



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

Citation: 2010 TMOB 132
Date of Decision: 2010-08-26

**IN THE MATTER OF AN OPPOSITION
by Leon's Furniture Limited to
application No. 1304316 for the trade-
mark PAY NOOO MONEY EVENT in
the name of Bad Boy Furniture
Warehouse Limited**

[1] On June 6, 2006, Bad Boy Furniture Warehouse Limited (the Applicant), filed an application to register the trade-mark PAY NOOO MONEY EVENT. The application is based upon proposed use in Canada, in association with the following services, as revised: "Operation of retail outlets for the sale of furniture and appliances, electronics, carpets, broadlooms and rugs and the installation thereof, window coverings."

[2] The application was advertised for opposition purposes in the Trade-marks Journal of January 10, 2007. On January 26, 2007, Leon's Furniture Limited (the Opponent) filed a statement of opposition, which was later revised. The grounds of opposition may be summarized as follows:

- The Mark is not registrable pursuant to s. 12(1)(d) of the *Trade-marks Act*, R.S.C. (1985), c. T-13 [the Act], because it is confusing with the Opponent's trade-marks DON'T PAY A CENT EVENT, registration No. TMA293,916 and NO MONEY MIRACLE, registration No. TMA319,107.
- The Applicant is not the person entitled to the application pursuant to s. 16(3)(a) because, at the date of filing of the application, the Applicant's mark was confusing with the two

aforementioned marks that had been used and made known in Canada by the Opponent in association with the services of operating a retail store supplying to the public furnishings and articles for the home, since at least as early as November, 1983 and July, 1985, respectively.

- The Mark is not distinctive because it is confusing with the Opponent's aforementioned registered trade-marks, which trade-marks have been registered, used and made known in Canada by the Opponent in association with the operation of a retail store supplying to the public furnishings and articles for the home, since prior to the Applicant's filing date of June 6, 2006.
- The Application does not comply with the requirements of Section 30 of the Act in that the Applicant was aware of the Opponent's aforementioned marks when it filed its application for essentially the same services and therefore could not have been satisfied that it was entitled to use the Mark in association with the services described in the application.

[3] The Applicant filed and served a counter statement in which it denied each of the above noted grounds of opposition.

[4] In support of its opposition, the Opponent filed the affidavit of Robert James McNally. The Applicant filed the affidavit of Tony Balasingham. Neither affiant was cross-examined.

[5] Both parties filed a written argument. An oral hearing was held at which both parties were represented.

Onus and Material Dates

[6] 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 C.P.R. (3d) 293 (F.C.T.D.) at 298].

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

- s. 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 C.P.R. (3d) 413 (F.C.A.)];
- s. 16(3) - the applicant's date of filing [see s. 16(3)];
- non-distinctiveness - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)];
- s. 30 - the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.) at 475].

Opponent's Evidence

[8] Mr. MacNelly is Vice President of Marketing of the Opponent and his affidavit discusses the Opponent's business in general and establishes the extent and nature of use of the trade-marks NO MONEY MIRACLE and DON'T PAY A CENT EVENT by the Opponent. Mr. MacNelly states that the Opponent has operated retail furniture outlets in Canada since at least as early as 1909, and currently has 63 retail outlets across Canada.

[9] The Opponent's trade-marks have been used with retail furniture store services in association with sales programs, whereby a consumer can purchase furniture and defer payment. The DON'T PAY A CENT EVENT trade-mark has been used by the Opponent since 1983 and the NO MONEY MIRACLE trade-mark has been used since 1985. Since 2000, more than 1.3 million customers have used each of the Opponent's sales programs to make purchases at the Opponent's furniture stores.

[10] The Opponent has spent over \$32 million in promoting these sales programs since 2000. The Opponent primarily promotes these sales programs in flyers and advertisements placed in local newspapers and Mr. MacNelly attaches examples of such advertisements to his affidavit. In all of the exhibits attached to his affidavit, the marks appear in association with the house mark "LEON'S", e.g. LEON'S DON'T PAY A CENT EVENT. The Opponent has also advertised its marks on radio and television stations that broadcast across Canada, and also on the Opponent's website in 2006 and 2007.

