



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2019 TMOB 138

Date of Decision: 2019-12-19

IN THE MATTER OF AN OPPOSITION

Rapport Credit Union Limited

Opponent

and

D+H Cheque Services Corporation

Applicant

**1,710,658 for PREMIERRAPPORT-
CRÉDIT**

Application

INTRODUCTION

[1] On January 13, 2015, D+H Limited Partnership filed application No. 1,710,658 (the Application) to register the trademark PREMIERRAPPORT-CRÉDIT (the Mark). A change of title was recorded on November 7, 2017, transferring the Application to the current owner D+H Cheque Services Corporation. Reference in this decision to the “Applicant” should be understood as a reference to D+H Limited Partnership or D+H Cheque Services Corporation, as appropriate based on the date concerned.

[2] The Application is based on proposed use of the Mark in Canada in association with the following goods and services (the Goods and Services):

Goods

(1) Brochures, catalogues, printed and electronic documents relating to identity theft services; anti-key logger software.

Services

(1) Identity theft assistance services; identity restoration and rehabilitation services; identity theft insurance; identity theft prevention services; credit bureau daily monitoring services; generation of credit reports for others; generation and monitoring of credit scores for others.

[3] The Application was advertised for opposition purposes in the *Trademarks Journal* on November 11, 2015.

[4] On April 11, 2016, Rapport Credit Union Limited (the Opponent) filed a statement of opposition against the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). I note that the Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised prior to that date).

[5] By decision of the Registrar dated January 17, 2017, the Opponent was granted leave to file an amended statement of opposition dated December 23, 2016.

[6] The grounds of opposition set out in the Opponent's amended statement of opposition are summarized below:

- (a) The Application does not comply with section 30(i) of the Act, because the Applicant could not have been satisfied that it was entitled to use the Mark in association with the Goods and Services as the Applicant ought to have been aware of the Opponent's existing application No. 1,686,591 for the trademark RAPPORC CREDIT UNION and common law marks RAPPORC and RAPPORC & Design, described below. The goods and services listed in the Opponent's application No. 1,686,591 (which

subsequently issued as registration No. TMA978,235) are set out in Schedule A to this decision.

- (b) The Applicant is not the person entitled to registration of the Mark having regard to the provisions of section 16(3)(b) of the Act because the Mark, at the date of filing the Application, was confusing with the Opponent's previously filed application No. 1,686,591 for the trademark RAPPOR CREDIT UNION.
- (c) The Applicant is not the person entitled to registration of the Mark having regard to the provisions of section 16(3)(a) because the Mark, at the date of filing the Application, was confusing with the Opponent's common law trademarks described below, which were previously used in Canada by the Opponent in association with the goods and services listed in application No. 1,686,591.
 - i. RAPPOR – a common law trademark used by the Opponent in Canada since August 2014; and
 - ii. RAPPOR & Design – a common law trademark, depicted below, used by the Opponent in Canada since August 2014



- (d) The Applicant is not the person entitled to registration of the Mark having regard to the provisions of section 16(3)(c), because the Mark, at the date of filing of the Application, was confusing with the trade names RAPPOR CREDIT UNION and rapportcu.ca which trade names were previously used in Canada by the Opponent in association with the goods and services described above, and which trade names have not been abandoned.

- (e) The Mark is not distinctive, within the meaning of section 2, as the Mark cannot distinguish the Goods and Services with which it is proposed to be used by the Applicant from the goods and services of the Opponent by reason of the Opponent's use of its trademarks and trade names described above.

[7] The Applicant filed a counter statement denying the grounds of opposition.

[8] Only the Opponent filed evidence, which is discussed below. Both parties filed written arguments. An oral hearing was requested and attended by the Opponent. The Applicant did not attend the oral hearing.

[9] I note that at paragraph 81 of the Opponent's written argument, the Opponent withdraws its section 30(i) ground of opposition. Consequently, the section 30(i) ground of opposition will not be addressed in this decision.

EVIDENCE

The Opponent's Evidence

[10] The Opponent's evidence is comprised of the affidavit of Kim Leak sworn November 14, 2016 (the Leak Affidavit). Ms. Leak is the CEO of the Opponent and states that she has held the position since August 1, 2014 when the Opponent was formed. Prior to that date, Ms. Leak was CEO of Ontario Civil Service Credit Union. Ms. Leak's evidence is summarized below.

