



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

Citation: 2016 TMOB 28
Date of Decision: 2016-02-22

IN THE MATTER OF AN OPPOSITION

Razor USA LLC

Opponent

and

LG Electronics Inc.

Applicant

1,464,079 for RAZOR FRAME

Applications

**1,464,080 for RAZOR FRAME
& DESIGN**

APPLICATION 1,464,079 RAZOR FRAME

FILE RECORD

[1] On December 23, 2009, LG Electronics Inc. filed an application to register the trade-mark RAZOR FRAME, based on proposed use in Canada, in association with:

television receivers.

[2] The applicant claims a priority filing date of December 11, 2009, pursuant to s.34 of the *Trade-marks Act*, R. C. 1985, c. T-13, based on the filing of a corresponding application in the Republic of Korea.

[3] The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated June 9, 2010 and was opposed by Razor USA LLC on November 5, 2010. The Registrar forwarded a copy of the statement of opposition to the applicant on November 30, 2010, as required by s.38(5) of the *Trade-marks Act*. The applicant responded by filing and serving a counter statement generally denying the allegations in the statement of opposition. The statement of opposition was subsequently amended twice. Further references to the statement of opposition pertain to the last amended version dated January 16, 2015.

[4] The opponent's evidence consists of the affidavit of John W. Cochrane and a certified copy of the opponent's trade-mark registration No. TMA545,590 for the mark RAZOR. I note that the registration covers computer accessories such as video game joysticks, game memory cards, video connectors and audio adapters. I further note that the application for the opponent's mark RAZOR was based on use and registration in the USA, and that a Declaration of Use was filed in Canada in 2001. The applicant's evidence consists of the affidavits of Gay Owens and Michael Duchesneau.

[5] The opponent's reply evidence consists of a further affidavit of John Cochrane. Shortly after the reply evidence was filed, the applicant objected that it constitutes improper reply because the facts therein could and should have been included as part of the opponent's evidence in chief. The applicant expanded on its concerns in its written argument, where it also objects that paragraphs 6 and 7 of the reply evidence are inadmissible hearsay. The opponent's position is that Mr. Cochrane's second affidavit is in reply to a portion of the Owens affidavit, and that paras. 6 and 7 fall into the "necessary and reliable" exception to the hearsay rule. For reasons that I will discuss later, (i) I agree with the applicant that paras. 6 and 7 are inadmissible hearsay, and (ii) I find the remainder of Mr. Cochrane's second affidavit is proper reply. In any event, it is likely that the opponent would have been granted leave to submit Mr. Cochrane's second affidavit, aside from paras. 6 and 7, as additional evidence under s.44 of the *Trade-marks Regulations*.

[6] Mr. Cochrane was cross-examined on each of his affidavits, the transcripts thereof forming part of the evidence of record.

[7] At a late stage in the proceedings the applicant requested and was granted leave to file additional evidence namely, the affidavit of Jayson B. Dinelle, under s.44 of the *Regulations*: see the Board ruling dated January 12, 2015.

[8] Both parties filed a written argument, however, only the opponent was represented at an oral hearing.

STATEMENT OF OPPOSITION

[9] The grounds of opposition are summarized below.

(i) The first ground of opposition, pursuant to s.30(e) of the *Trade-marks Act*, alleges that the applicant did not intend to use RAZOR FRAME as a trade-mark for television receivers; rather, the term was intended to convey that the applicant's television receivers have thin frames.

(ii) The second ground of opposition, pursuant to s.12(1)(d) of the *Act*, alleges that the applied-for mark is not registrable because it is confusing with the opponent's registered mark RAZOR (referred to in para. 4, above).

(iii) The third ground, pursuant to s.16(3)(a), alleges that the applicant is not entitled to register the applied-for mark because, at the date of filing the application (that is, the priority filing date December 11, 2009), the applied-for mark RAZOR FRAME was confusing with the opponent's marks RAZOR and RAZR previously used in Canada in association with computer accessories, power adapters and cell phones.

(iv) The fourth ground, pursuant to s.16(3)(b), alleges that the applicant is not entitled to register the applied-for mark because, as of December 11, 2009, the applied-for mark was confusing with the opponent's previously filed trade-mark applications for RAZR, listed below:

application no. 1,161,976

(1) computer operating software for use with hand-held computers and personal digital assistants, namely, for playing games on hand-held computers and personal digital assistants . . .

