



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

Citation: 2015 TMOB 84
Date of Decision: 2015-05-04

**IN THE MATTER OF AN OPPOSITION
by SpinMedia (formerly InterMedia Vibe
Holdings, LLC) to application
No. 1,125,712 for the trade-mark VIBE in
the name of Bell Media Inc.**

The Record

[1] On December 19, 2001, Bell Media Inc. (the Applicant) applied to register the trade-mark VIBE (the Mark), based upon proposed use in Canada in association with the following services:

- (1) Television broadcasting services, cable television programming services; television programming services; distributing of television programming to cable television systems.
- (2) Development and production of television programs and systems; distribution of television programs.
- (3) Operation of an interactive website for the purpose of providing online sales in the field of music and online broadcasting television programs.
- (4) Providing information on a wide variety of topics of general interest to the consuming public via the media of television, satellite, computer, telephone, audio, video, and/or via the World Wide Web on the global Internet (including narrow band and broad band applications) or through electronic mail.
- (5) Entertainment services in the nature of an ongoing series of shows featuring commentary, news, arts, fashion, lifestyle, sports, music and/or performances through the mediums of television, satellite, computer, telephone, electronic mail, radio, audio, and video media and/or the Internet.

[2] The application was advertised on November 21, 2012.

[3] InterMedia Vibe Holdings, LLC (InterMedia) filed a statement of opposition on April 22, 2013. The grounds of opposition are based upon sections 30(e), 30(i), 16(3)(a), 16(3)(c), 12(1)(d) and 2 of the *Trade-Marks Act*, RSC 1985, c T-13 (the Act) and are set out in the attached Schedule A. Many of these grounds turn on a determination of the issue of confusion between the Mark and one of the Opponent's VIBE registered marks (TMA526,485 and TMA793,016). On February 6, 2014, InterMedia was granted leave to amend its statement of opposition to reflect an assignment of its rights in the VIBE trade-marks to SpinMedia. The term Opponent will be used to refer to SpinMedia or InterMedia, as is appropriate depending on the time frame.

[4] A counter statement denying each of the grounds of opposition was filed by the Applicant.

[5] In support of its opposition, the Opponent filed the affidavit of Jeff Leeds. Mr. Leeds was not cross-examined. The Applicant elected not to file any evidence.

[6] Both parties filed a written argument.

[7] A hearing was not held.

Onus and Material Dates

[8] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. There is however an initial 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 [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA* (2002), 20 CPR (4th) 155 (FCA)].

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

- Section 38(2)(a)/Section 30 - the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];

- Section 38(2)(b)/Section 12(1)(d) - the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)];
- Section 38(2)(c)/Section 16(3)(a) and 16(3)(c) – the filing date of the application;
- Section 38(2)(d)/non-distinctiveness - the date of filing of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

Prior Decisions Based on the Opponent's Trade-mark

[10] The Opponent has referred to previous Federal Court and opposition decisions involving the Opponent's VIBE trade-marks. These decisions include the following: *Vibe Media Group LLC now InterMedia Vibe Holdings LLC v. Lewis Craig trading as Vibetrain* (2010), 82 CPR (4th) 1 (FC), an appeal from an opposition regarding the trade-mark VIBETRAIN; *Vibe Ventures LLC v 3681441 Canada Inc.* (2005), 45 CPR (4th) 17 (FC), a section 57 expungement action regarding the trade-mark VIBE Design; *InterMedia Vibe Holdings, LLC (now SpinMedia) v CTV Limited (formerly Chum Limited and now Bell Media Inc)* 2010 TMOB 165, an opposition against the Opponent's application for the trade-mark VIBE; *Vibe Ventures LLC and Vibe Media Group LLC & InterMedia Vibe Holdings, LLC (now SpinMedia)*, 2010 TMOB 166, an opposition against the Applicant's application for the trade-mark MUCHVIBE; and *InterMedia Vibe Holdings, LLC (now SpinMedia) v Vibe Studio Productions Inc*, 2011 TMOB 156, an opposition by the Opponent against the application for the trade-mark VIBE. The conclusions drawn in the above cases are not binding on me as every case has to be decided on its own merit. I will still have regard to them, however, where I consider it appropriate to do so.