[11] The Opponent is a credit union that offers financial products and services to its members. Its members are comprised of current and retired employees of municipalities, the Government of Ontario, the Government of Canada, as well as public sector agencies, boards, commissions, and members of the Legislative Assembly of Ontario.

[12] The Opponent was formed following the amalgamation of two existing credit unions, namely, the Provincial Alliance Credit Union (PACU) and the Ontario Civil Service Credit Union (OCS). The Leak Affidavit includes as Exhibit "A" a copy of the certificate of amalgamation which indicates that the amalgamation was effective as of July 31, 2014 and that

the parties would continue under the name “RAPPORT CREDIT UNION LIMITED”. Exhibit “B” to the Leak Affidavit is a press release dated June 25, 2014 - prior to the amalgamation - announcing that members of PACU and OCS had approved the merger and that “[t]he merger will close on July 31, 2014 and over the next several months we will be working diligently on integration planning.”

[13] Ms. Leak describes at paragraph 6 of her affidavit Canadian application No. 1,686,591 for the trademark RAPPORT CREDIT UNION, which was filed on July 23, 2014. The particulars of application No. 1,686,591 are not included in the Leak Affidavit, and are not otherwise included in the opponent’s evidence.

[14] Ms. Leak indicates that the Opponent uses the trademarks RAPPORT CREDIT UNION, RAPPORT and RAPPORT & Design (depicted above) in association with a variety of financial services and related goods as part of its operation of the credit union, including the goods and services listed in paragraphs 6 and 7 of her affidavit.

[15] Ms. Leak indicates that the Opponent has 14 branches across Ontario and that its trademarks RAPPORT CREDIT UNION, RAPPORT and RAPPORT & Design are displayed at all of these branches. The Leak Affidavit includes as exhibits numerous examples of the use of these trademarks in association with the Opponent’s operation of a credit union. Examples include exterior store signage, ATM machine signage, newsletters, brochures, posters, a newspaper advertisement, exhibit displays and a parade float, all bearing one or more of the Opponent’s trademarks.

[16] While the Leak Affidavit includes numerous examples of the Opponent’s use of its trademarks in association with its operation of a credit union, for the purposes of this proceeding there is an important factual issue as to *when* use of those trademarks commenced. In particular, it is apparent from the certificate of amalgamation document included as Exhibit “A” to the Leak Affidavit that the Opponent adopted the corporate name RAPPORT CREDIT UNION LIMITED as of July 31, 2014. However, in my view, the Opponent’s evidence does not demonstrate any use by the Opponent of the trademarks RAPPORT CREDIT UNION, RAPPORT or RAPPORT & Design, for the purposes of section 4 of the Act, until April 2015. This will be discussed in greater detail, below, in the analysis of the grounds of opposition.

[17] Ms. Leak was not cross-examined on her affidavit.

The Applicant's Evidence

[18] The Applicant did not file any evidence.

ONUS AND MATERIAL DATES

[19] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the Application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. 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 Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[20] The material dates with respect to the grounds of opposition are as follows:

- Sections 38(2)(c)/16(3) of the Act – the filing date of the Application, namely, January 13, 2015; and
- Sections 38(2)(d) of the Act - the filing date of the opposition, namely, April 11, 2016 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317 (FC)].

GROUND OF OPPOSITION SUMMARILY DISMISSED

Non-entitlement under section 16(3)(a) of the Act

[21] With the ground of opposition under section 16(3)(a), the Opponent has an initial evidential burden to demonstrate use of its trademarks in Canada prior to the filing date of the Application and non-abandonment of its trademarks as of the date of advertisement.

[22] I am not satisfied that the Opponent has met that initial onus. In particular, I am not satisfied that I have sufficient evidence to conclude that the Opponent used its trademarks RAPPORC CREDIT UNION, RAPPORC or RAPPORC & Design, pursuant to section 4 of the Act, prior to the Application filing date of January 13, 2015.

[23] Based on the Leak Affidavit, it is apparent that upon amalgamation on July 31, 2014, the Opponent adopted the corporate name RAPPORC CREDIT UNION LIMITED. However, business/corporate name registrations alone are not evidence that such names have been used as trademarks [see *Pharmx Rexall Drug Stores Inc v Vitabrin Investments Inc* (1995), 62 CPR (3d) 108 (TMOB) at para 5]. The Opponent's evidence does not provide any examples of the display of the trademarks RAPPORC CREDIT UNION, RAPPORC or RAPPORC & Design, that would constitute use for the purposes of section 4 of the Act, during the period between July 31, 2014 and the material date of January 13, 2015.

