



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

**Citation: 2011 TMOB 169**  
**Date of Decision: 2011-09-19**

**IN THE MATTER OF AN OPPOSITION  
by Iwasaki Electric Co. Ltd. to application  
No. 1,142,430 for the trade-mark  
HORTILUX in the name of Hortilux  
Schröder B.V.**

Introduction

[1] On May 31, 2002 Hortilux Schröder B.V. (the Applicant; sometimes also referred to as Schröder) filed application No. 1,142,430 to register the trade-mark HORTILUX (the Mark) based on use in Canada since at least as early as August 27, 1997. The application was amended on September 10, 2008 so that the list of wares now reads as follows:

lighting apparatus and lamp reflectors sold to the commercial horticultural industry (the Wares).

[2] The application was advertised on October 25, 2006 in the *Trade-marks Journal* for opposition purposes. Iwasaki Electric Co. Ltd. (the Opponent; sometimes also referred to as Iwasaki) filed a statement of opposition on March 26, 2007 which was forwarded by the Registrar on May 31, 2007 to the Applicant.

[3] The Applicant filed a counter statement on June 28, 2007 denying the grounds of opposition pleaded by the Opponent.

[4] The Opponent filed the affidavits of Len Thomas, Peter Berkhout and Keith T.S. Ward while the Applicant filed the affidavits of George Dickinson and Gwendoline A. MacIsaac. Mr Ward, Ms. MacIsaac and Mr. Dickinson were cross-examined and transcripts of their cross-examinations are part of the record.

[5] Both parties filed written arguments and were represented at an oral hearing.

#### The Grounds of Opposition

[6] The grounds of opposition raised by the Opponent as they appear in its statement of opposition can be summarized as follow:

1. The application does not comply with the requirements of s. 30(b) of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the “Act”) in that the Applicant has not used the Mark in Canada in association with the Wares as of the date of first use claimed in the application;
2. The Applicant is not the person entitled to registration of the Mark pursuant to the provisions of s. 37(1)(c) of the Act because at the date of advertisement of the application, namely October 25, 2006, the Mark was confusing with the trade-mark HORTILUX, subject of a co-pending application No. 1,064,360 owned by the Opponent. The Opponent’s application has not been abandoned at any of the material dates in this matter. Accordingly the Registrar should have refused registration of the Mark;
3. Pursuant to s. 38(2)(d) and s. 2 of the Act, the Mark is not distinctive in that the Mark is not and cannot be distinctive of the Wares, nor is it adapted to distinguish them from the wares and services of others, and particularly, from the wares and services of the Opponent in that the Mark is confusing with the Opponent’s trade-mark HORTILUX which has been used and made known in Canada in association with electric lamps since at least as early as December 31, 1997.

[7] By interlocutory ruling dated August 27, 2007 the Registrar struck the second ground of opposition. Therefore only the first and third grounds of opposition remain to be assessed.

## Legal Onus and Burden of Proof in Trade-mark Opposition Proceedings

[8] The legal onus is upon the Applicant to show that its application complies with the provisions of the Act, but there is however 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. Once this initial burden 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.* (1984), 3 C.P.R. (3d) 325 (T.M.O.B.); *John Labatt Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) and *Wrangler Apparel Corp. v. The Timberland Company* [2005] F.C. 722].

### Relevant dates

[9] The relevant date for the analysis of each ground of opposition varies depending on the ground of opposition to be assessed:

- Non-compliance with the requirements of s. 30 of the Act: The filing date of the application (May 31, 2002);
- Distinctiveness of the Mark: The filing date of the statement of opposition (March 26, 2007) [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.)].

### Section 30(b) Ground of Opposition

[10] The Opponent has an initial evidential burden when alleging non-compliance with s. 30(b) of the Act but it has been characterized as a light one. Moreover the Opponent can rely on the evidence filed by the Applicant itself [see *York Barbell Holdings Ltd. v. ICON Health & Fitness, Inc.* (2001), 13 C.P.R. (4th) 156]. However such evidence must raise serious doubts on the accuracy of the statements made by the Applicant in its application [see *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986) 10 C.P.R. (3d) 84 (T.M.O.B.), *Labatt Brewing Co. v. Molson Breweries, a Partnership*

(1996), 68 C.P.R. (3d) 216 (F.C.T.D.) and *Williams Telecommunications Corp. v. William Tell Ltd.*, (1999) 4 C.P.R. (4th) 107 (T.M.O.B)].

