



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

**Citation: 2015 TMOB 172**  
**Date of Decision: 2015-09-28**

**IN THE MATTER OF AN OPPOSITION**

<b>Spray Fresh Ltd.</b>	<b>Opponent</b>
<b>and</b>	
<b>Fresh Start Odour Treatment Inc.</b>	<b>Applicant</b>
<b>1,553,432 for Fresh Start Odour Treatment</b>	<b>Application</b>

[1] On November 23, 2011, Duane King filed application No. 1,553,432 to register the trade-mark Fresh Start Odour Treatment (the Mark). The Mark was subsequently assigned to the current applicant, Fresh Start Odour Treatment Inc. (the Applicant).

[2] The application is based upon use of the Mark in Canada since at least as early as August, 2011 in association with the following goods and services:

- (1) Odour neutralizing preparations for enclosed areas. (the Goods)
- (1) Odour neutralization services for enclosed areas.
- (2) Retail and wholesale sales of odour neutralizing preparations and products for enclosed areas. (the Services)

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of May 1<sup>st</sup>, 2013. Spray Fresh Ltd. (the Opponent) opposed the application under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) by filing a statement of opposition on

June 20, 2013. The grounds of opposition are based upon sections 30(a), 30(i), 16(1)(a), 16(1)(b) and 2 of the Act.

[4] Only the Opponent filed evidence by way of an affidavit of its Director, Grigg Kellock, sworn June 2, 2014. Both parties filed written arguments. No hearing was held.

[5] For the reasons that follow, the application ought to be refused.

The parties' respective burden or onus

[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 evidentiary 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 Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); and *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

Grounds of opposition that can be summarily dismissed

Ground of opposition based on non-compliance with section 30(i) of the Act

[7] The section 30(i) ground alleges that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada as the Applicant knew or ought to have known of the Opponent's use and notoriety of its trade-mark OT ODOR TREATMENT & DESIGN (reproduced below) in association with the following goods and services:

Spray-on deodorizers, liquid deodorizers and air deodorizer refills for use on sports equipment, sports bags, sportswear, and sports footwear.

Retail store services featuring spray-on deodorizers, liquid deodorizers, and air deodorizer refills for use on sports equipment, sports bags, sportswear, and sports footwear; and online retail store services featuring spray-on deodorizers, liquid deodorizers and air deodorizer refills for use on sports equipment, sports bags, sportswear, and sports footwear.



[8] 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 on the part of the applicant [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. As the application includes the required statement and there is no allegation or evidence of bad faith or other exceptional circumstances, this ground is dismissed.

Ground of opposition based on non-entitlement under section 16(1)(b) of the Act

[9] The section 16(1)(b) ground alleges that the Applicant is not the person entitled to registration of the Mark in that, at the date on which the Applicant filed its trade-mark application, the Mark was confusing with the Opponent's trade-mark OT ODOR TREATMENT & DESIGN in respect of which an application for registration had been previously filed in Canada on January 29, 2013.

[10] The application relied upon by the Opponent (the particulars of which are attached as Exhibit "B" to the Kellock affidavit) having been filed on January 29, 2013, that is *after the date of first use* claimed in the Applicant's application for the Mark, cannot form the basis of a section 16(1)(b) ground of opposition. Accordingly, this ground is dismissed.

[11] I shall note that in its written argument, the Opponent refers to the section 16(1)(b) ground of opposition as having pled that it is the owner of a previously filed application for the trade-mark MAGIC FRESH ODOR REDUCING CARPET NEUTRALISATEUR D'ODEURS (and Cloud Design) filed on June 22, 2010 and registered on October 4, 2011 under No. TMA808,180. However, this is incorrect. If the Opponent wished to rely on this trade-mark, it should have sought leave to file an amended statement of opposition. It did not. Accordingly, I will not consider this latter application. Besides, I note that the Kellock affidavit is completely

silent on this application.