[24] At the hearing, the Opponent's counsel noted that the Opponent's adoption of the name RAPPORC CREDIT UNION LIMITED as of July 31, 2014 was not a circumstance of a new business starting afresh without any existing customers; it was instead the result of the amalgamation of two existing credit unions, carrying forward under the new name. Thus, the Opponent appeared to have an existing base of customers in Canada when it adopted the new name. In this regard, the June 25, 2014 press release notes that "[t]he new organization will be known as Rapport Credit Union. It will serve over 22,000 members at 13 branch locations, with more than 100 employees and approximately \$350 million in assets under administration." However, this press release does not provide any timeline for when formal adoption and use of the opponent's trademarks would commence.

[25] In addition, the Opponent's counsel indicated that I should read paragraphs 16 and 17 of the Leak Affidavit, which include reference to operating income and advertising expenditures in 2014, as being evidence of use of the Opponent's trademarks prior to the January 13, 2015 material date. However, I find myself unable to make that inference based on the evidence as a whole. For example, the reference in paragraph 16 to the Opponent's operating income in 2014 appears to be taken directly from the audited financial statement of the Opponent that is included as Exhibit "X" to the Leak Affidavit. A review of that document, particularly pages 8-10,

suggests that those figures relate to the entire 2014 year, rather than solely the post amalgamation period after July 31, 2014. Given this ambiguity, I am not prepared to assume that the operating income and advertising expenditures in 2014 referenced in paragraph 16 and 17 of the Leak Affidavit were conducted in association with the Opponent's trademarks RAPPOR CREDIT UNION, RAPPOR and RAPPOR & Design.

[26] Further, in the Opponent's audited financial statement that is included as Exhibit "X" to the Leak Affidavit, the introduction on page 2 of that document includes the following statement [Emphasis added]: "In 2015 we launched Rapport Credit Union, a merger of two great credit unions." This statement is consistent with use of the Opponent's trademarks commencing at some point in 2015 rather than 2014.

[27] The Opponent's evidence does demonstrate that the Opponent began using the trademarks RAPPOR CREDIT UNION, RAPPOR and RAPPOR & Design as early as April 2015 [see Exhibit "E" to the Leak Affidavit which is a newsletter dated "April 2015"]. However, in my view, I have no evidence from which to conclude that the Opponent's use of its trademarks commenced prior to January 13, 2015.

[28] Consequently, the Opponent has not met its initial evidential burden under section 16(3)(a) and this ground of opposition is dismissed.

Non-entitlement under section 16(3)(c) of the Act

[29] With the ground of opposition under section 16(3)(c), the Opponent has an initial evidential burden to demonstrate use of its trade names RAPPOR CREDIT UNION and rapportcu.ca in Canada prior to the filing date of the Application (January 13, 2015).

[30] Jurisprudence under section 16(3)(c) has established that an opponent seeking to rely on prior use of a trade name, must prove sufficient reputation in that trade name prior to the material date, in order to succeed under this ground of opposition [see *Mirabed AG v Springwall Sleep Products Ltd* (1985), 4 CPR (3d) 45 (TMOB); *Pacific Carbon Trust Inc v Carbon Trust*, 2013 FC 946, 116 CPR (4th) 1].

[31] In the present case, the only evidence of the display of the trade name RAPPORT CREDIT UNION prior to the material date is the press release dated June 25, 2014 which stated that the new amalgamated entity “will be known as Rapport Credit Union”, and the amalgamation certificate with an effective date of July 31, 2014 which indicated that PACU and OCS will amalgamate and continue under the name RAPPORT CREDIT UNION LIMITED.

[32] With respect to the press release, that document was issued prior to the amalgamation which created the Opponent, and so is not use of a trade name which can be attributed to the Opponent.

[33] With respect to the amalgamation certificate, in my view, that document alone does not demonstrate use by the Opponent of the trade name RAPPORT CREDIT UNION. Business/corporate name registrations alone are not evidence that such names have been used as trade names [see *Pharmx Rexall Drug Stores Inc, supra*, at para 5]. Indeed, there is no evidence of public display by the Opponent of the trade name RAPPORT CREDIT UNION in association with its operation of a credit union, prior to the material date of January 13, 2015. In any event, the amalgamation certificate alone is not sufficient to demonstrate that the Opponent had acquired a reputation in that trade name prior to the material date.