Applicant's Evidence

[11] Mr. Balasingham identifies himself as the President of the Applicant, a furniture, appliance and electronics retailer with eight retail stores located in Scarborough, North York, Whitby, Mississauga, Barrie, Burlington, London and Kitchener. His affidavit discusses the Applicant's business in general, and specifically its use of the Mark and other trade-marks including: NOOOBODY, NOBODY'S BETTER...NOOOBODY!, NOBODY'S BETTER THAN BAD BOY...NOOOBODY!

[12] Mr. Balasingham states that for at least 18 years, nearly all of the Applicant's advertising has carried one or more of the Applicant's NOOOBODY trade-marks. One or more of these marks are displayed on each of the Applicant's stores, price tags on merchandise, business cards of the sales staff, point of sale materials and other signage in the store. Every piece of the Applicant's advertising displays one or more of the marks, and the audio component of every television and radio advertisement announces one or more of the marks. When pronounced, the first syllable of the word "nobody" is emphasized and elongated in a manner that the spelling of NOOOBODY evokes. Between 2000 and 2007, the Applicant spent between \$3.1 and \$5.3 million in advertising. Representative samples of newspaper inserts and flyers, as well as samples of radio and television advertisements are attached to Mr. Balasingham's affidavit. Total sales from the Applicant's stores in Ontario have been between \$42 million in 2000 and \$52 million in 2007.

[13] Mr. Balasingham explains that the Applicant initiated its PAY NOOO MONEY EVENT in 2006. The Mark was chosen to be instantly recognizable by customers as originating from Bad Boy, because of the elongated NOOO element.

[14] The Mark is used in association with a deferred payment purchase promotion that allows a customer to purchase furniture and/or appliances and defer payment for an extended length of time. He explains that deferred payment plans are very common in his business. Since 2006, the Applicant has spent in excess of \$1M to promote its PAY NOOO MONEY EVENT sales program through brochures, in flyers, on billboards, in newspapers and in radio and television advertisements. Attached to his affidavit are representative samples of each form of promotion.

He states that 40 million flyers have been distributed in Canada since 2006, and 112 million advertisements have appeared in a various newspapers that were distributed to Canadians.

[15] Since its introduction in 2006, sales of furniture and appliances in association with the Mark were in excess of \$3.2 million at the date of his affidavit.

Preliminary Issue

[16] At paragraphs 33, and 38-45 of his affidavit, Mr. Balasingham opines that as a result of the Applicant's strong reputation and goodwill in Canada in association with its NOOOBODY trade-marks, the use of PAY NOOO MONEY EVENT would be associated with the Applicant because of the extended NOOO aspect of the Mark. He also provides his opinion with respect to the absence of confusion between the Opponent's marks and the Applicant's mark. I do not afford much weight to Mr. Balasingham's opinions as in addition to being self-serving, his statements relate to issues of law to be decided by the Registrar. I have also disregarded those statements in his affidavit that are more in the nature of argument and conclusions of law rather than statements of fact or expert opinion.

Section 30(i) Ground of Opposition

[17] Where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. As this is not such an exceptional case as there is no evidence of bad faith, I am dismissing this ground of opposition.

Section 12(1)(d) Ground of Opposition

[18] The Opponent pleads that the Mark is not registrable because it is confusing with the Opponent's registered trade-marks DON'T PAY A CENT EVENT, registration No. TMA293,916 and the mark NO MONEY MIRACLE, registration No. 1,304,316, which are registered for the services of operating a retail store supplying to the public furnishings and articles for the home. The Opponent's initial burden with respect to the s. 12(1)(d) ground has

been satisfied because, as shown by Exhibits A and B to the MacNelly Affidavit, registration nos. TMA293,916 and TMA319,107 are both in good standing.