### Remaining grounds of opposition

#### Ground of opposition based on non-compliance with section 30(a) of the Act

[12] The section 30(a) ground alleges that the Applicant has not provided a statement in ordinary commercial terms of the specific goods and services in association with which the Mark is proposed to be used.

[13] More particularly, concerning the Goods, the Opponent submits in its written argument that the statement of goods does not explain the type of products used to neutralize odors or how these products would be applied to neutralize odors. It submits that the word “preparations” is vague and open to interpretation such that the ingredients used to prepare such products should be specified. The word “enclosed areas” is also imprecise and indefinite since it can refer to many types, forms or dimensions.

[14] Concerning the Services, the Opponent submits that there is also no reference as to how and to whom these services are offered. It submits that there is no distribution service made or proposed to be made in the sense that it must be understood as geared toward “third party distribution services”. If the Applicant were to distribute its own products, this is not a service to claim in a trade-mark registration.

[15] I disagree with the Opponent’s position. First, there is no evidence to support it. Second, relying on the guidelines and representative listing of goods and services contained in *The goods and services manual* of the Canadian Intellectual Property Office, I find that each of the aforementioned terms can be considered as an acceptable identification of goods and services.

[16] I find that an analogy can be made between the Applicant’s preparations and the goods “rust removing preparation” and “odour neutralizing preparations for carpets” listed as acceptable as such in the *Manual*. Likewise, an analogy can be made between the Applicant’s services and the services “cleaning of buildings” and “cleaning of industrial premises” listed as acceptable as such in the *Manual*.

[17] Accordingly, the section 30(a) ground of opposition is dismissed.

Ground of opposition based on non-entitlement under section 16(1)(a) of the Act

[18] The section 16(1)(a) ground alleges that the Applicant is not the person entitled to registration of the Mark in that, at the date of filing of the application, the Mark was confusing with the Opponent's OT ODOR TREATMENT & DESIGN trade-mark that had been previously used and made known in Canada, since April 9, 2001 in association with the goods and services described above in paragraph 7 of my decision.

[19] An opponent meets its evidentiary burden with respect to a section 16(1)(a) ground if it shows that as of the date of first use claimed in the applicant's application, its trade-mark had been previously used or made known in Canada and had not been abandoned as of the date of advertisement of the applicant's application [section 16(5) of the Act]. As per my review below of the salient points of the Kellock affidavit, the Opponent has met its burden.

The Kellock affidavit

[20] I shall note at this point of my decision that I am not affording weight to any of the statements made by the affiant that constitute personal opinion on the likelihood of confusion between the parties' marks. The likelihood of confusion is a question of fact and law to be determined by the Registrar based on the evidence of record in the present proceeding.

[21] Mr. Kellock states that the Opponent has been using and carrying on its business as a manufacturer and merchant of, and also providing, high-quality locker room and equipment deodorizer and other ancillary products since at least as early as April 9, 2001, and hereafter continues to use, promote, market, and advertises its OT ODOR TREATMENT & Design trade-mark in association with the "deodorizer" [paras 4 and 5 of the affidavit].

[22] Mr. Kellock states that the OT ODOR TREATMENT & Design trade-mark has been continuously and extensively used in Canada by the Opponent, and has always been and is currently being prominently marked and displayed on all of its products and related packaging [para 6 of the affidavit]. Mr. Kellock states that due to the Opponent's usage, promotion, marketing, and advertising efforts, the Opponent's OT ODOR TREATMENT & DESIGN trade-

mark has been recognised and is being officially licensed as an equipment and locker room deodorizer for the National Hockey League (NHL), and extensively used by teams of the National Football League (NFL), Canadian Football League (CFL), National Collegiate Athletic Association (NCAA), as well as at other colleges and high schools [para 14 of the affidavit].

[23] Mr. Kellock states that the channels of distribution of the Opponent's OT ODOR TREATMENT & DESIGN products are through national retail outlets, including Source for Sports, Wal-Mart, Ice Group, etc. and direct sale to the public [para 17 of the affidavit].