[11] Mr Ward is the President and COO of Eye Lighting International of North America, Inc. (Eye Lighting) and has held this position since January 20, 2000. He states that Eye Lighting is a subsidiary of the Opponent, a Tokyo based high technology manufacturer. He describes the Opponent's activities with its principal operating area being illumination, including lamps.

[12] He alleges that the Opponent has granted an exclusive license to Eye Lighting to use the trade-mark HORTILUX in Canada and elsewhere and wherein the Opponent has direct control of the character and quality of the electric lamps sold in Canada by Eye Lighting in association with the HORTILUX trade-mark. He states that Standard Products Inc. (SPI) is Eye Lighting's main customer/agent/distributor in Canada.

[13] Mr. Ward alleges that the Applicant ceased using the Mark in December 1997. He asserts that "The Applicant changed its name from Hortilux to Hortilux Schröder in December 1997". He contends that any use since December 1997 has been use of the trade-mark HORTILUX SCHRÉDER rather than the Mark. Mr. Dickinson, a sales representative with the Applicant's wholly owned subsidiary P.L. Light Systems (P.L. Light) since 2005, affirms that the Applicant "was originally known as Hortilux B.V. After a corporate change in September 1997 the company became Hortilux Schreder B.V".

[14] I wish to point out at this stage that I am reproducing in this decision the exact spelling used by the different deponents, namely "Schröder" or "Schreder". I do not consider such discrepancy to be an important fact in my decision except when discussing the surname issue.

[15] Mr. Ward's statement about the use of a particular trade-mark as opposed to the Mark is a conclusion in law and is part of the issue that I have to determine under this ground of opposition. I do take note however that the Opponent is arguing that the

Applicant's evidence shows use of the trade-mark HORTILUX SCHREDER and not the Mark.

[16] The Applicant has brought to my attention the recent judgment of the Federal Court in *Hortilux Schreder B.V. v. Iwasaki Electric Co. Ltd* 2011 FC 967 wherein the present Applicant appealed the Registrar's decision rejecting its opposition to the application filed by the present Opponent for the registration of the trade-mark HORTILUX. The appeal was allowed, the decision of the Registrar was set aside and trade-mark application No. 1,064,360 for the registration of the trade-mark HORTILUX was refused. Application No. 1,064,360 was filed on June 23, 2000, prior to the present application. In application No. 1,604,360 Iwasaki claimed a date of first use of December 31, 1997 (subsequent to the date of first use claimed by Schröder in this application).

[17] A reading of Mr. Justice Russell's judgment in *Hortilux* leads me to conclude that he has not made any conclusion on the issue of whether the use of HORTILUX SCHRÉDER constitutes use of the Mark. In his analysis of the argument raised by Iwasaki that Schröder had abandoned its use of the Mark, Mr. Justice Russell does conclude in paragraph 96 of his judgment that the evidence in that record showed Schröder's "continuing use of the trade-marks and trade-names HORTILUX and HORTILUX SCHREDER". Such conclusion was partly based on evidence not in this file (an affidavit of Mr. Brok with exhibits attached thereto).

[18] Therefore the following questions remain unanswered: whether the evidence in this file is sufficient to conclude that the Opponent has met its initial burden under s. 30(b) of the Act, and if so did the Applicant meet its burden to prove that it has used the Mark as of the claimed date of first use?

[19] To meet its initial burden under this ground of opposition the Opponent is relying on the Applicant's own evidence, namely the affidavit of Mr. Dickinson, in particular Exhibit 1 to his affidavit and a portion of the transcript of his cross-examination.

[20] I do not consider the Applicant's change of name described above sufficient by itself to meet the Opponent's initial burden. However in paragraph 8 of his affidavit Mr.