(2) . . . motorized vehicles, namely motorized scooters and structural parts; video game software; interactive video game programs; video games; . . . rideable toys . . . skate boards

application no. 1,281,912

(1) pagers, two-way radios, radio transmitters, radio receivers, radio transceivers . . . computer game software for mobile handsets . . . analog and digital radio transceivers or receivers for data, voice, image and video communication; electronic game software for mobile handsets; cameras, namely photographic cameras, digital cameras, motion picture cameras, video cameras . . .

(2) telephones and related accessories . . .

application no. 1,283,235

(1) cellular telephone and related accessories . . .

(2) pagers, two-way radios, radio transmitters, radio receivers, radio transceivers . . . computer game software for mobile handsets; computer software and programs featuring music, movies, animation, electronic books.

(3) . . . cameras, namely photographic cameras, digital cameras, motion picture cameras, video cameras . . .

(v) The fifth ground of opposition, pursuant to s.2, alleges that the applied-for mark RAZOR FRAME is not distinctive of the applicant's goods because it is not adapted to distinguish the applicant's goods from those of the opponent sold under the marks RAZOR and RAZR.

(10) Before assessing the allegations in the statement of opposition, I will first discuss the parties' evidence, the evidential burden on the opponent and the legal onus on the applicant. It will also be necessary to discuss the meaning of "confusion" within the context of the *Trade-marks Act*, and the factors to be considered in assessing the issue of confusion.

OPPONENT'S EVIDENCE

John Cochrane

The Opponent's RAZOR Marks

[11] In addition to the mark RAZOR referred to in para. 4 above, the opponent also owns:

(i) the registered mark RAZOR & Design, shown below, used in association with the goods listed below:



motorized and non-motorized scooter for personal transportation (excluding automobiles and bicycles) . . . non-motorized scooter for personal amusement . . . toy scooter, toy bicycle, model scooter, model bicycle . . . skateboards . . .

(ii) the applied-for mark RAZOR & Design, shown below, used in association with the goods listed below:



- (1) computer operating software . . . for playing games on hand-held computers . . .
- (2) . . . bicycles, tricycles, motorized vehicles, namely motorized scooters and structural parts; . . . rideable toys, toy scooters, non-motorized scooters, ride-on toys, pogo sticks, skate boards . . .

(iii) the applied-for mark RAZR used in association with the goods listed below:

- (1) cellular telephone and related accessories . . .
- (2) pagers, two-way radios, radio transmitters, radio receivers . . .
- (3) computer software for the distribution of information and interactive multimedia content containing text, images, video and sound to users in the field of communications . . . electronic game software for mobile handsets; cameras . . .

[12] The opponent refers to its marks as the “RAZOR Marks” and to the goods associated with its marks as the “RAZOR Wares.” I would add that, for the purposes of this proceeding, the two above “design” marks are equivalent to the word mark RAZOR: see *Canadian Jewish Review Ltd. v. The Registrar of Trade Marks* (1961) 37 CPR 89 (ExC).

[13] The opponent’s goods fall into the toy, sporting goods, gaming and electronic products categories. The opponent’s goods include electric powered ride-on toys, a junior line of scooters and bikes, as well as the video game ULTRA PRO Rider, a mobile game for iPhones and iPod devices. The opponent Razor USA has won numerous awards for its toy products including the

outdoor “Toy of the Year” from the Toy Industry Association (in the USA) in 2008. Exhibit KM6 describes the toy as “innovative and patented with a unique mechanical device that blends the carving and surfing of snowboarding into a sport for dry land.” The opponent has also won numerous “Toy of the Year” honours from various magazines including *TIME Magazine*, *Parents*, *Parenting*, and *Sports Illustrated for Kids*.

[14] In Canada, RAZOR products are available through national retailers including Canadian Tire, Walmart, Costco, Toys “R” Us and Sears. Canadian Tire expended about \$24,600 in advertising the opponent’s products in the period 2007 – 2009 inclusive. The wholesale value of RAZOR products sold to Canadian Tire amounted to about \$2.4 million in the same time period.

Testimony on Cross-Examination

[15] The exhibit materials attached to Mr. Cochrane’s affidavits reference, for the most part, products such as (manual) scooters, electronic (battery) scooters, and electronic (battery) powered ride-on toys. According to Mr. Cochrane, such products bridge the sports and toy categories, as discussed at cross-examination (on November 15, 2012):

page 3, lines 28-43

. . . in a lot of our products we will register trademarks[sic] in both class 12 which is vehicles, and class 28 which is toys. There are different delineations for other regulatory purposes and customs purposes and things like that, but certainly we make electrically-powered ride-on products including several lines of electric scooters that while they are not necessarily intended for, you know, highway use, they are used around town and things of that nature.

