



## The Record

[5] The Opponent filed a statement of opposition on June 21, 2013. The Applicant then filed and served its counter statement on September 10, 2013 denying all of the grounds of opposition.

[6] In support of its opposition, the Opponent filed the affidavit of Dawn Villa, a legal assistant and trade-mark clerk employed by the Opponent's trade-marks agent. In support of its application, the Applicant filed the affidavit of Loreen Morden, Supervisor, Legal Assistants, Trade-marks of The Great-West Life Assurance Company. Neither affiant was cross-examined.

[7] Both parties filed a written argument. Although both parties requested a hearing, the Opponent informed the Registrar subsequently that it would not participate in the scheduled hearing. Consequently, only the Applicant was represented at the hearing, which was heard together with another application filed by the Applicant. A separate decision will be issued for the proceeding pertaining to the trade-mark LIVING MADE EASY of application No. 1,578,073.

[8] I note that the Opponent included additional written submissions in its letter informing the Registrar of its withdrawal from the hearing, to which the Applicant objected at the hearing. In view of section 46 of the *Trade-marks Regulations*, I will not have regard to these additional submissions as they were filed after the prescribed deadline for written arguments, without requesting leave from the Registrar.

## The Parties' Respective Burden or Onus

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd.* (1990), 30 CPR (3d) 293 (FCTD) at 298].

Does the Application Conform to the Requirements of Section 30 of the Act?

[10] In its statement of opposition, the Opponent alleges that the application does not conform to the requirements of section 30 of the Act, namely that:

- i. the statement of services, in particular the terms “operations [and] customer services... for multi-residential buildings”, is not in ordinary commercial terms, contrary to section 30(a) of the Act; and
- ii. the Applicant did not in fact use the Mark as alleged in the application, contrary to section 30(b) of the Act.

[11] The grounds of opposition raised under sections 30(a) and (b) of the Act are dismissed for the reasons that follow.

[12] The material date for considering the circumstances with respect to the grounds of opposition based upon non-compliance with section 30 is the filing date of the application, namely May 17, 2012 in this case [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB)].

[13] The Opponent relies on paragraph 7 of the Villa affidavit as “uncontroverted evidence” that “such wording cannot be understood”, in support of its section 30(a) ground:

Looking at the description of the services [...], I can understand what is meant by “leasing” and “property management” services for multi-residential buildings, but I do not understand the terms “operations” or “customer services” for such buildings; I could probably guess what they might include but I would not know where those terms would end.

[14] No other documentary evidence was presented on this issue. In its written argument, the Opponent submits that “if someone (such as the affiant) were to adopt the same mark for various services, the person would not know if those services constitute ‘operations’ or ‘customer services’.”

[15] I am not satisfied that the Opponent has provided any evidence that would substantiate its allegation that the statement “leasing, operations, customer services and property management services for multi-residential buildings” is not in ordinary commercial terms, nor did it submit sufficient argument to put the statement of services into question. Without additional

submissions or documentary evidence in support of the affiant's personal impression of the statement of service in question, I am not prepared to give any weight to these statements made by an employee of the Opponent's trade-marks agent as they are self-serving, vague, unsubstantiated and do not assist me in determining whether a statement of services is specific and in ordinary commercial terms. The statements in question amount to opinions given on a matter of substance in the present opposition proceeding [see *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2006 FCA 133].

[16] Consequently, I dismiss the section 30(a) ground of opposition for the Opponent's failure to meet its initial burden.

[17] With respect to the section 30(b) ground of opposition, an opponent's initial burden can be met by reference not only to its own evidence but also that of the applicant's [see *Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 230]. In the present case, the Applicant did not file any evidence regarding use of the Mark. Thus, the Opponent is relying solely on its own evidence. The Opponent submits that (i) the evidence does not show use of the Mark at all, let alone as a trade-mark; and (ii) the evidence does not show provision of all of the applied for services, let alone with the Mark.