Dickinson does state that “Exhibit 1 is a copy of a representative sticker that appears on each box of the Wares received by a purchaser in Canada”. During his cross-examination he provided in answers to questions 68 and following more information on what exactly represents Exhibit 1 to his affidavit. For sake of clarity I reproduce such exhibit:

**HORTILUX  
SCHRÉDER**

B.V. VLOTAAN 412  
2681 T.V. MONSTER  
NL OLANDA



HORTILUX SCHRÉDER  
B.V. VLOTAAN 412  
2681 T.V. MONSTER  
NL OLANDA  
Mo  
Tel.  
info

[21] The top portion, wherein the words “HORTILUX” and “SCHRÉDER” appear in same size and font letters but in which “SCHRÉDER” is written immediately underneath “HORTILUX”, is a typical shipping label that is attached to the boxes containing the Wares. The bottom portion of Exhibit 1, wherein the words “HORTILUX” and “SCHRÉDER” are written on the same line but separated by a curved line and a circle portion, is a packing tape.

[22] It is important to note that there is no other documentary evidence to illustrate the use of the Mark by the Applicant. Moreover Mr. Dickinson affirms that Exhibit 1 is a representative sticker used by the Applicant. Even though he does not state since when such sticker has been used by the Applicant, one has to assume that it has been used in close proximity to the Applicant's change of corporate name to Hortilux Schréber B.V. in September 1997 as alleged in paragraph 2 of Mr. Dickinson's affidavit.

[23] As stated in *Labatt Brewing Co. v. Benson & Hedges (Canada) Ltd.* (1996), 67 C.P.R. (3d) 258 (F.C.T.D.) at 262 any non-use of the Mark outside the normal course of trade would be sufficient to defeat the application under a ground of opposition based on s. 30(d) of the Act. If I conclude that use of the trade-mark HORTILUX SCHRÉDER does not constitute use of the Mark and there is no other evidence of use of the Mark in the record, I would have no other alternative but to rule in favour of the Opponent under this ground of opposition as there would be no evidence of use of the Mark from September 1997 and May 31, 2002.

[24] The applicable test has been set out in *Registrar of Trade Marks v. Compagnie L'informatique CII Honeywell Bull, Société Anonyme et al.* (1985), 4 C.P.R. (3d) 523 by Mr. Justice Pratte in the following terms:

The problem to be resolved is not whether CII deceived the public as to the origin of its goods. It clearly did not. The real and only question is whether, by identifying its goods as it did, CII made use of its trade mark "Bull". That question must be answered in the negative unless the mark was used in such a way that the mark did not lose its identity and remained recognizable in spite of the differences between the form in which it was registered and the form in which it was used. The practical test to be applied in order to resolve a case of this nature is to compare the trade mark as it is registered with the trade mark as it is used and determine whether the differences between these two marks are so unimportant that an unaware purchaser would be likely to infer that both, in spite of their differences, identify goods having the same origin.

[25] Moreover in *Nightingale Interlock Ltd. c. Prodesign Ltd.* (1984), 2 C.P.R. (3d) 535 the Registrar stated:

The jurisprudence relating to the question of what deviations in a trade mark are permissible is complicated and often contradictory but in my opinion it is best viewed as establishing two basic principles:

Use of a mark in combination with additional material constitutes use of the mark per se as a trade mark if the public, as a matter of first impression, would perceive the mark per se as being used as a trade mark. This is a question of fact dependent upon such factors as whether the mark stands out from the additional material, for example by the use of different lettering or sizing (see e.g., *Standard Coil Products (Canada) Ltd. v. Standard Radio Corp. et al.* (1971), 1 C.P.R. (2d) 155 at p. 163, [1971] F.C. 106 (Fed.T.D.)), or whether the additional material would be perceived as purely descriptive matter or as a separate trade mark or trade name: see e.g., *Carling O'Keefe Ltd. v. Molson Cos. Ltd.* (1982), 70 C.P.R. (2d) 279 (T.M. Opp. Bd.) at pp. 280-1, applying *Bulova Accutron Trade Mark*, [1969] R.P.C. 102 (Eng. Ch. Div.) at pp. 109-10.