[24] Mr. Kellock states that the Opponent spends a great deal of time and effort to use, promote, market, and advertise its products, in Canada and the United States of America, in association with the Opponent's OT ODOR TREATMENT & DESIGN trade-mark, where its promotional activities respecting the foregoing are primarily publicity-oriented, either through direct advertising or trade show attendance, including mainly the Canadian Sporting Good Association [para 19 of the affidavit].

[25] In support of his statements of use and advertising of the OT ODOR TREATMENT & DESIGN trade-mark, Mr. Kellock attaches the following exhibits:

- Exhibit "C": snapshots of the Opponent's website front pages of the domain names *http://sprayfresh.ca* and *http://sprayfresh.com* (collectively referred to as the Domain Name). Mr. Kellock states that the Domain Name has been used to extensively promote, market, and advertise the Opponent's OT ODOR TREATMENT & DESIGN trade-mark, which, Mr. Kellock asserts, is displayed on each and every individual page of the websites. Upon review of this exhibit, I note that the OT ODOR TREATMENT & DESIGN trade-mark is displayed on the top left corner above a list of hyperlinks referring to the following: "catalogue 2007"; "products"; "retailers"; "spray fresh radio"; "contact". Another list of hyperlinks is displayed besides the Opponent's trade-mark and refers to the following: "store locator"; "online store"; "tips and usages" and "dealer/retailers". The pages further bear the mention "The Officially Licensed Locker room & Equipment Deodorizer of the NHL™" [para 7 of the affidavit];
- Exhibits "E" to "K": copies of web pages extracted from the Opponent's website *http://sprayfresh.com*, retrieved from the Wayback Machine Internet archive for the

years 2003 to 2005, 2008, 2011, 2013 and 2014. Upon review of these web pages, I note that they are either essentially identical to the web pages attached under Exhibit C or else, refer to the Opponent's trade-mark with the phrase "Why do the professionals use OT? Because it works!" [paras 9 and 11 of the affidavit];

- Exhibits "L" to "Q": copies of web pages extracted from the Opponent's website <http://sprayfresh.ca>, retrieved from the Wayback Machine Internet archive for the years 2002 to 2005, 2013 and 2014 [paras 10 and 11 of the affidavit]. The same comments as those made for Exhibits "E" to "K" apply;
- Exhibits "R" and "S": photographs of product containers (4oz and 16oz) of OT ODOR TREATMENT & Design professional quality deodorizer [para 12 of the affidavit];
- Exhibit "T": copy of a poster displaying the Opponent's OT ODOR TREATMENT & DESIGN trade-mark along with the Opponent's trade-name Spray Fresh Ltd. Upon review of this exhibit, I note that it is essentially identical to the material displayed on the Opponent's headers for display stands discussed below [para 12 of the affidavit];
- Exhibits "U" and "V": photographs showing the Opponent's trade-mark on the actual product containers of OT ODOR TREATMENT- PROFESSIONAL QUALITY DEODORIZER (4oz, 16oz and 1 US Gallon) at their point of sale [para 12 of the affidavit];
- Exhibit "W": a copy of the Opponent's products catalogue featuring the OT ODOR TREATMENT & DESIGN deodorizer. Upon review of this exhibit, I note that it also features ancillary products under the OT ODOR TREATMENT & DESIGN trade-mark such as visor cloths, floor display stands and headers for display stands [para 13 of the affidavit];
- Exhibit "X": random copies of invoices relating to the sale of the Opponent's OT ODOR TREATMENT & DESIGN deodorizer (16oz and 1 US Gallon) and ancillary products including spray containers, floor display stands, and headers for display stands issued for the years 2001-2004 and 2008-2009 [para 15 of the affidavit];
- Exhibit "Y": a collection of testimonials provided by the equipment managers of various NHL teams concerning the Opponent's OT ODOUR TREATMENT deodorizer, as prominently displayed on the Opponent's website at <http://www.sprayfresh.ca/odor-treatment/testimonials.php> [para 16 of the affidavit]; and

- Exhibit “Z”: copies of the Opponent’s accounting systems displaying (i) the amount paid for trade show purchase from the Global Experience Specialists, a global event marketing company specialised as an exhibitor and show organiser, and (ii) dues and subscription paid to the Canadian Sporting Goods Association (CSGA) [para 19 of the affidavit].