[18] In support of these allegations, the Opponent points to printouts from a website located at [www.vertica.ca](http://www.vertica.ca) attached as Exhibits A and B to the Villa Affidavit. Exhibit A consists of a webpage printed on June 18, 2013, identified as Vertica Resident Services with information on rental properties in various Canadian cities, along with the Applicant's complete mailing address at the bottom. The following references appear on the webpage: "Living made easy with apartments for rent in: [name of Canadian cities]", "Our goal every day is to provide you with superior service that will make apartment living easy, convenient and comfortable for you", and "We're here to help make living easy...".

[19] Exhibit B is a document said to be extracted from a "Vertica Resident Services" website providing information on "Condominium Inspired Rental Living" at 10 Lisa St., Brampton, Ontario. "Vertica Resident Services" is identified at the bottom of the document. The following reference can be seen in the description of the property: "This is living made easy at 10 Lisa."

[20] In its written argument, the Opponent submits that the terms “living made easy” are not capitalized and do not stand out from the rest of the sentence, and that in any case, the printouts do not show the Mark at all. The Opponent further submits that the evidence does not conclusively establish that the Applicant has provided all of the applied for services with the Mark. Finally, the Opponent indicates that it would have been a simple matter for the Applicant to provide clear evidence of use.

[21] Having reviewed the evidence in its entirety, I am not satisfied that the Opponent has presented evidence that would put into question the date of first use alleged by the Applicant in its application in support of the section 30(b) ground of opposition. All that I am able to gather from the Villa affidavit is that the Opponent found references to statements that convey ideas similar to that of the Mark on the Internet in or around June 2013. However, the evidence does not put into question, or even speak to, the alleged date of first use of September 2007 of the Mark as a trade-mark in association with the applied for services. It also does not contain any reference to the phrase “apartment living made easy”. Failure to find an Internet presence in such limited circumstances as the search of one website, which may or may not have been the Applicant’s primary website at the material date, is not sufficient to support this ground of opposition.

[22] In the absence of any evidence suggesting that the Applicant has not used the Mark in Canada as of the alleged date of first use, the Applicant is under no obligation to positively evidence such use. Consequently, I dismiss the section 30(b) ground of opposition for the Opponent’s failure to meet its initial burden.

#### Is the Mark Clearly Descriptive or Deceptively Misdescriptive?

[23] In its statement of opposition, the Opponent alleges that contrary to section 12(1)(b) of the Act, the Mark is not registrable because “it clearly describes a character, and even a quality” of the applied for services as “the phrase conveys that living is made easy and comfortable by those services”. The Opponent further alleges that “in cases where the services do not in fact make such living easy”, then the Mark is deceptively misdescriptive.

[24] In support of this ground, the Opponent points to the following in the Villa affidavit:

- i. Exhibits A and B – the use of the terms “living made easy” as part of a sentence on the Applicant’s website; and
- ii. Exhibit C – printouts from 13 different sources online showing use of the terms “living made easy” by others, including a Chicago Condo Resource webpage with the phrase “Condo Living Made Easy”, property listings with the terms “living made easy” used as part of the description, a housing guide entitled “2007 Living Made Easy”, apartment rental ads with the phrases “Apartment Living Made Easy!” and “Living Made Easy!”, a home health care equipment ad for “Living Made Easy Ltd”, a website for a wood burning oven by “Outdoor Living Made Easy.com”, and a book entitled “Healthy Living Made Easy”.

[25] In its written argument, the Opponent submits that “the mark may be descriptive” and that the evidence shows that the phrase “living made easy” is capable of being utilized as ordinary wording within a sentence by traders.

[26] At the outset of the analysis, I note that in considering the Villa affidavit, I disregard any opinions that go to the questions of fact and law to be determined by the Registrar in this proceeding, including the statement that the phrase “living made easy” conveys the idea that living is made easy by the Applicant’s applied for services.

[27] The material date for assessing a section 12(1)(b) ground of opposition is the filing date of the application, that is May 17, 2012 [*Shell Canada Limited v PT Sari Incofood Corporation* (2005), 41 CPR (4th) 250 (FC); *Fiesta Barbeques Limited v General Housewares Corporation* (2003), 28 CPR (4th) 60 (FC)].