Summary of the Opponent's Evidence

Leeds' Affidavit

[11] In his affidavit, Mr. Leeds, General Manager of the Music division of the Opponent, states the following concerning use of the Opponent's VIBE trade-mark and trade-name in Canada:

- the VIBE mark has been continuously and prominently used in Canada by or on behalf of the Opponent since 1992 in association with a general interest magazine relating to music, fashion, urban culture and entertainment [para. 3];
- in a representative sample issue of VIBE magazine dated December 2012/January 2013 VIBE is prominently displayed on the front cover of the magazine, on the spine of the magazine and in various spots inside the magazine [para. 4 and Exhibit 3];
- copies of the front cover of some other issues of VIBE magazines dated between 1992 and 1995, 2002, 2003 and summer 2013 show VIBE prominently displayed thereon [para. 4 and Exhibit 4];
- the number of VIBE magazines sold in Canada annually between 1996 and 2001 have been between 60,000 and 80,000, with a retail value in the tens of millions of Canadian dollars [para. 5 and Exhibit 4];
- VIBE is a prominent award-winning magazine, having won multiple awards from the Society of Publication Designers, including 4 awards in 2009 alone [para. 6];
- the trade-mark VIBE has been used in connection with the operation of a website providing, among other things, an online magazine and information relating to music, entertainment and hip-hop culture since at least as early as 1994 [para. 7 and Exhibit 5];
- in 2013 there were approximately 1.6 million visits from Canadian readers to the Opponent's website www.VIBE.com [para. 9];
- use of the VIBE mark has been extended to other goods and services, including: books relating to music, entertainment and urban culture; mobile or tablet based services providing users with daily news, album reviews, and other information including articles originating from www.VIBE.com or the Opponent's magazine; and fashion and apparel [paras. 13-17];
- a television program called VIBE was broadcast on CFMT-TV in Canada from January to August 1998 [para. 12];

- through the Opponent's website, and continuously since at least as early as 1998, the mark VIBE has been used by the magazine in connection with the provision of audio/video content, such as music, music videos and interviews – while such content was originally downloadable, since the mid-2000s it has been provided by means of streaming [para. 11]; and
- the Opponent has used the trade-name VIBE since the inscription of the magazine eg. on all of the Opponent's subscription cards and buck slips; the Opponent's trade-name VIBE has also been referenced in text within the content of the magazine and other media (eg. VIBE goes behind the scenes, VIBE spoke with..., etc.) [para. 18].

[12] Mr. Leeds also provided a list of the Opponent's predecessors in title who had used the mark VIBE in Canada in association with the above mentioned goods and services [para. 19]. He further states that the above mentioned activities were all carried out either by the officers and other employees of the applicable trade-mark owner at the time, or by affiliates or other licensees of the applicable owner at the time on the complete understanding that the owner had, under the license, direct or indirect control of the character or quality of such goods or services [para. 20].

Non-compliance – Section 30(i)

[13] The Opponent pleads that the Applicant could not have been satisfied that it was entitled to use the Mark pursuant to section 30(i) of the Act because it had knowledge of the prior use of the Opponent's confusing trade-marks.

[14] Section 30(i) of the Act merely requires that an applicant declare in its application that it is satisfied that it is entitled to registration of its trade-mark. Where an applicant has provided the requisite statement, a section 30(i) ground should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. Mere knowledge of the existence of an opponent's trade-mark or trade-name does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use the mark [*Woot, Inc v Woot Restaurants Inc Les Restaurants Woot Inc* 2012 TMOB 197 (CanLII)].

[15] In the present case, the Applicant has provided the necessary statement and this is not an exceptional case. This ground is accordingly dismissed.

Non-compliance – Section 30(e)

[16] The Opponent pleads that the Applicant did not have the necessary intention to use the Mark as of the filing date. In the alternative, the Opponent submits that such use for one or more services had already commenced.

[17] Since it is difficult to prove a negative and certainly more so in the case of a proposed use application, the initial burden upon an opponent with respect to a ground of opposition based upon non-compliance with section 30(e) is a relatively light one [*Molson Canada v Anheuser-Busch Inc*, 2003 FC 1287 (CanLII); (2003), 29 CPR (4th) 315 (FC)]. I also note that there is a line of decisions wherein the Registrar has refused proposed use applications where use of the trade-mark was evidenced prior to the filing date [*Nabisco Brands Ltd v Cuda Consolidated Inc* (1997), 81 CPR (3d) 537 at 540 (TMOB) and *Canada Post Corporation v IBAX Inc* (2001), 12 CPR (4th) 562 (TMOB)].