[26] Applying those principles to the trade-mark used by the Applicant, namely HORTILUX SCHRÉDER as opposed to the Mark, I conclude that the addition of the word SCHRÉDER is not so unimportant that an unaware purchaser would be likely to infer that both, in spite of their differences, identify goods having the same origin.

[27] The Applicant tried to minimize the importance of the addition of SCHRÉDER to the Mark by presenting evidence that such word would be seen by an average purchaser as a surname. I refer to Ms. Gwendoline A. MacIsaac's affidavit. She has been a student-at-law in the Ottawa office of the Applicant's agent. On August 28, 2008 she performed a search on the Canada411.ca website to find residential listings of people with surnames that begin with "SCHRE" and she filed the results as Exhibit GM-2. She got 989 listings but narrowed it down to names that begin with "SCHRE" and end with "ER" or "ERS" or "DL". There were 217 individuals falling under those criteria.

[28] She then did a similar search on the Canada411.ca search engine to locate residential listings for the surname SCHROEDER. She obtained 1591 listings and filed only the first three pages of the results of this particular search. She did a similar search for the surname SCHRODER which revealed over 170 listings and she filed the first three pages of the results of this particular search.

[29] On the assumption that the addition of a common surname to a trade-mark is unimportant and would not lead a consumer to think that the goods bearing that modified version of a trade-mark come from a different source, the Applicant was able to locate only 14 individuals with the surname SCHREDER, let alone SCHRÉDER which was not located. In view of the scarcity of individuals bearing that surname in Canada, I cannot conclude that the average Canadian consumer would associate the word SCHRÉDER to a surname.

[30] I did not consider any other surnames (for example SCHRECKER, SCHREADER, SCHROEDER) since they are not the additional word in issue. Again even if I were to consider SCHRÉDER as a surname, I do not consider such addition as an unimportant addition to the Mark.

[31] Consequently, having concluded that the use of HORTILUX SCHRÉDER does not constitute use of the Mark and since there is no other evidence of use of the Mark, the Applicant has failed to meet its burden to prove that it has used the Mark since the claimed date of first use alleged in its application. I therefore maintain the first ground of opposition.

#### Distinctiveness of the Mark

[32] Under this ground of opposition the Opponent has the initial evidential burden to prove that its trade-mark HORTILUX had become sufficiently known on March 26, 2007, the filing date of the statement of opposition, to negate any distinctiveness of the Mark [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 at 58]. Once this burden is met, the Applicant has a legal onus to show, on a balance of probabilities, that the Mark was not likely to create confusion with the Opponent's aforesaid trade-mark such that it was adapted at the relevant date to distinguish or actually distinguished throughout Canada the Wares from the Opponent's wares [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272].

[33] Mr. Thomas is the Marketing Manager of Eye Lighting. He has held this position since January 2006. He has been working for Eye Lighting under various capacities since 1994.

[34] He filed as Exhibit A to his affidavit a copy of the agenda of a meeting in which he participated on August 5, 1997 wherein the LU 1000/B and LU 1000B/I lamps were discussed and on which appears HORTILUX in handwritten form. He states that he worked on the monogram design and the packaging for the HORTILUX brand electric lamps (Opponent's wares) during the summer of 1997 with a view of completing them by the fall of 1997.

[35] He states that the trade-mark HORTILUX appears on the monogram created in the summer 1997. He explains how the monogram was prepared in conjunction with Tampoprint International Corporation. He filed as Exhibit B some correspondence exchanged with the latter company in August of 1997. I note that on the drawings filed the mark appearing is EYE HORTILUX. The invoice issued by Tampoprint and filed in the record is dated October 1, 1997.

[36] Furthermore Eye Lighting worked on a sleeve graphic to be used on the packaging on which would appear the trade-mark HORTILUX. He filed a copy of such sleeve graphic prepared by Dixie Graphics dated September 2, 1997. I note however that the trade-mark appearing on the sleeve is EYE HORTILUX.

[37] Mr. Thomas filed an internal record of a transaction by which Eye Lighting sold to SPI on October 15, 1997 for zero value two units of the Opponent's wares. In his judgment Mr. Justice Russell concluded that such transaction could not be considered as having taken place in the normal course of trade. As such I am disregarding this portion of the evidence. However on December 31, 1997 Eye Lighting sold to SPI in the normal course of trade 36 units of the Opponent's wares (See Exhibit G to Mr. Thomas' affidavit). He attests that the Opponent's wares sold to SPI on that occasion displayed the HORTILUX monogram and the sleeve graphic as described above.