[28] The analysis under section 12(1)(b) of the Act has been summarized as follows in *Engineers Canada/ Ingénieurs Canada v Burtoni*, 2014 TMOB 174 at para 14 to 16:

When conducting an analysis under section 12(1)(b) of the Act, a trade-mark must be considered as a matter of first impression, in its entirety and not dissected into its constituent parts [*Wool Bureau of Canada Ltd v Registrar of Trade Marks* (1978), 40 CPR (2d) 25 (FCTD) at 27-8; *Atlantic Promotions Inc v Registrar of Trade Marks* (1984), 2 CPR (3d) 183 (FCTD) at 186].

The word “character” in section 12(1)(b) has been held to mean a feature, trait or characteristic of the product and the word “clearly” has been held to mean “easy to understand, self-evident or plain” [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34].

The test to be applied when assessing whether a trade-mark violates section 12(1)(b) of the Act has been summarized by the Federal Court of Appeal in *Ontario Teachers’ Pension Plan Board v Canada* (2012), 99 CPR (4th) 213 (FCA) at para 29:

It is trite law that the proper test for a determination of whether a trade-mark is clearly descriptive is one of first impression in the mind of a normal or reasonable person. [...] One should not arrive at a determination of the issue by critically analyzing the words of the trade-mark, but rather by attempting to ascertain the immediate impression created by the trade-mark in association with the wares or services with which it is used or proposed to be used. In other words, the trade-mark must not be considered in isolation, but rather in its full context in conjunction with the wares and services.

[29] As noted in *Ottawa Athletic Club Inc (Ottawa Athletic Club) v Athletic Club Group Inc*, 2014 FC 672, section 12(1)(b) analysis is “a contextual inquiry based on the immediate impression of the potential users of the service”, even though dictionaries or other reference works might be used as guides to help determine possible meanings of a trade-mark [see *ITV Technologies Inc v WIC Television* 2013 FC 1056 citing *Brûlerie Des Monts Inc v 3002462 Canada Inc* (1997), 132 FTR 150 and *Bagagerie SA v Bagagerie Willy Ltéd* (1992), 97 DLR (4th) 684]. I must also apply common sense in making the determination [see *Neptune SA v Canada (Attorney General)*, 2003 FCT 715, para 11].

[30] I note that definitions of the term “easy” in *The Canadian Oxford Dictionary* include “not difficult; achieved without great effort”, and “with ease; in an effortless or relaxed manner”.

[31] Having reviewed the Opponent’s evidence and the definitions of the term “easy”, I fail to see how the trade-mark APARTMENT LIVING MADE EASY clearly describes or even describes the character or quality of “leasing, operations, customer services and property management services for multi-residential buildings”. While I agree with the Opponent that the Mark consists of ordinary English words and that the phrase “living made easy” appears to be used in various contexts by other businesses, including those in property rental, the phrase cannot be said to be self-evident, plain, or manifest, of any of the applied for services.

[32] At best, the Mark evokes the idea that the applied for services will lead to an effortless experience for tenants living in apartment buildings administered by the Applicant, which appears to be a desirable sentiment that many other traders would like to convey for a multitude of different services that they provide to customers. However, the Mark does not describe the character or quality of services pertaining to the administration and operation of residential rental buildings. In any case, even if the Mark “may be descriptive” as contended by the Opponent in its written argument, which it is not, it does not for that reason violate section 12(1)(b) of the Act. A suggestive trade-mark, or even a descriptive trade-mark, is registrable. In the end, the Mark does not describe something that goes to the material composition or that refers to an obvious intrinsic quality of the Applicant’s services. The public would likely regard the meaning conveyed by the Mark to be mere puffery.

[33] In determining whether a trade-mark is deceptively misdescriptive, I note the following excerpt from *Hugues on Trade-marks* (Hugues, Roger T., *et al.*, Second Edition, LexisNexis, Markham, 2005-2012), pages 630 and 631:

To be deceptively misdescriptive, a mark must first be found to be descriptive so as to suggest that the wares are or contain something that is not the case. The deceptively misdescriptive part must lead a person to believe that the mark identifies something that is, in fact, not true. Where the mark is a combination of words, the deceptively misdescriptive part must so dominate the mark as applied for such that it would be precluded from registration. [...] Where a word or phrase is capable of more than one meaning, it still may be descriptive or misdescriptive if one of those meanings is descriptive or misdescriptive.