[18] In the present case, the Applicant has not filed any evidence. The Opponent, however, relies on evidence of the Applicant filed in respect of its opposition regarding application No. 1,163,727 for the mark VIBE [*InterMedia Vibe Holdings, LLC (now SpinMedia) v CTV Limited (formerly Chum Limited and now Bell Media Inc)*, *supra*]. Attached as Exhibit 8 to the affidavit of Mr. Leeds are copies of certain ads of the Applicant from at least as early as April 2002 to at least September 2004 which had been filed as part of exhibit J to the affidavit of David Kines which was filed in the other proceeding. Attached as Exhibit 9 to Mr. Leeds' affidavit is a copy of pages 8 – 14 of the cross examination of David Kines conducted January 3, 2003 in respect of his affidavit mentioned above. The Opponent submits that in this earlier proceeding, the Applicant's officer had denied that the Mark VIBE had yet been used, even though several years had elapsed since the filing of the subject application.

[19] I will comment first on the admissibility of the exhibits attached to Mr. Leeds' affidavit. In addition to being photocopies of incomplete documentation on file within the Trade-marks

Office, such evidence is hearsay. I therefore do not find the exhibits attached to Mr. Kines' affidavit admissible.

[20] Even if this evidence was admissible, it would not have changed the outcome of this ground of opposition. In this regard, the fact that Mr. Kines stated in the other proceeding that the Applicant didn't use the mark VIBE but instead used the mark MUCHVIBE is not clearly inconsistent with the Applicant's statement of intention to use the mark VIBE in the present case. Further, the ads used by the Applicant wherein the word VIBE appeared in a similar style and font on its TV program as the Opponent's VIBE mark appeared in its magazine, were dated after December 19, 2001, the material date for this ground of opposition.

[21] This ground of opposition is therefore dismissed.

Non-registrability – Section 12(1)(d) Ground

[22] The Opponent pleads under this ground that the Mark is not registrable in that it is confusing with one or more of the following VIBE trade-mark registrations: Nos. TMA526,485 and TMA793,016. I have exercised the Registrar's discretion to confirm that the Opponent's VIBE trade-mark registration Nos. TMA526,485 and TMA793,016 are in good standing as of today's date and, as such, the Opponent has met its burden under this ground [*Quaker Oats Co of Canada Ltd/Cie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410, (TMOB) at 411-412]. The Opponent's VIBE trade-marks are registered for use in association with the following goods and services:

TMA526,485 VIBE

Goods:

General interest magazine.

TMA793,016 VIBE

Goods:

(1) General interest magazine relating to music, fashion, urban culture and entertainment.

Services:

(1) Operation of an Internet website providing an on-line magazine and information relating to music, fashion, urban culture and entertainment.

[23] The legal onus is on the Applicant to show that there would be no reasonable likelihood of confusion, within the meaning of section 6(2) of the Act. Section 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 section 6(2) is whether there would be confusion of the Applicant's services provided under the Mark as emanating from or sponsored by or approved by the Opponent [*Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD) at 12].

test for confusion

[24] The test for confusion is one of first impression and imperfect recollection. The purchaser in mind is described as the casual consumer somewhat in a hurry [*Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC) at para. 58].

[25] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; (b) the length of time each has 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 or trade-names in appearance or sound or in the ideas suggested by them. These factors need not be attributed equal weight; rather, the weight to be given to each relevant factor may vary, depending on the circumstances [*Clorox Co v Sears Canada Inc* (1992), 41 CPR (3d) 483 (FCTD); *Gainers Inc v Marchildon* (1996), 66 CPR (3d) 308 (FCTD)]. Further, the list of factors set out is not exhaustive of matters that could be considered [see in general *Mattel supra*;

United Artists Corp v Pink Panther Beauty Corp (1988), 80 CPR (3d) 247 (Fed CA) at 263-264; *Veuve Cliquot Ponsardin v Boutiques Cliquot Ltée* (2006), 49 CPR (4th) 401 (SCC)].

[26] In most instances, the dominant factor in determining the issue of confusion is the degree of resemblance between the trade-marks in their appearance or sound or in the ideas suggested by them, and other factors play a subservient role in the overall surrounding circumstances [*Beverly Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145, conf 60 CPR (2d) 70 (FCTD)]. In *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC), the Supreme Court of Canada considered the importance of section 6(5)(e) in conducting an analysis of the likelihood of confusion (see para 49):

...the degree of resemblance, although the last factor listed in s. 6(5), 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. The other factors become significant only once the marks are found to be identical or very similar ... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start.