[19] 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 wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act.

[20] In *Polo Ralph Lauren, L.P. v. United States Polo Assn.* (2000), 9 C.P.R. (4th) 51 (F.C.A.) at 58-59, Malone J.A. summarized the guidelines to be applied when assessing the likelihood of confusion as follows:

A review of some of the leading cases also establishes some practical guidelines. For example, the Court is to put itself in the position of an average person who is familiar with the earlier mark but has an imperfect recollection of it; the question is whether the ordinary consumer will, on seeing the later mark, infer as a matter of first impression that the wares with which the second mark is used are in some way associated with the wares of the earlier. With respect to the degree of resemblance in appearance, sound or ideas under subparagraph 6(5)(e), the trade-marks at issue must be considered in their totality. As well, since it is the combination of elements that constitutes a trade-mark and gives distinctiveness to it, it is not correct to lay the trade-marks side by side and compare and observe similarities or differences among the elements or components of the marks when applying the test for confusion. In addition, trade-marks must not be considered in isolation but in association with the wares or services with which they are used. When dealing with famous or well-known marks, it may be more difficult to demonstrate that there is no likelihood of confusion, especially if the nature of the wares are similar. Lastly, the enumerated factors in subsection 6(5) need not be attributed equal weight. Each particular case of confusion might justify greater emphasis being given to one criterion than to others.

In the recent Supreme Court of Canada decision in *Mattel, Inc. v. 3894207 Canada Inc.*, 2006 SCC 22, 49 C.P.R. (4th) 321 at 348, Mr. Justice Binnie elaborated on the consumer in question as follows:

A consumer does not of course approach every purchasing decision with the same attention, or lack of it. When buying a car or a refrigerator, more care will naturally be taken than when buying a doll or a mid-priced meal: *General Motors Corp. v. Bellows*, [1949] S.C.R. 678. In the case of buying ordinary run-of-the-mill consumer wares and services, this mythical consumer, though of average intelligence, is generally running behind schedule and has more money to spend than time to pay a lot of attention to details. In appropriate markets, such a person is assumed to be functionally bilingual: *Four Seasons Hotels Ltd. v. Four Seasons Television Network Inc.* (1992), 43 C.P.R. (3d) 139 (T.M.O.B.). To those mythical consumers, the existence of trade-marks or brands make shopping decisions faster and easier. The law recognizes that at the time the new trademark catches their eye, they will have only a general and not very precise recollection of the earlier trade-mark, famous though it may be or, as stated in *Coca-Cola of Canada Ltd. v. Pepsi-Cola Co. of Canada Ltd.*, [1942] 2 D.L.R. 657 (P.C.), "as it would be remembered by persons possessed of an average memory with its usual imperfections" (p. 661). The standard is not that of people "who never notice anything" but of persons who take no more than "ordinary care to observe that which is staring them in the face": *Coombe v. Mendit Ld.* (1913), 30 R.P.C. 709 (Ch. D.), at 717. However, if ordinary casual consumers somewhat in a hurry are likely to be deceived about the origin of the wares or services, then the statutory test is met.

Analysis of s. 6(5) factors

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

[21] All three marks are highly suggestive of a deferred payment plan. They therefore do not possess much inherent distinctiveness as applied to the services. The Mark is more inherently distinctive than the Opponent's marks because of the unique spelling of the word "NO" which results in an elongated pronunciation of that word.

[22] With respect to the extent to which the marks have become known, the Opponent has shown extensive advertising and use of both of its registered marks. However, in view that the trade-marks always appear in association with the house mark LEON'S, I agree with the Applicant that the manner of use and advertising by the Opponent of its trade-marks diminishes the measure of reputation that the Opponent can claim in its marks [see *Simmons I.P. Inc. v. Regal Bedding 1977 Ltd.* (1992), 42 C.P.R. (3d) 89 (T.M.O.B.) and *Simmons I.P. Inc. v. Park Avenue Furniture Corp.* (1996), 74 C.P.R. (3d) 404 (T.M.O.B.)]. I therefore respectfully

disagree with the Opponent that each of its marks is a well known mark entitled to a wide scope of protection.