[34] As per my discussion above, I am of the view that the Mark is not descriptive of the applied for services. In any case, I note that there is no evidence to support the Opponent’s allegation that “the services do not in fact make such living easy”.

[35] When the Mark is considered as a whole, I find that it is not clearly descriptive or deceptively misdescriptive of the applied for services. Consequently, I dismiss the ground of opposition based on section 12(1)(b) of the Act.



### Is the Mark Confusing with a Registered Trade-Mark?

[36] In its statement of opposition, the Opponent alleges that the Mark is not registrable pursuant to section 12(1)(d) of the Act, on the ground that it is confusing with a third party trade-mark LIVING MADE EASY (No. TMA768,141) registered for use in association with “retail store services, namely, selling, renting and leasing home furnishings, appliances, computers and electronics”, in the name of “easyhome Ltd.”.

[37] The material date for considering this issue, which arises from the section 12(1)(d) ground of opposition, is the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[38] Having exercised the Registrar’s discretion to check the Register, I confirm that the cited registration is in good standing. The Opponent has therefore met its initial evidential burden in relation to this ground of opposition.

[39] Since the Opponent has satisfied its initial evidential burden, the issue becomes whether the Applicant has met its legal burden to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and any of the Opponent’s registered trade-marks.

[40] For reasons that follow, I reject this ground of opposition.

### The test for confusion

[41] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the 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.

[42] 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 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 in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al* (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.]

[43] I will now turn to the assessment of the section 6(5) factors.

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

[44] The overall consideration of the section 6(5)(a) factor, which involves a combination of inherent and acquired distinctiveness of the trade-marks, does not particularly favour either party. I assess both trade-marks to have some degree of inherent distinctiveness. While they both consist of ordinary words of the English language, neither is descriptive of their respective services.

[45] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. However, neither party provided evidence of promotion or use of the trade-marks to date.

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

[46] The application of the Mark is based on use in Canada since at least as early as September 2007. As noted above, the Applicant did not provide any evidence of use of the Mark.

[47] Registration No. TMA768,141 claims use of the trade-mark in Canada since at least as early as November 2007. The Opponent did not provide any evidence of use of this third party trade-mark. The mere existence of the registration establishes no more than minimal use and cannot give rise to an inference of significant and continuous use of the trade-mark in association

with the registered services [see *Entre Computer Centers, Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB)].

[48] Accordingly, the overall consideration of the section 6(5)(b) factor does not favour either party.

*Sections 6(5)(c) and (d) – the nature of the services, trade and business*

[49] The sections 6(5)(c) and (d) factors, which involve the nature of the services, trade and business of the parties, favour the Applicant.

[50] When considering sections 6(5)(c) and 6(5)(d) of the Act, it is the statement of services as defined in the application for the Mark and that in the registration No. TMA768,141 that govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. The statements of services must be read with a view of determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording.

[51] In its written argument, the Opponent submits that “leasing [...] for multi-residential buildings” overlaps, or is otherwise “extremely similar” to the registered services of the cited mark, which include “leasing home furnishings” as “obviously home furnishings are used in apartments in multi-residential buildings”.

[52] At the hearing, the Applicant submitted that its services are designed for building owners, not the potential tenants *per se*. I note that there is no evidence of record in support of this interpretation of the applied for statement of services.

[53] In any case, having regards to the statements of services and the evidence in this case, I disagree with the Opponent. I see very little connection or similarity between the services offered with the cited mark and those of the Applicant. In this regard, the cited mark is registered for use with services that could describe as the sale, rental and leasing of home furnishings, appliances, computers and electronics in a retail store. In comparison, the Mark is proposed to be used with

the leasing and property management of multi-residential buildings, as well as its operation and related customer services. Contrary to the Opponent's argument, there is no indication that retail stores that rent furniture for home use also rent apartment units, or that the average consumer of those services would think that an entity that operates a store of home furnishing rentals would also rent and administer apartment buildings.