[34] With respect to the trade name rapportcu.ca, there is no evidence of the use of that trade name prior to the material date.

[35] Consequently, in my view, the Opponent has not met its initial evidential burden with respect to the section 16(3)(c) ground of opposition and so it is dismissed.

REMAINING GROUNDS OF OPPOSITION

Non-entitlement under section 16(3)(b) of the Act

[36] With the ground of opposition under section 16(3)(b) of the Act, the Opponent asserts that the Applicant is not the party entitled to registration of the Mark, because of a likelihood of confusion with the Opponent’s previously filed application No. 1,686,591 for the trademark RAPPORT CREDIT UNION.

[37] As with the other section 16(3) grounds of opposition, the material date is the filing date of the Application, namely, January 13, 2015.

[38] I note that the Applicant in its written arguments takes the position that the Opponent has not met its initial evidential burden with respect to the section 16(3)(b) ground of opposition, as the Opponent has not included any evidence of the particulars of its application, beyond it being identified in paragraph 6 of the Leak Affidavit.

[39] However, it is well established that the Registrar, acting in the public interest to maintain the purity of the register, may check the register to confirm the existence of a registration or pending application referred to in a statement of opposition [see *Molson Breweries, A Partnership v John Labatt Ltd* (1999), 3 CPR (4th) 543 at para 9 (TMOB); see also *El-En Packaging Co v Alte-Rego Corp*, 2010 TMOB 4 at para 11]. In this regard, I have exercised my discretion to confirm that the Opponent's application No. 1,686,591 for the trademark RAPPORT CREDIT UNION was filed prior to the Applicant's Application and was pending on the date the Applicant's Application was advertised (i.e. November 11, 2015). Consequently, the Opponent has met its initial evidential burden for the purposes of the section 16(3)(b) ground of opposition.

[40] I note that the Opponent's application No. 1,686,591 subsequently matured to registration (TMA978,235) on August 11, 2017. However, nothing turns on that fact for the purposes of the Opponent's section 16(3)(b) ground of opposition, and the Opponent has not raised a ground of opposition under section 12(1)(d) of the Act seeking to rely on registration No. TMA978,235.

Test for confusion

[41] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the

inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[42] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[43] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

Inherent distinctiveness of the trademarks and extent to which they have become known

[44] In considering the likelihood of confusion, the respective parties' marks must be assessed from the perspective of a unilingual Anglophone, unilingual Francophone and bilingual consumer [see *Mattel, supra*; see also *Mexx International BV v Poulin* (2004), 35 CPR (4th) 241 (TMOB)]. This principle has particular significance in the present case where each party's mark is comprised of terms that have meaning in both English and French.

[45] Consequently, at the outset of the analysis, it is worthwhile to identify the likely meanings in English and French attributable to the terms which comprise the respective parties' marks. In this regard, I have exercised my discretion to refer to dictionary definitions [see *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29 which provides that the

Registrar can take judicial notice of dictionary definitions], which are set out below:

English [*Canadian Oxford Dictionary*, 2nd Ed.]

“premier” – *adjective* – first in importance, order, or time.

“rapport” – *noun* – a relationship or communication, esp. when useful and harmonious.

“credit” – *noun* – a person’s financial standing; the sum of money at a person’s disposal in a bank, etc.; the power to obtain goods etc. before payment (based on the trust that payment will be made).

“credit union” – *noun* – banking co-operative offering financial services to members.

French [*Le Robert & Collins, Dictionnaire Français Anglais – Anglais Français*, 8th Ed.]

“premier (-ière)” – *adjective* – first; leading, foremost, top.

“rapport” – *noun* – connection, relationship; report.

“crédit” – *noun* – credit; funds.

“union” – *noun* – union; combination, blending; association.

[46] I note that consideration of the above definitions is not at the expense of the principle that a trademark must be assessed as a whole. The above definitions help inform the meanings that may be ascribed to the marks as a whole.