[23] Similarly, as the Applicant has admitted that all use of the Mark has been in association with the Applicant's house mark BAD BOY, the reputation which would accrue to the Mark on its own is also minimized. This factor therefore does not favour either party as neither party's mark has acquired much reputation *on its own* (i.e. without its house mark) in Canada.

s. 6(5)(b) – the length of time the trade-marks have been in use

[24] In view that the Opponent's marks have been in use since 1983 and 1985 respectively, and the Applicant only commenced use of its mark in 2006, this factor favours the Opponent.

s. 6(5)(c) and (d) – the nature of the services or business and the nature of the trade

[25] As for the services and trades of the parties, it is the Applicant's statement of services and the Opponent's statement of services in registration Nos. TMA293,916 and TMA319,107 that govern: see *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.) at 10-11, *Henkel Kommanditgesellschaft Auf Aktien v. Super Dragon Import Export Inc.* (1986), 12 C.P.R. (3d) 110 (F.C.A.) at 112, and *Miss Universe, Inc. v. Bohna* (1994), 58 C.P.R. (3d) 381 (F.C.A.) at 390-392. However, 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. In this regard, evidence of the actual trades of the parties is useful: see the decision in *McDonald's Corp. v. Coffee Hut Stores Ltd.* (1996), 68 C.P.R. (3d) 168 (F.C.A.) at 169.

[26] The Applicant submits that the nature of the business in which the parties' marks are used is such that no confusion is likely. In this regard, the Applicant submits that in order to purchase a product from the Applicant, the consumer must attend at the Applicant's BAD BOY retail outlet in person. Once inside the store, the consumer would see the BAD BOY and NOOOBODY trade-marks everywhere. It would therefore not be reasonable to propose that the consumer would attend the Applicant's store and believe that he or she is at Leon's or at a store sponsored, endorsed or associated with Leon's in some way. The Applicant further submits that

since the Opponent only uses its marks in association with the LEON'S trade-mark, customers will immediately appreciate that the DON'T PAY A CENT EVENT and NO MONEY MIRACLE promotions originate from Leon's.

[27] The Opponent, on the other hand, submits that the services, the prospective customers and the nature of the business and channels of trade of the two parties are identical. The Opponent emphasizes that the applied for services are not limited to services offered at BAD BOY stores.

[28] In my view, having regard to the strong association between the services associated with each mark and their house brand, it is unlikely that the services would be offered for sale in the same stores. However, while that may indeed presently be the case, the manner in which the parties are currently carrying on business is not determinative of the channels of trade when considering the issue of the likelihood of confusion in respect of a s. 12(1)(d) ground of opposition. As previously noted, in an opposition proceeding the Registrar must have regard to the respective services covered in the present application and in the Opponent's registrations as these statements of services determine the scope of the monopoly of the Opponent in respect of its registered trade-marks or being sought by the Applicant in relation to its Mark.

[29] While both parties may presently be offering their respective services in retail outlets branded by their trade-names, neither the Applicant's application nor the Opponent's registrations are restricted in this regard. In other words, nothing prevents either party from offering their respective services in the future in retail outlets without their respective house marks. Therefore, in view that the services covered in the present application and the Opponent's registrations are more or less identical, I must consider that the channels of trade of the parties for these services could potentially overlap.

s. 6(5)(e) – the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them

[30] With respect to the degree of resemblance between the marks, the marks must be considered in their totality; it is not correct to lay the trade-marks side by side and compare and observe similarities or differences among the elements or components of the marks.