[38] Mr. Thomas filed as Exhibit H “Technical Information Bulletin Sheets” that contain information on the Opponent’s wares that issued in September 1997, October 1998 and June 2001. I note that on those documents there are references to EYE HORTILUX™.

[39] He filed as Exhibit I a sample of a sell-sheet dated July 1998 sent by Eye Lighting to potential consumers in the horticultural market and distributed to potential consumers at trade shows. The following inscriptions appear on the exhibit: EYE MULTI-METAL ACE HORTILUX™ as well as HORTILUX™.

[40] In 1999 Eye Lighting redesigned the packaging with SPI. In June 1999 Eye Lighting along with SPI worked to design new marketing material, including brochures, posters and product shelving stands. They all featured the trade-mark HORTILUX. He filed as Exhibit J the second page of one of these brochures that contains the following:

“Iwasaki Electric, manufacturer of “EYE” brand lamps is pleased to lunch their new range of lamps designed explicitly for the horticultural industry.”

Again the trade-mark that appears on the brochure is EYE HORTILUX. However On page 3 of the 1999 brochure, filed as Exhibit K to his affidavit, there is reference to HORTILUX™.

[41] Mr. Ward (president of Eye Lighting) asserts that HORTILUX is a brand name of a family of grow lamps which provide increased energy sources in the violet, blue and green light spectrum providing the optimum spectral energy levels through all stages of plant growth. He filed as Exhibit A a brochure outlining the HORTILUX family of grow lamps. However the trade-marks appearing on the brochure vary from EYE HORTILUX & design to HORTILUX SUPER SHP, HORTILUX METAL ACE, HORTILUX ULTRA ACE and HORTILUX-BLUE.

[42] Mr. Ward alleges that the trade-mark HORTILUX has been used since at least as early as December 31, 1997 and filed as Exhibit B to his affidavit is a copy of the original invoice issued by Eye Lighting to SPI for the sale of electric lamps bearing the trade-mark HORTILUX. He also filed other invoices dated in February, July, October and

December 1998 to evidence the sale of the Opponent's wares in Canada in association with the trade-mark HORTILUX.

[43] He provides the annual sales figures in Canada of the Opponent's wares bearing the trade-mark HORTILUX. The annual sales were minimal in 1997 but went from \$99,000 in 1998 to over \$2.5 million in 2006 with sales reaching over \$4.6 million in 2003. I shall discuss the admissibility of these figures as this portion of the evidence is contested by the Applicant.

[44] He asserts that Eye Lighting has spent a portion of its revenues in advertising and promotion. However the annual expense figures provided are for North America. There is no breakdown for Canada. Eye Lighting has used direct mail, trade magazine advertising, direct selling, tradeshow representation, point of sale posters and packaging, amongst other, as vehicles to communicate and promote the Opponent's wares in association with the trade-mark HORTILUX throughout Canada and North America. He provides a list of publications in which advertisements were placed but we have no information on their circulation figures in Canada. He filed samples of those advertisements. On some of these advertisements the trade-mark HORTILUX appears alone.

[45] The Applicant argues that beside the sales figures of the Opponent's wares bearing the trade-mark HORTILUX there is not that much evidence that could lead to a conclusion that the Opponent's trade-mark HORTILUX was known in Canada to some extent. Therefore the Opponent would not have met its initial evidential burden of proof. Accordingly, the ground of opposition should be dismissed.

[46] The Applicant bases its argument on the fact that during his cross-examination Mr. Ward admitted not having personal knowledge of the sales figures provided in his affidavit. Despite the fact that Mr. Ward is the President of the Opponent and that he sought the help of the accounting department to provide such information, he was not able during his cross-examination to identify the person of the accounting department who provided such information and he did not see the documents containing such information. The Applicant therefore takes the position that the sales figures mentioned in Mr. Ward's affidavit constitute inadmissible hearsay evidence as it does not fall within

the exceptions under such rule and the Opponent has not demonstrated that such information was necessary and reliable. Consequently, without those sales figures, the Opponent has not proven that its trade-mark HORTILUX was known in Canada prior to the relevant date.