[47] In my view, the Opponent’s trademark RAPPORTE CREDIT UNION has a reasonable degree of inherent distinctiveness. While the term “credit union” is clearly descriptive of the nature of the goods and services listed in the Opponent’s application, the English word “rapport” has no descriptive connotation in association with those goods and services. Similarly, in my

view, the Opponent's trademark RAPPORT CREDIT UNION would have a reasonable degree of inherent distinctiveness in French, as each of the words that comprise the mark have a meaning in French, but taken together are not descriptive of the Opponent's goods and services.

[48] With respect to the Applicant's Mark, from the perspective of a unilingual Francophone or bilingual Canadian, in my view, PREMIERRAPPORT-CRÉDIT has a relatively low degree of inherent distinctiveness. The Mark is likely to be perceived as meaning "first credit report" or "first report regarding credit", which has a descriptive connotation in association with the Goods and Services listed in the Application. I do not view the conjunction of the two words "premier" and "rapport" into a single term to lend much, if any, distinctiveness to the Mark, as in my view the first component of the mark would be read and understood as "premier rapport" [see *General Motors Corp v Bellows*, [1949] SCR 678 at 688]. Also, to a unilingual Francophone or bilingual Canadian, I note that the word "premier" could be viewed as having a laudatory connotation (i.e. leading), putting further importance on the word "rapport". To a unilingual Anglophone, the Applicant's Mark would likely have a moderate degree of inherent distinctiveness, owing to the presence of the word "rapport" which as noted above has no clear descriptive connotation in English in association with the goods and services listed in the Application.

[49] The degree of distinctiveness of a trademark may be increased by means of it becoming known through promotion or use; however, this has no bearing on this ground of opposition in the present case. As discussed above, there is no evidence of the Opponent's use of its trademark prior to the Application filing date. The Applicant's Application is based on proposed use and there is no evidence that the Applicant's Mark has ever been used in Canada.

Length of time the trademarks have been in use

[50] As discussed above, in my view, the Opponent has not provided any evidence of its use of its trademark prior to the Application filing date.

[51] The Applicant's Application is based on proposed use and the Applicant has not filed any evidence to suggest that the Mark has ever been used in Canada.

[52] Consequently, this factor does not favour either party.

Nature of the services; nature of the trade

[53] When considering the goods and services of the parties, it is the statement of goods and services in the parties' trademark applications that govern the issue of confusion [*Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); and *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties can be useful, particularly where there is an ambiguity as to the goods or services covered in the application or registration at issue [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB); and *American Optical Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[54] In the Applicant's Application, in my view, the services "credit bureau daily monitoring services; generation of credit reports for others; generation and monitoring of credit scores for others" overlap with the various financial services listed in the Opponent's application, including "[f]inancial services, namely the operation of a credit union; [...] line-of-credit services, loan services, [...] financial analysis and consultation services". Similarly, I find that the service "identity theft insurance" listed in the Application overlaps to a degree with the "insurance services" listed in the Opponent's application.

[55] The remaining goods and services listed in the Application generally relate to identity theft prevention. While there is less direct overlap between these remaining goods and services relating to identity theft prevention, and those listed in the Opponent's application, I am nonetheless of the view that there is still a connection between the parties' respective goods and services. For example, I think it reasonable to consider that goods and services related to identity theft prevention and protection might well be offered in conjunction with, and marketed through the same channels and to the same customers, as the various financial services and related goods listed in the Opponent's application. In this regard, I note that the Applicant has not filed any evidence speaking to this issue that might dispel that view.

[56] In my view, this factor favours the Opponent.

Degree of resemblance

[57] As mentioned above, it is well-established in the case law that a likelihood of confusion is a matter of first impression and imperfect recollection. In this regard, “[w]hile the marks must be assessed in their entirety (and not dissected for minute examination), it is still possible to focus on particular features of the mark that may have a determinative influence on the public’s perception of it” [*Pink Panther Beauty Corp v United Artists Corp* (1998), 80 CPR (3d) 247 (FCA) at para 34]. Even though the first word or portion of a trademark is generally the most important for the purpose of distinction, the preferable approach is to first consider whether any aspect of the trademark is particularly striking or unique [*Masterpiece, supra*, at para 64].

[58] With respect to the Opponent’s trademark RAPPORT CREDIT UNION, in my view, the most striking or unique aspect of the mark is the word “RAPPORT”, given its position at the beginning of the mark, the fact that it is not descriptive in association with the Opponent’s goods and services, and the fact that the remainder of the mark, namely, “CREDIT UNION” is descriptive.