[27] I will follow this approach and begin my analyses with a consideration of the degree of resemblance between the marks.

section 6(5)(e) - the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[28] In this proceeding, it is self-evident with regard to section 6(5)(e) that the trade-marks at issue are identical in sound, appearance and in ideas suggested. Accordingly, as reasoned in *Masterpiece, supra*, I must now consider whether any of the other surrounding circumstances is significant enough to have an effect on the confusion analysis.

section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which each trade-mark has become known

[29] The inherent distinctiveness of the word VIBE was previously considered by Member Bradbury in *CTV Limited v InterMedia Vibe Holdings, LLC, supra*. That decision concerned an opposition to the mark MUCHVIBE which had been applied for by the Applicant in the present

proceedings, and opposed by the same Opponent who at the time was only relying on its VIBE registration No. 562,485. Ms. Bradbury stated as follows at paragraph 62:

Both parties' marks [MUCHVIBE and VIBE] consist of ordinary dictionary words. The *Oxford Canadian Dictionary* defines "vibe" as "vibration, esp. in the sense of feelings or atmosphere communicated". The word can thus be considered to be slightly suggestive of both parties' wares/services. I note that Mr. Justice Harrington stated, "There is nothing inherently distinctive in the word "VIBE". [*Vibe Ventures LLC v 3681441 Canada Inc* (2005), 45 CPR (4th) 17 (FC)] Overall, neither mark is inherently strong.

[30] Similarly, in the present case, I find the word VIBE to also be slightly suggestive of the goods and services of both parties. I therefore do not find either party's mark to be inherently strong.

[31] A mark may also acquire distinctiveness through promotion or use. In view of the unchallenged evidence of Mr. Leeds, I am satisfied that the Opponent's mark has become known to some extent in Canada. As the Applicant has not provided any evidence of the use or promotion of its Mark, overall this factor favours the Opponent.

section 6(5)(b) - the length of time each trade-mark has been in use

[32] In view of the evidence of Mr. Leeds, and the fact that the Applicant has not filed any evidence to suggest that it has started using the Mark, this factor favours the Opponent.

sections 6(5)(c) and (d) - the nature of the goods, services or business; the nature of the trade

[33] When considering the goods, services and trades of the parties, it is the statement of goods or services in the parties' trade-mark application and registration that govern in respect of the issue of confusion arising under section 12(1)(d) [*Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)].

[34] The Applicant submits that the nature of the business of both parties is different in that the Applicant is Canada's premier multimedia company with leading assets in television, radio, out of home advertising, and digital media while the Opponent is a company and blog network based in Los Angeles which owns a community of pop culture websites. The Applicant has not,

however, furnished any evidence, to support this statement. There is therefore no information about the Applicant's services other than what I can infer from its statement of services.

[35] For ease of reference, I reproduce the applied for services below:

(1) Television broadcasting services, cable television programming services; television programming services; distributing of television programming to cable television systems.

(2) Development and production of television programs and systems; distribution of television programs.

(3) Operation of an interactive website for the purpose of providing online sales in the field of music and online broadcasting television programs.

(4) Providing information on a wide variety of topics of general interest to the consuming public via the media of television, satellite, computer, telephone, audio, video, and/or via the World Wide Web on the global Internet (including narrow band and broad band applications) or through electronic mail.

(5) Entertainment services in the nature of an ongoing series of shows featuring commentary, news, arts, fashion, lifestyle, sports, music and/or performances through the mediums of television, satellite, computer, telephone, electronic mail, radio, audio, and video media and/or the Internet.

[36] The Opponent submits that the Applicant's services (4) and (5) directly overlap with the Opponent's operation of an Internet website providing an on-line magazine and information relating to music, fashion, urban culture and entertainment, both in terms of content and medium (method of delivery). I agree.

[37] The Opponent further submits that the remaining applied for services are related to those of the Opponent. In this regard, the Opponent relies on its evidence which shows that its website is both an electronic version of its magazine and also provides information relating to music, fashion, urban culture and entertainment. Mr. Leeds' evidence is that through the Opponent's website, and continuously since at least as early as 1998, the mark VIBE has been used by the magazine in connection with the providing of audio/video content such as music, music videos and interviews. He states as follows at paragraph 11:

“Originally, such content was downloadable (such as with our VIBE TV Online service in connection with our original TV show) but since about the mid-2000s, it has been provided by means of streaming. All such video is loosely a form of television over the Internet, in the sense of constituting video for viewing on an electronic screen, with sound. See, in particular, the sample webpage marked “June 1998” as contained in Exhibit 5 mentioned above, which refers to Vibe’s “A/V section” and “Vibe TV Online”.

[38] I agree with the Opponent that while the remaining services may not directly overlap with those of the Opponent, they are related. In this regard, as noted by the Opponent, the same hip hop musician could be featured both on television and in a magazine and their music videos could be viewed on television just as easily as on an Internet website. I have also taken into account the evolution of media, and agree with the Opponent that the provision of audio or video content by means of streaming on an Internet site could be loosely considered a form of television over the Internet. Finally, the Applicant has not shown how any of its services would differ in any significant manner from those of the Opponent.

