there is reference to the Opponent's restaurants operated under the same trade-mark. There is no evidence that such magazine ever circulated in Canada or has been read by Canadians.

[42] The difference in the nature of the parties' respective wares and services is sufficient to conclude that there would be no likelihood of confusion between the Mark and the Opponent's trade-mark BUDDHA-BAR used in association with compact discs. The fourth ground of opposition is dismissed.

VIII Entitlement under s. 16(3)(b) of the Act

[43] Ms. Visan filed an extract of the Canadian database Strategis containing information on application 1,148,691 for the trade-mark BUDDHA-BAR. The application was filed on August 1, 2002 and was still pending when the present application was advertised (November 23, 2005). It covers restaurant services. As such the Opponent has met its initial onus. Therefore the Opponent has to prove, on a balance of probabilities that the Mark would not likely cause confusion with the Opponent's trade-mark.

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[44] I have already done such analysis under the ground of registrability and the difference in the relevant dates would not change my conclusion, Therefore for the same reasons detailed under the ground of registrability I maintain in part the fifth ground of opposition, namely only in so far as the Services are concerned.

IX The remaining grounds of opposition

[45] The Opponent did not adduce any evidence to support the grounds of opposition 6 ii) and 6 iii) described above in paragraph 5. Therefore they are dismissed for failure by the Opponent to meet its initial onus.

[46] Assuming that the second ground of opposition is properly pleaded, the main issue would still be the determination of a likelihood of confusion between the Mark and the Opponent's trade-mark BUDDHA-BAR. I presume that the Opponent is referring to its prior use of the trade-mark BUDDHA-BAR in association with compact discs in Canada and its prior application 1148691 to register that trade-mark when it refers to its prior rights since its registration was obtained after the relevant date. In any event those are the only prior rights it has established in the file. My conclusions would be the same under this ground of opposition as those reached under s. 16(3)(a) and s. 16(3)(b).

[47] Finally, with respect to the first portion of the ground of opposition under distinctiveness, the Opponent has only established prior use and making known of its trade-mark BUDDHA-BAR in Canada in association with compact discs. For the reasons outlined under the ground of opposition based on s. 16(3)(a), I would also dismiss this ground of opposition.

X Conclusion

[48] The Applicant failed to discharge its burden to prove, on a balance of probabilities, that the Mark is not likely to cause confusion with the Opponent's trade-mark BUDDHA-BAR when used in association with the operation of restaurants, cafes and coffee shops.

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[49] Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, and applying the principles enunciated in the case of *Produits Ménagers Coronet Inc. v. Coronet Werke Heinrich Scherf GmbH* 10 C.P.R. (3d) 482, I refuse, pursuant to s. 38(8) of the Act, the Applicant's application for the registration of the Mark, in association with the operation of restaurants, cafes and coffee shops and reject the opposition for the following wares: food wares, namely coffee, tea and spices:

DATED, IN BOUCHERVILLE, QUEBEC, THIS 16th DAY OF DECEMBER 2009.

Jean Carrière,
Member, Trade-marks Opposition Board