So, yeah, those things fall into the category of vehicles in some lexicons. You have to be careful on how you use it because depending upon the context, different consideration[sic] apply and customs positions and stuff like that.

[16] The opponent’s reputation for its products, at least in the USA, is discussed by Mr. Cochrane at page 7, lines 36-42 of the transcript of cross-examination:

Forbes magazine actually awarded the Razor scooter the toy of the decade award for the decade of the 2000s. You know, they went back and had a hundred years of best toy of the decade. There was Mr. Potato Head and Barbie and Razor scooter was for the decade of 2000 to 2010.

[17] Mr. Cochrane's concerns with the subject applications filed by LG Electronics Inc. for the marks RAZOR FRAME and RAZOR FRAME & Design are expressed at page 12, line 38 to page 13, line 9 of the transcript of cross-examination:

I would say the Razor brand is primarily marketed with cutting edge, high-tech, cool and groovy stuff appealing to youth and that is the manner in which the Razor brand as used by Razor USA in the early 2000s took off and became very, very famous and became desirable for companies such as others to licence. And people have tried to take advantage of that fame and that connection and that's what your company is doing . . .

. . . in fact, there are people who very much want to take advantage of the fame and the reputation of Razor's world and it's not Gillette. Its people that want to take advantage of the conceptual novelty, excitement, and high-tech grooviness of products that have been introduced by Razor. You see it around the world and that's what is meant by Razor wares. It's associated with the Razor brand.

APPLICANT'S EVIDENCE

Michael Duchesneau

[18] Mr. Duchesneau identifies himself as a law clerk with the firm representing the applicant. His affidavit serves to introduce into evidence, as exhibit material, copies of web pages featuring RAZOR formative marks for various services and goods such as registering domain names, a gaming machine, a gaming laptop, gaming controllers, and the games themselves.

Gay Owens

[19] Mr. Owens identifies himself as a trade-mark searcher with the firm representing the applicant. His affidavit serves to introduce into evidence, as exhibit material, copies of registration pages for the marks BLUE RAZOR, MOTORAZOR, RAZER Design, a second RAZER Design, RAZORPOINTS, and THE RAZOR'S EDGE, which marks appear in Mr. Duchesneau's exhibit material.

[20] I agree with the opponent's submissions, at page 15 of its written argument, regarding the limited probative value of the applicant's above evidence:

(iii) The Applicant filed, through the Affidavit of Michael Duchesneau dated July 22, 2013, copies of web pages. We note that not all of these web pages show use of a "razor" formative trade-mark in Canada. In particular, we refer to Exhibits A

through E of the Duchesneau Affidavit, attaching various pages of the CanadianGamingService.com web site.

This web site refers to the RAZAR Design mark referred to in the Owens Affidavit filed by the Applicant. However, the trade-mark RAZAR Design is registered in association with wares. Exhibit[sic] B through E do not show sales of the wares in Canada. The web site is merely promotional material and there is no evidence that the gaming machines featured on the web site can be and is[sic] sold in Canada.

(iv) Similarly, other web pages showing products for sale do not constitute evidence of use of a trade-mark in Canada in association with wares. The web pages attached as exhibits to the Duchesneau Affidavit provide, at best, proof that these pages existed on July 22, 2013 when they were printed by the affiant. As stated in *Generation Nouveau Monde Inc. v. Teddy SPA*, 2006 Canlll 80484 (TMOB):

The web pages annexed to the affidavit of Ms. Ready's affidavit (sic) make proof, at best, that they existed at the time the search was performed and, that some products were offered for sale. However there is no evidence of sales in Canada of any of these products. In order to prove sales of third party products, by way of examples, the affiant could have ordered the products advertised or the Applicant could have filed affidavits signed by a representative of the companies offering the products via email orders to establish that they were sold in Canada at any relevant time. Those web pages do not constitute evidence that the products advertised were sold in Canada.

(v) Moreover, we respectfully submit that six marks is certainly not a large number sufficient to draw inferences about the state of the marketplace. We further submit that the Applicant's evidence as regards the state of the marketplace is insufficient to conclude that the wares shown in the various web pages attached to the Duchesneau Affidavit are in fact sold in Canada.