[26] Mr. Kellock states that the approximate annual revenues of the Opponent are generated by the sale of products in association with the Opponent’s OT ODOR TREATMENT & DESIGN trade-mark and vary around \$250,000 [para 20 of the affidavit]

[27] Mr. Kellock states that the approximate dollar value for advertising conducted by the Opponent for its OT ODOR TREATMENT & DESIGN trade-mark over the years amounts to \$50,000 [para 21 of the affidavit].

[28] To sum up, I am satisfied from my review of the Kellock affidavit that the Opponent’s OT ODOUR TREATMENT & DESIGN trade-mark has been used and become known to a significant extent in Canada, if not well-known in the sports field, in association with the Opponent’s deodorizer. I am also satisfied that the Opponent’s OT ODOR TREATMENT & DESIGN trade-mark has been used and become known in Canada in association with the Opponent’s online retail stores services, although the evidence of record does not enable me to determine the extent to which it has become known in Canada with respect to these services.

#### The test for confusion

[29] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act provides that the 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.

[30] Thus, this section does not concern the confusion of the trade-marks themselves, but of the goods or services from one source as being from another.

[31] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those listed at 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 the trade-marks have 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. This list is not exhaustive and all relevant factors are to be considered. Further, all factors are not necessarily attributed equal weight as the weight to be given to each depends on the circumstances [see *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* (2006), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) for a thorough discussion of the general principles that govern the test for confusion].

#### Consideration of the section 6(5) factors

##### The inherent distinctiveness of the trade-marks and the extent to which they have become known

[32] I assess the inherent distinctiveness of the parties' marks as about the same and relatively weak. As acknowledged by the Opponent in its written argument, the words "odour" ("odor") and "treatment" forming part of both trade-marks suggest a treatment to eliminate odours. In the context of the parties' respective goods, the wording "odour treatment" clearly describes the purpose of the Opponent's deodorizer and the Applicant's preparations and products.

[33] The first portion of the Opponent's trade-mark is also relatively weak as it is formed of the letters or initials "OT". In the context of the Opponent's trade-mark considered as a whole, it is also likely to be perceived as an acronym of the words "odor treatment". Likewise, the first portion of the Mark made up of the words "fresh start" is relatively weak as it suggests that the enclosed areas treated with the Applicant's preparations will regain a fresh clean start.

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

[35] There is no evidence that the Applicant's Mark has been used in Canada pursuant to section 4 of the Act or that it has become known to any extent in Canada.

[36] In contrast, as indicated above, the Kellock affidavit evidences that the Opponent's OT

ODOR TREATMENT & DESIGN trade-mark has been used and become known to a significant extent in Canada, if not well-known in the sports field, in association with the Opponent's deodorizer, thereby reinforcing the distinctiveness of the Opponent's mark with respect to same.

Conclusion regarding this first factor

[37] In view of the foregoing, I find that this factor, which is a combination of inherent distinctiveness and acquired distinctiveness, favours the Opponent.

The length of time the trade-marks have been in use

[38] In view of my comments above, this factor favours the Opponent.

The nature of the goods, services or business; and the nature of the trade

[39] There is a clear overlap between the Opponent's deodorizer and the Applicant's Goods and Services. Both parties provide goods and services geared toward odour elimination. Likewise, there is a clear overlap between the parties' channels of trade. There is no reason to conclude that the parties' goods and services would not be directed to the same type of clientele. Besides, the Applicant did not make any representations on this point in its written argument.

The degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them.

[40] As noted by the Supreme Court in *Masterpiece, supra*, at paragraph 49, "the degree of resemblance, although the last factor listed in [section] 6(5) [of the Act], is the statutory factor that is often likely to have the greatest effect on the confusion analysis [...] if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion".