[47] Even if I were to disregard those sales figures, I conclude that the Opponent has established that its trade-mark HORTILUX was known to a certain extent in Canada as of the relevant date for the reasons detailed hereinafter. Mr. Berkhout was employed by P.L. Light Systems Canada Inc. (P.L. Light Canada) from 1984 to May 2001. He states that by virtue of his employment at P.L. Light Canada he was familiar with its business relationship with SPI which started in 2000. It was unclear however if there exists any relationship between P.L. Light Canada and the Applicant and/or its wholly owned subsidiary P.L. Light.

[48] He states that he has knowledge of P.L. Light Canada's purchase of the HORTILUX brand lamps produced by Eye Lighting, the Opponent's licensee. He further states that he is familiar with the Opponent's HORTILUX products and that he was introduced to such products by Eye Lighting in 1999. He goes on to state that P.L. Light Canada was interested in purchasing the Opponent's HORTILUX products because they were an established product in the indoor garden market. Finally he states that P.L. Light Canada by 2000 purchased the Opponent's HORTILUX products from SPI.

[49] This evidence does establish that the Opponent's HORTILUX products were known in Canada as of the relevant date. I note that Mr. Berkhout does not refer to EYE HORTILUX or any other trade-marks to identify the Opponent's products. He does refer to them as the HORTILUX products. As mentioned above the documentary evidence filed by the Opponent does contain references to the trade-mark HORTILUX alone. I therefore do not need to determine if any of the other trade-marks used by the Opponent constitute use of the trade-mark HORTILUX alone. Finally, I do not have to rule on the admissibility of the Opponent's sales figures contained in Mr. Ward's affidavit as, even without them, the evidence in the record satisfies me that the Opponent's trade-mark HORTILUX was known in Canada to some extent at the relevant date.

[50] The Opponent having met its initial evidential burden, I must now assess, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's trade-mark HORTILUX. The test to determine this issue is set out in s. 6(2) of the Act. I must take into consideration all the relevant surrounding circumstances, including those listed in s. 6(5): the inherent distinctiveness of the trade-marks and the extent to which they have become known; the length of time the trade-marks 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 in appearance, or sound or in the ideas suggested by them.

[51] Those criteria are not exhaustive and it is not necessary to give each one of them equal weight. In its recent judgment in *Masterpiece Inc. v. Alavida Lifestyles Inc. et al.* 2011 S.C.C. 27 the Supreme Court of Canada has clearly indicated that the most important factor amongst those listed under s. 6(5) of the Act is the degree of resemblance between the marks.

[52] In this case the parties' marks are identical. Moreover as argued by the Opponent, Mr. Justice Russell in *Hortilux* concluded that the parties' marks were confusing. However the Applicant contends that the evidence in this file shows that the channels of trade of the parties are different and that in *Hortilux* the Court did not have to deal with an application that contains a restriction in the channels of trade used by the Applicant for the sale of the Wares.

[53] The Applicant asserts that it sells the Wares only to the commercial horticultural industry and not at retail to consumers while the Opponent sells its HORTILUX products to retail stores, typically retail home grow hydroponic stores, which then sell the products directly to consumers. Even if I were to rule in favour of the Applicant when assessing the factor under s. 6(5)(c) of the Act the facts remain that the trade-marks are identical and the wares are light bulbs (for the Opponent) versus lighting apparatus and lamp reflectors (for the Applicant) but all of these lighting products are for horticultural use. Those two factors clearly outweigh any advantage that the Applicant may have when considering just the channels of trade used by the parties.

[54] Consequently I conclude that the Applicant failed to meet its burden to establish, on a balance of probabilities, that the Mark would not likely cause confusion with the Opponent's trade-mark HORTILUX. Therefore the Mark was not distinctive at the relevant date. I maintain as well the third ground of opposition.

Disposition

[55] Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I refuse pursuant to s. 38(8) of the Act the Applicant's application for the registration of the Mark.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office