Jayson Dinelle

[21] Mr. Dinelle identifies himself as a law clerk with the firm representing the applicant. His affidavit serves to introduce into evidence, as exhibit material, copies of pages from the applicant's website. The applicant discusses the exhibit material at para. 43 of its written argument:

43 Exhibits A to E of the Dinelle Affidavit are printouts of webpages from the Canadian sub-site of the Applicant's website located at www.lg.com/ca which demonstrate how the Applicant's trademark[sic] RAZOR FRAME is depicted in association with television sets. In particular, the trademark RAZOR FRAME is used in association with a specific feature of the television set, and the trademark[sic] RAZOR FRAME is always depicted in close association with the

primary brand name of the television set, namely, the well-known trademark LG. (emphasis added).

[22] The opponent's submissions on Mr. Dinelle's evidence are found at page 8 of its written argument:

4.1.6 . . . the evidence produced by the Applicant as its Rule 44 evidence shows how the Applicant currently uses or displays the Mark [RAZOR FRAME]. In particular, we draw your attention to Exhibits B through E of Jason B. Dinelle's Affidavit dated December 15, 2014. Specifically, we draw your attention to the second page of each of these exhibits which show[sic] that the trade-mark is used to indicate that the Applicant's television receivers have a razor thin plasma therefore a razor thin frame.

4.1.7 We respectfully submit that the Mark as used by the Applicant is not used to indicate the source of the wares but rather to describe a feature of the wares. As such, the Mark does not function as a trade-mark. (emphasis added)

[23] I am inclined to agree with the opponent's above submissions for the following reasons. The applicant in its promotional materials, included as exhibits to the Dinelle affidavit, refers to "Key Features" of its televisions. Those key features are listed as "Resolution Upscaler;" "600Hz Max;" "Triple XD Engine;" and "Razor Frame." The desirability of each feature is then discussed sequentially. For example, in discussing the Triple XD Engine, the promotional material points to a computer chip which is described as "LGs latest and most advanced Triple XD Engine brings the highest level of excellence in Color, Contrast, and Clarity for the best picture quality and performance." Similarly, in discussing the Razor Frame, the promotional material points to the television frame with the commentary "Enjoy immersive viewing and optimal design with razer-thin plasma TV." The television itself is identified as LG Plasma TV.

[24] In my view, each of the above mentioned "features" might, at best, be claimed as a trade-mark for a particular component of the television, but not for the complete "television receiver" which are the goods claimed in the application. The emphasized portion of para. 43 of the applicant's written argument, cited above, supports my conclusion.

OPPONENT'S REPLY EVIDENCE

John Cochrane

[25] The opponent has licensed Motorola Mobility to use the mark RAZR in association with wireless telephones. The RAZR flip phone was first sold in Canada in early 2005; the RAZR smart phone was first sold in Canada in late 2011. The parties entered into a second agreement in mid-2001 to permit Motorola to use the mark RAZR in association with mobile communication accessories and with computers. At all times the opponent controlled the character and quality of the goods sold under license by Motorola. Motorola's promotional expenses in Canada for RAZR mobile communications products averaged about \$8.7 million for the years 2010 and 2011, and \$5.4 million for the years 2012 and 2013. Revenues in Canada for RAZR mobile communications products amounted to \$1 million in 2010; \$19.1 million in 2011; and \$12 million in 2012. The promotional expenses and revenues referred to above are detailed in paras. 6 and 7 of his affidavit, and were provided to Mr. Cochrane by a third party.

[26] As mentioned earlier, the applicant has objected that Mr. Cochrane's second affidavit is not proper reply. The opponent's submissions on this issue are found at pages 5-6 of its written argument:

3.1.3 The Opponent's Rule 43 reply evidence consisted of a second affidavit signed by John W. Cochrane, sworn March 14, 2014. In the March 2014 Affidavit, Mr. Cochrane puts into evidence the licensing relationship between the Opponent and Motorola Mobility, Inc., with respect to the use of the trade-mark RAZR in association with Motorola's flip phone, marketed as the Motorola RAZR flip phone. We respectfully submit that the Cochrane Affidavit dated March 14, 2014 constitutes reply evidence as such evidence is in direct response to the Applicant's Owens Affidavit which purports to provide state of the Register evidence, and lists Motorola's MOTORAZR registration[in this regard see para 19 , above].