[54] There is also no indication that the Applicant's services are offered in the same market as those of the cited mark. In the absence of evidence and given that the vast difference between the registered and the applied for services, for the purpose of assessing confusion, I conclude that there is no potential for overlap in the channels of trade for a retail store in the field of household electronics and home furnishings, and that of the operation and the administration of multi-unit residential properties.

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

[55] When considering the degree of resemblance, the law is clear that the trade-marks must be considered in their totality. It is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trade-marks.

[56] There is a high degree of resemblance between the parties' marks owing to the use of the terms LIVING MADE EASY. When considered in their entirety, there are strong similarities in appearance and sound between the trade-marks in question. There are also similarities in the ideas suggested as both trade-marks evoke the idea of living made effortless.

[57] Accordingly, this factor favours the Opponent.

*Conclusion in the likelihood of confusion*

[58] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having considered all of the surrounding circumstances, despite a high degree of resemblance between the trade-marks in question, in view of the wide disparity between the registered and the applied for services, the absence of any potential for overlap in their respective channels of trade, and the lack of evidence of acquired distinctiveness or use of

the cited mark, I am satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between Mark and the cited mark.

[59] In the end, I am satisfied that the ordinary consumer would not, as a matter of first impression, think that the leasing, management and the operation of multi-residential buildings and a retail store for the sale and rental of home furnishings and electronics emanate from a common source.

[60] Accordingly, I dismiss the section 12(1)(d) ground of opposition.

Was the Mark distinctive of the Applicant's services at the filing date of the statement of opposition?

[61] In its statement of opposition, the Opponent alleges that the Mark is not distinctive within the meaning of section 2 of the Act in that the Mark does not actually distinguish, nor is it adapted to distinguish the services of the Application from the goods, services and business of the others. In its written argument, the Opponent relies on the submissions and the evidence pertaining to confusion and descriptiveness in support of its non-distinctiveness ground of opposition.

[62] The material date to assess this ground of opposition is generally accepted to be the filing date of the statement of opposition, namely June 21, 2013 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

[63] In order to meet its initial burden with respect to the non-distinctiveness ground of opposition based on confusion, the Opponent was required to show that the alleged trade-mark had become known sufficiently in Canada, as of the filing date of the statement of opposition, to negate the distinctiveness of the Mark [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC); *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]; it has not done so.

[64] With respect to the non-distinctiveness ground of opposition based on descriptiveness, I am of the view that the Mark is not clearly descriptive of the applied for services for the same reasons as those set out under the section 12(1)(b) analysis. Even though the material date for the distinctiveness ground of opposition falls on a later date, the different dates do not result in a different outcome in the present case.

[65] In *Canadian Council of Professional Engineers v. APA – Engineered Wood Association* (2000), 7 CPR (4th) 239 (FCTD), the Court noted that “while it may be true that a purely descriptive or a deceptively misdescriptive trade-mark is necessarily not distinctive, it is not correct to hold that merely because a mark is adjudged *not* to be either purely descriptive or deceptively misdescriptive, it is therefore distinctive” [para 49].

[66] When the Villa affidavit is viewed in its entirety, even though there is some evidence of use of the phrase “living made easy” as ordinary wording within sentences by traders in different industries online, there is no indication that these websites were accessed, nor the extent to which they were accessed, by Canadians at the material date. Thus, I am not satisfied that the Opponent has met its initial evidential burden to show that the Mark has been commonly adopted by third parties to describe similar or identical services in Canada at the material date.

[67] Accordingly, the non-distinctiveness ground of opposition is dismissed.

#### Disposition

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

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Pik-Ki Fung  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Hearing Date: August 25, 2015

Appearances

No one appearing

For the Opponent

Ronald S. Ade

For the Applicant

Agents of Record

MacBeth & Johnson

For the Opponent

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For the Applicant