Nevertheless, the first component of a mark is often considered more important for the purpose of distinction [*Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183 (F.C.T.D.) and *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.)]. Also, when a word is a common, descriptive word, it is entitled to a narrower range of protection than an invented or unique word [*Laurentide Chemicals Inc. v. Les Marchands Deco Inc.* (1985), 7 C.P.R. (3d) 357 (F.C.T.D.) at 365].

[31] In the present case, and as previously noted, the ideas suggested by the Opponent's DON'T PAY A CENT EVENT and the Applicant's PAY NOOO MONEY EVENT are similar. There are significant differences, however, between the marks in appearance and sound. The only common components of the marks are the words PAY and EVENT, and neither of these words are dominant components of the marks as a whole. In my view, the dominant portion of the Applicant's mark is the word NOOO.

[32] There is also some similarity in ideas suggested between the Opponent's NO MONEY MIRACLE mark and the Mark as both suggest an event where money is not required. There is very little similarity, however, between the marks in appearance or sound. In this regard, the only common component shared by both marks is the word MONEY. While the Applicant's NOOO is a variation of the word NO that also appears in the Opponent's mark, it is different in appearance and sound because of its unique spelling.

Surrounding Circumstances

Family of Trade-marks

[33] As a surrounding circumstance with respect to the issue of confusion, the Applicant has relied upon the adoption and use of an alleged family of NOOO formative trade-marks. The Applicant submits that since it has established the existence of a family of NOOO marks for similar services, it follows that consumers would be more likely to assume that a new mark with the same prefix for similar services belongs to the Applicant as opposed to the Opponent.

[34] It is true that when trade-marks that have a common component or characteristic are all registered in the name of one owner, this gives rise to the presumption that these marks form a

family of marks used by the one owner [see *McDonald's Corp. v. Alberto-Culver Co.* (1995), 61 C.P.R. (3d) 382 (T.M.O.B.); *McDonald's Corp. v. Yogi Yogurt Ltd.* (1982), 66 C.P.R. (2d) 101 (F.C.T.D.)]. In the present case, the Applicant has shown use of the marks NOOOBODY, NOOOBODY'S BETTER... NOOOBODY! NOOOBODY'S BETTER THAN BAD BOY, NOOOBODY!, and NOOOBODY'S BETTER THAN BAD BOY & Design in the marketplace. The common component of each of these marks is the word "NOOOBODY". Since the Mark does not contain the word NOOOBODY, I agree with the Opponent that it cannot be considered part of this family of trade-marks. I am therefore not convinced that the existence of the Applicant's family of NOOOBODY marks is a particularly relevant factor with respect to the issue of confusion in this opposition. Had the Applicant established a family of NOOO marks, I may have found differently.

Absence of evidence of actual confusion

[35] Another surrounding circumstance to be considered may be the lack of confusion despite more than two years of alleged co-existence. Mr. Balasingham attests in his affidavit that the Applicant has not received any inquiries from any member of the public that would indicate any confusion between the deferred payment plans of the Opponent and the Applicant.

[36] It is of course not necessary for the Opponent to evidence confusion in order for me to find that there is a likelihood of confusion. Nevertheless, an absence of confusion over a relevant period of time may entitle one to draw a negative inference about the likelihood of confusion [see *Monsport Inc. v. Vetements de Sport Bonnie (1978) Lteé* (1988), 22 C.P.R. (3d) 356 (F.C.T.D.), *Mercedes-Benz A.G. v. Autostock Inc. (formerly Groupe T.C.G. (Québec) Inc.)*, 69 C.P.R. (3d) 518 (T.M.O.B.)].

[37] In the present case, the marks have only co-existed for a relatively short period of time, especially given that the deferred payment programs offered in association with each party's mark appear to have only been offered at certain times during the year. Having said that, in view of the extensive sales and advertising of the Applicant's mark, and the fact that both parties have carried on business concurrently in Southern Ontario, I am prepared to accord at least some weight to this surrounding circumstance.