3.1.4 The Applicant raised the issue of co-existence on the Register through the Owens Affidavit, which specifically identifies Motorola's MOTORAZR registration. The March 14, 2014 Cochrane Affidavit is therefore in direct reply to the issue raised by the Applicant, as it supports the position that the MOTORAZR registration should not be considered in the state of the Register analysis, given the relationship between the Opponent and the Motorola group of companies . . .

[27] Although the opponent might have detailed its relationship with Motorola Mobility in its evidence in chief, I agree with the opponent's above submissions that such evidence is

nevertheless proper reply. However, paras. 6 and 7 of Mr. Cochrane's reply evidence are inadmissible hearsay as there is no justification for its inclusion on the basis of necessity and reliability. Accordingly, I have not had regard to paras. 6 and 7. Further, I disagree with the opponent that "the MOTORAZR registration should not be considered in the state of the Register analysis." I did consider it while nevertheless accepting the opponent's submissions regarding the limited probative value of the applicant's state of the register evidence: see para. 20, above.

Legal Onus and Evidential Burden

[28] As mentioned earlier, before considering the grounds of opposition, it is necessary to review (i) the evidential burden on the opponent to support the allegations in the statement of opposition and (ii) the legal onus on the applicant to prove its case.

[29] With respect to (i) above, there is in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition: see *John Labatt Limited v. The Molson Companies Limited*, 30 CPR (3d) 293 at 298 (FCTD). The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on the applicant to show that the application does not contravene the provisions of the *Trade-marks Act* as alleged by the opponent in the statement of opposition (for those allegations for which the opponent has met its evidential burden). 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.

FIRST GROUND OF OPPOSITION

[30] The material time to assess the first ground of opposition is the date of filing the application. Mr. Dinelle's evidence, discussed at paras 21- 23 above, is at the very least sufficient to put into issue the opponent's contention that the applicant has used the term RAZOR FRAME as a phrase to describe a feature of the applicant's television receivers rather than as a trade-mark to identify a source for television receivers. The applicant, for its part, has not provided any credible evidence to show that the applied-for term RAZOR FRAME has ever

functioned, or was intended to function, as a trade-mark. Accordingly, the first ground of opposition succeeds as the applicant has not met the legal onus on it to show that the applicant in fact intended to use the term RAZOR FRAME as a mark in association with television receivers.

[31] In the event that I am wrong in deciding in favour of the opponent on the first ground of opposition, I will next consider the second ground.

SECOND GROUND OF OPPOSITION

[32] The second ground of opposition alleges that the applied-for mark RAZOR FRAME is not registrable because it is confusing with the opponent's registered mark RAZOR. The material time to assess the second ground of opposition is the date of my decision.

Meaning of Confusion

[33] Trade-marks are confusing when there is a reasonable likelihood of confusion within the meaning of s.6(2) of the *Trade-marks Act*, shown below:

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 . . . or performed by the same person, whether or not the goods or services . . . are of the same general class.

[34] Thus, s. 6(2) does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source. In the instant case, the question posed by s. 6(2) is whether consumers shopping for television sets would believe that the applicant's goods, sold under the mark RAZOR FRAME, were made by the opponent, or that the applicant was authorized or licensed by the opponent, whose goods are sold under the mark RAZOR. The legal onus is on the applicant to show, on the usual civil balance of probabilities standard, that there would be no reasonable likelihood of confusion.

Test for Confusion

[35] The test for confusion is one of first impression and imperfect recollection. Factors to be considered, in making an assessment as to whether two marks are confusing, are "all the surrounding circumstances including" those specifically mentioned in s.6(5)(a) to s.6(5)(e) of

the *Act*: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the wares, services or business; the nature of the trade; the degree of resemblance in appearance or sound of the marks or in the ideas suggested by them. This list is not exhaustive and all relevant factors are to be considered. Further, all factors do not necessarily have equal weight as the weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 CPR(3d) 308 (FCTD). However, as noted by Mr. Justice Rothstein in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 92 CPR(4th) 361 (SCC), although the degree of resemblance is the last factor cited in s.6(5), it is the statutory factor that is often likely to have the greatest effect in deciding the issue of confusion.