[41] Moreover, as previously mentioned, it is well-established in the case law that likelihood of confusion is a matter of first impression and imperfect recollection. In this regard, "[w]hile the marks must be assessed in their entirety (and not dissected for minute examination), it is still possible to focus on particular features of the mark that may have a determinative influence on

the public's perception of it" [see *Pink Panther Beauty Corp v United Artists Corp* (1998), 1998, CanLII 9052 (FCA), 80 CPR (3d) 247 (FCA), at para 34]. Even though the first word or portion of a trade-mark is generally the most important for the purpose of distinction, the preferable approach is to first consider whether any aspect of the trade-mark is particularly striking or unique [see *Masterpiece*, above, at paragraph 64].

[42] Applying those principles to the present case, I find that the parties' trade-marks are more different than alike.

[43] As acknowledged by the Opponent in its written argument, "the main distinctive element of the Opponent's OT ODOR TREATMENT & DESIGN trade-mark is the design and the acronym 'OT'". The Opponent submits that this acronym can stand for various abbreviations, namely "*Overtime, Other, Over the Top, On Target, Overtone, Operating Time*", just to name a few. However, this is not supported by evidence. In any event, I find that it is more likely than not that the average Canadian would react to the letters "OT", in the context of the Opponent's trade-mark considered as a whole, as an acronym for "odor treatment" reiterating the descriptive element.

[44] The Opponent further submits that "the first word in the [Mark] 'FRESH' is identical to the Opponent's corporate name 'SPRAY FRESH LTD', which increases the likelihood of confusion in the mind of the average consumer perceiving a connection between the [Mark] and the [Opponent's OT ODOR TREATMENT & DESIGN trade-mark]". Presumably, the Opponent makes this argument because some of the exhibits attached to the Kellock affidavit show instances where the Opponent's OT ODOR TREATMENT & DESIGN trade-mark is displayed along with the Opponent's trade-name [re Exhibits "E", "F", "G", "L", "M", "N", "O", and "T"]. This is not relevant in the present case. Such an argument may be suitable in a passing off action, but not when considering any of the pleaded grounds of opposition in this case (none of which reference the Opponent's trade-name). What has been pleaded by the Opponent in its statement of opposition is confusion of the Mark with the Opponent's OT ODOR TREATMENT & DESIGN trade-mark.

[45] As in the case of the Opponent's OT ODOR TREATMENT & DESIGN trade-mark, the descriptive words "odour" and "treatment" do not constitute the dominant element of the Mark.

Rather, the suggestive words “fresh” and “start” appearing in the first dominant position of the Mark do.

[46] In terms of appearance, the Mark is a word mark, whereas the Opponent’s OT ODOUR TREATMENT & DESIGN trade-mark is a composite mark. Their only point in common is that they both include the descriptive words “odour” (“odor”) and “treatment” positioned as the last two words.

[47] In terms of sound, regardless of whether the first portion of the Opponent’s OT ODOR TREATMENT & DESIGN trade-mark is sounded as the word “ought” or as the letters “O” – “T”, either way, “OT” sounds nothing like the first portion of the Mark.

[48] In terms of ideas suggested, the parties’ marks resemble each other to some extent since they both describe a treatment to eliminate odours. That said, the first portion of the Mark suggests a new beginning, a sense of fresh air entering a room that has been stale until application of the product, which is not an idea suggested by the Opponent’s OT ODOUR TREATMENT & DESIGN trade-mark.

Additional surrounding circumstances

Concerning the inherent distinctiveness of the words “ODO(U)R”  
and “TREATMENT”

[49] In its written argument, the Applicant submits that “[t]he words ‘ODO(U)R’ and ‘TREATMENT’ are common dictionary words, with more than 200 marks apiece on the CIPO database”. The Applicant further refers to a trade-mark application that would have been filed by the Opponent with the United States Patent & Trademark Office (USPTO), wherein the examiner requested a disclaimer of the wording “odor treatment”. Finally, the Applicant submits that prior to the Canadian Intellectual Property Office’s practice notice of August 15, 2008, the Opponent would have been required to file a disclaimer of the words “odor” and “treatment” in respect of its application for the OT ODOR TREATMENT & DESIGN trade-mark, as it has been required to do in its parallel application in the United States.