[39] With respect to the parties' channels of trade, I also find that, in the absence of evidence to the contrary, these could overlap.

Conclusion

[40] 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 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.**

[41] As noted above, the legal onus is on the Applicant to show that there is no reasonable likelihood of confusion between the marks. In view that: 1) that the marks are identical, 2) the Opponent has shown a reputation in Canada of its VIBE magazine and associated services in the field of culture, music and entertainment, and 3) the Applicant has filed no evidence, I find that there is a sufficient connection between the parties' services to conclude that there is a reasonable likelihood of confusion. In other words, the Applicant has not satisfied me that, on a balance of probabilities, a Canadian who has an imperfect recollection of the Opponent's VIBE trade-mark as associated with the Opponent's services, would not, as a matter of first impression, assume that there was some connection between the Applicant's VIBE services and the Opponent's VIBE services.

[42] The section 12(1)(d) ground is therefore successful.

Non-entitlement – Section 16(3)(a)

[43] The Opponent pleads under this ground that the Applicant is not the person entitled to registration as the Mark was, as of the date of filing the application, confusing with the Opponent's trade-mark VIBE which had been previously used or made known in Canada by the Opponent (through its predecessors or licensees) and affiliates.

[44] In order to meet its evidentiary burden under this ground of opposition, the Opponent must show previous use or making known of its VIBE trade-mark in Canada prior to the Applicant's filing date, and non-abandonment of its mark as of the date of advertisement of the Mark in the *Trade-marks Journal* [section 16(5) of the Act]. As per my review above of the relevant parts of the Leeds' affidavit, the Opponent has met its burden under this ground.

[45] For the most part, even though the material dates are different, my conclusions above under the registrability ground also apply to this ground of opposition. As a result, the section 16(3)(a) ground of opposition also succeeds.

Remaining Grounds of Opposition

[46] In view that I have found the Opponent successful on two grounds of opposition, I do not find it necessary to consider the remaining grounds.

Disposition

[47] In view of the above, and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application.

Cindy R. Folz
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Schedule A

The grounds of opposition are as follows:

Under Section 38(2)(a): The application does not comply with the requirements of Section 30 as follows:

A. Under Section 30(e), with respect to that portion of the application which is based on proposed use, the statement of intent to use is invalid. In particular, and without limiting the generality of the foregoing, the Opponent states that the Applicant did not have the necessary intention as of the filing date. Without limitation, the Applicant's witness had denied that the subject mark had been used yet, several years after the filing, particularly for all of the services as listed. In the alternative or in addition, such use for one or more services had already commenced, and the application is therefore misleading and not properly based on proposed use.

B. Under Section 30(i), the Applicant could not have been satisfied that it was entitled to use the trade-mark in Canada in association with the services described in the application including, for among other reasons, the facts stated herein. In the alternative or in addition, the Applicant had prior knowledge of the confusing marks and names stated herein, Applicant's officer was aware of, and had read, the Opponent's Magazine under the subject mark, and Applicant had simulated the Opponent's logo or design, and theme of content. Even if it is ruled that the marks are not confusing, the application was filed in bad faith, and with the intention of taking advantage of the Opponent's well-known mark.

Under Section 38(2)(b): The Applicant's trade-mark is not registrable in that:

C. Under Section 12(1)(d), the Applicant's trade-mark is confusing with one or more of the following Canadian trade-mark registrations:

Registration No.:

TMA526,485 VIBE - General interest magazine.

TMA793,016 VIBE - (1) General interest magazine relating to music, fashion, urban culture and entertainment.

(1) Operation of an Internet website providing an on-line magazine and information relating to music, fashion, urban culture and entertainment.

Under Section 38(2)(c): The Applicant is not the person entitled to registration as follows:

D. The subject mark was, under Section 16(3)(a), as of the date of filing the application, confusing with a trade-mark which had been previously used or made known in Canada by another person, namely the mark VIBE by the

Opponent (herein including any use deemed to be use by the Opponent through its predecessors or licensees) and affiliates.

E. The subject mark was, under Section 16(3)(c), as of the date of filing the application, confusing with a trade-name that had been previously used in Canada by another person, namely by the Opponent (herein including its predecessors and licensees) and affiliates.

Under Section 38(2)(d):

F. The Applicant's trade-mark is not distinctive within the meaning of Section 2 in that the Applicant's trade-mark does not actually distinguish, nor is it adapted to distinguish, the wares or services of the Applicant from the wares, services or business of the Opponent and/or the other persons, including, without limitation, the TV program LATIN VIBES.