Consideration of Section 6(5) Factors

Factor 1 - Inherent and Acquired Distinctiveness

[36] The opponent's mark RAZOR possesses a fair degree of inherent distinctiveness even though it is a common English word. It derives its inherent distinctiveness from the disjunction between the meaning of the word and the opponent's goods, from its uniqueness as a mark in the marketplace, and also from the ingenious implication of a "sharp leading edge" product, that is, what the opponent refers to as "conceptual novelty . . . and high-tech grooviness:" see para. 17, above. As discussed at para. 20, above, Mr. Owens' evidence, filed on behalf of the applicant, is ineffective to lessen the degree of inherent distinctiveness that I have attributed to the opponent's mark.

[37] The applied-for mark RAZOR FRAME, for use in association with television receivers, possesses a lesser degree of inherent distinctiveness than the opponent's mark RAZOR because the mark as a whole would be understood to be a reference to the applicant's televisions having a thin frame. The mark as a whole is suggestive of a feature of the goods. I am prepared to infer from the opponent's evidence that its mark RAZOR had, at all material times, acquired some reputation in Canada for electronic devices and battery powered products. The applicant has not submitted any evidence that would allow me to draw a similar inference of acquired distinctiveness for its mark RAZOR FRAME at any material time. The first factor, which is a combination of inherent and acquired distinctiveness, therefore favours the opponent.

Factor 2 - Length of Time in Use

[38] I am prepared to infer from the opponent's evidence that it has used its mark RAZOR in Canada since at least as early as June 2004. I am not prepared to infer any use of the applied-for mark at any material time. The second factor therefore also favours the opponent.

Factors 3 & 4 - The Nature of the Parties' Goods and Businesses

[39] The natures of the parties' goods are different and, in the absence of evidence to the contrary, I assume that the parties' channels of trade would also be different. The third and fourth factors favour the applicant.

Factor 5 - Resemblance

[40] In considering the degree of resemblance, the Supreme Court of Canada in *Masterpiece*, above, provided guidance that resemblance is the quality of being either like or similar (para. 62) and that assessing resemblance should involve a consideration of whether there is an aspect of a trade-mark that is particularly striking or unique (para. 64). In the instant case, it is the component RAZOR that is particularly striking in the applied-for mark as the component FRAME would be perceived as a reference to the frame of the applicant's television sets. I therefore conclude that there is a fairly high degree of resemblance between the parties' marks as the striking feature of the applied-for mark incorporates the whole of the opponent's mark. The degree of resemblance between the marks RAZOR and RAZOR FRAME therefore favours the opponent.

Conclusion

[41] Having regard to the above, I find that the applicant has not met the onus on it to show that the marks in issue are not confusing. The second ground of opposition is therefore successful. I would add that, had the applicant been able to establish a significant reputation for its mark, then the second ground of opposition would likely have been rejected as the first factor, above, would have favoured neither.

[42] As the opponent has succeeded on the first two grounds of opposition, it is not necessary to consider the remaining grounds. I would add, however, that the remaining grounds also hinge on the issue of confusion, and that much the same considerations as discussed with respect to the second ground apply. The opponent would therefore likely have succeeded with respect to each of the remaining grounds.

APPLICATION 1,464,080 RAZOR FRAME & DESIGN

[43] The mark which is the subject of the second application in issue is shown below:



[44] The second application was filed on the same day as the application for RAZOR FRAME, claims the same priority filing date, is also based on proposed use in Canada, and covers the same goods, namely television receivers. The two oppositions are entirely analogous with respect to issues, evidence and material dates. The only difference of note is that the design feature of application 1,464,080 makes the mark somewhat more inherently distinctive than application 1,464,079. However, that difference has no significant effect on the considerations for the grounds of opposition pursuant to s.30(e) and s.12(1)(d) as discussed above for application 1,464,079. Consequently, the same results follow for application 1,464,080, that is, the opponent is successful on both grounds.

DISPOSITION

[45] In view of the foregoing, the subject applications are refused. These decisions have been made pursuant to a delegation of authority by the Registrar of Trade-marks under s.63(3) of the *Trade-marks Act*.

Myer Herzig, Member,
Trade-marks Opposition Board
Canadian Intellectual Property Office

APPEARANCES AND AGENTS OF RECORD

HEARING DATE: 2015-11-9

APPEARANCES

Giovanna Spataro

FOR THE OPPONENT

No one appearing

FOR THE APPLICANT

AGENTS OF RECORD

Gowlings

FOR THE OPPONENT

Smart & Biggar

FOR THE APPLICANT