[50] I find it is not necessary to consider these submissions in detail. Suffice it to say that none

of these submissions is supported by evidence. Further, the present ground of opposition is based on prior use and making known of the Opponent's OT ODOUR TREATMENT & DESIGN trade-mark in Canada, as opposed to a previously filed application under section 16(1)(b).

Concerning the prior examination of the application for the Mark

[51] In its written argument, the Applicant further submits that the Mark was examined and allowed by the Examiner having regard to, among others, the Opponent's pending application for the OT ODOUR TREATMENT & DESIGN trade-mark. This is not relevant. As indicated in the practice notice dated May 19, 2005 entitled *Entitlement – Confusing Marks*: “the Registrar will no longer consider the dates of first use or making known as a relevant consideration under paragraph 37(1) of the Act [see *Procureur Général du Canada v Effigi Inc* (unreported, Neutral Citation: A-432-04)]. Therefore, when pending marks are confusing, the applicant with the earlier filing date [in the present case, the Applicant] will be considered to be the person entitled to registration of the trade-mark.”

Conclusion regarding the likelihood of confusion

[52] As indicated above, the Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. The presence of a legal onus on the Applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant.

[53] Having considered all of the relevant circumstances, I am left in a state of doubt as to whether a consumer encountering the Mark for the first time would be able to distinguish between the Mark and the OT ODOR TREATMENT & DESIGN trade-mark.

[54] As indicated above, the first four factors weight decidedly in favour of the Opponent. Thus, the question becomes whether the differences existing between the parties' trade-marks are sufficient to tip the balance of probabilities in favour of the Applicant. I find they are not and that the balance of probabilities weighs equally for both parties.

[55] I am aware that comparatively small differences may suffice to distinguish between “weak” marks, that is, between marks of low inherent distinctiveness [see *GSW Ltd v Great West*

*Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)]. However, in the present case, the Opponent has presented extensive evidence of use and advertising of its OT ODOR TREATMENT & DESIGN trade-mark over the last decade. This acquired distinctiveness mitigates in favour of the Opponent.

[56] The parties' trade-marks both describe a treatment to eliminate odours. While there can be no monopoly in this type of idea, the fact remains that the parties' marks both include the descriptive words "odour" ("odor") and "treatment" positioned as the last two words and that neither of their first portions, despite being the dominant element of the marks, are inherently strong and particularly striking. The distinctiveness acquired by the Opponent's mark is not only for the prefix "OT", but for the OT ODOUR TREATMENT & DESIGN trade-mark as a whole. Besides, I note that in many of the testimonials found under Exhibit "Y" to the Kellock affidavit, the Opponent's customers use the short hand "ODOR TREATMENT" when referring to the Opponent's deodorizer.

[57] Accordingly, the section 16(1)(a) ground of opposition succeeds.

Ground of opposition based on non-distinctiveness of the Mark under section 2 of the Act

[58] The Opponent has pleaded that the Mark is not distinctive, within the meaning of section 2 of the Act, in that it does not distinguish, nor is it adapted to distinguish the Goods and Services of the Applicant from those of the Opponent described above in paragraph 7 of my decision.

[59] An opponent meets its evidentiary burden with respect to a distinctiveness ground if it shows that as of the filing date of the opposition (in this case June 20, 2013) its trade-mark had become known to some extent at least to negate the distinctiveness of the applied-for mark [see *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD)]. As per my review above of the Kellock affidavit, the Opponent has met its evidentiary burden.

[60] The difference in relevant dates does not affect my analysis above under the section 16(1)(a) ground of opposition. Accordingly, the non-distinctiveness ground of opposition succeeds.

Disposition

[61] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application under section 38(8) of the Act.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

No Hearing held

Agents of Record

Flansberry, Menard & Associates/Associés

For the Opponent

Smuglers LLP

For the Applicant