The combination of both of the Opponent's marks

[38] For the first time at the oral hearing, the Opponent argued that a further relevant surrounding circumstance in the present case is that the Mark is a combination of both of the Opponent's marks and this enhances the degree of resemblance between the Applicant's mark and each of the Opponent's marks. The Opponent argues that since each of its trade-marks have been used continuously and extensively in Canada by the Opponent for many years in association with a deferred payment program, the average consumer is accustomed with the Opponent's trade-marks. As a result, on seeing the Applicant's trade-mark, the average consumer with imperfect recollection will logically assume that it is a new mark introduced by the Opponent which simply combines elements from its well established trade-marks.

[39] There are several cases wherein the fact that an opponent employed two marks, each comprising one half of an Applicant's mark, was treated as a significant surrounding circumstance [see *Mini Togs Inc. v. Sierbruck Hosiery Ltd.* (2000), 7 C.P.R. (4th) 153 (T.M.O.B.); *Truefoam Ltd. v. Nova Perma Coating Ltd.* (1984), 2 C.P.R. (3d) 128 (T.M.O.B.) *Dataline Inc. v. Dyonix Greentree Technologies Inc.* (1989), 24 C.P.R. (3d) 378 (T.M.O.B.); *Data Accessories Corp. v. Dainolite Ltd.* (1993), 51 C.P.R. (3d) 538 (T.M.O.B.)]. The present case can be distinguished from the above cases, however, on the basis that the Opponent's marks in the present case do not each comprise one half of the Applicant's mark. Rather, the Opponent is attempting to rely on non-distinctive components of each of its marks to suggest that consumers would view the Applicant's mark as a new mark of the Opponent. As the Opponent has not shown an acquired reputation in association with the individual words "PAY", "NO", "MONEY" or "EVENT", and as I would consider these marks to be words that are common to the trade, I do not consider this argument a relevant surrounding circumstance in the present case.

Conclusion re likelihood of confusion

[40] In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. Having considered all of the surrounding circumstances, I find that there is not a reasonable likelihood of confusion between the parties' marks. The most crucial or dominant factor in determining the issue of confusion is the degree of resemblance between the

trade-marks and the marked differences between the marks in the present case make confusion unlikely, regardless of whatever reputation the Opponent can claim in its marks [See *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2d) 145 (F.C.T.D.) at 149, affirmed 60 C.P.R. (2d) 70.] Accordingly, the s. 12(1)(d) ground of opposition is unsuccessful.

[41] The following words of Mr. Justice Cattanach in *Questor Commercial Inc. v. Discover Services Ltd.* (1979), 46 C.P.R. (2d) 58 (F.C.T.D.) at p. 62, apply well to the case at hand:

For the appellant's mark to be confusing with the respondent's the respondent cannot rely on the common feature to both it and the appellant and to other traders but must rely on something peculiar to the respondent which the appellant has adopted. This has not been done by the appellant from which it follows that the appellant's trade mark is not confusing with the respondent's registered mark.

Remaining Grounds of Opposition

[42] The Opponent has pleaded two other grounds that turn on the likelihood of confusion between the applied-for mark and the above-mentioned marks of the Opponent. As noted above, the material dates with respect to these grounds of opposition are as follows: entitlement under section 16 - the filing date of the Applicant's application; non-distinctiveness - the date of filing of the opposition [see *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 412 at 424 (F.C.A.)].

[43] The Applicant had not shown use of the Mark as of either of the material dates for these grounds. Therefore the fact that there would have been no evidence of actual confusion would not have been a relevant surrounding circumstance under those grounds. The remainder of my conclusions under the s. 12(1)(d) ground, however, still applies to these grounds of opposition. Therefore, for reasons similar to those set out with respect to the registrability ground of opposition, the non-entitlement and distinctiveness grounds of opposition fail.

Disposition

[44] Pursuant to the authority delegated to me under s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

Cindy R. Folz

Member, Trade-marks Opposition Board

Canadian Intellectual Property Office