[59] With respect to the Applicant’s Mark, in my view, the most striking or unique aspect is the term PREMIERRAPPORT.

[60] The analysis of the resemblance between the marks must not be limited to only one of the official languages of Canada. For example, it is not sufficient to show that a unilingual Francophone or a bilingual individual would not pronounce or understand the parties’ marks in the same way. There must not be a resemblance from the standpoint of the three types of average Canadian consumer: the unilingual Anglophone, the unilingual Francophone, and the bilingual consumer. If there is a likelihood of confusion in either of the country’s official languages, a trademark cannot be registered. [See *Pierre Fabre Médicament v SmithKline Beecham Corp* (2001), 11 CPR (4th) 1 (FCA) at paras 12-15; see also *Mexx International BV v Poulin* (2004), 35 CPR (4th) 241 (TMOB) at paras 33-34].

[61] With the above in mind, in my view, there is a reasonable degree of resemblance between the parties’ marks as a whole, because of the visible and auditory similarity between the

dominant elements “RAPPORT” and “PREMIERRAPPORT”, and because the word “CREDIT” follows the word “RAPPORT” in both parties’ marks.

[62] I anticipate that the perceived degree of similarity between the parties’ marks would be greatest for a unilingual Anglophone consumer, who would likely focus on the visible and auditory similarity between the marks, and perhaps less so for a bilingual or unilingual Francophone consumer who would likely understand the Applicant’s Mark as “first credit report”. However, a perceived resemblance between the parties’ marks among any of the three language categories is sufficient to weigh this factor in an opponent’s favour.

[63] Thus, in my view, this factor favours the Opponent.

Additional surrounding circumstances

Family of trademarks

[64] The Opponent in its written argument asserts that it owns a “family” of trademarks which include the term “RAPPORT”. However, in order to benefit from the wider scope of protection that may be afforded to a “family” of trademarks, an opponent must prove use of each of the marks in the family [*McDonald’s Corp v Alberto-Culver Co* (1995), 61 CPR (3d) 382 (TMOB)]. In the present case, since there is no evidence of use by the Opponent of any of its marks in Canada prior to the material date for the section 16(3)(b) ground of opposition, the Opponent cannot rely on a “family” of trademarks.

Applicant’s other applications

[65] The Applicant at paragraph 83 of its written argument takes the position that as a surrounding circumstance the Registrar should take judicial notice of the Applicant’s other applications such as application No. 1,710,615 (PREMIERRAPPORT), application No. 1,710,605 (PREMIERRAPPORT & Design), and application No. 1,710,655 (PREMIERRAPPORT-ID) which were allowed and have since proceeded to registration. I do not agree with the Applicant’s submissions on this point. First, in *Molson Breweries v John Labatt Ltd (Labatt Brewing Co Ltd)* (1999), 3 CPR (4th) 543 (TMOB) at 552, this Board refused to take judicial notice of other trademarks on the register owned by an applicant that included a

common component, as the Board Member did “not consider there to be any public interest in assisting an applicant to register its trade-mark by checking Office records and thereby doing what the applicant ought to have done by filing evidence in the opposition.” In any event, even if I were to take judicial notice of the Applicant’s other applications identified at paragraph 83 of its written argument, I note that they are not identical to the Mark at issue in the present case (notably, they do not include both terms RAPPORT and CREDIT). Further, it is well established that the owner of a registration does not have an automatic right to obtain further registrations, no matter how closely they may be related to the original registration [see *Groupe Lavo Inc v Proctor & Gamble Inc* (1990), 32 CPR (3d) 533 (TMOB) at para 15; see also *Highland Feather Inc v American Textile Co*, 2011 TMOB 16 at para 20]. Ultimately, I do not consider the Applicant’s other applications to be a surrounding circumstance which assists the Applicant in this case.

Conclusion regarding the Section 16(3)(b) ground

[66] The test to be applied is a matter of first impression in the mind of a casual consumer “somewhat in a hurry” who sees the Mark PREMIERRAPPORT-CRÉDIT in association with the Goods and Services at a time when he or she has no more than an imperfect recollection of the Opponent’s trademark RAPPORT CREDIT UNION and does not pause to give the matter any detailed consideration or scrutiny [*Veuve Clicquot*, supra at para 20].

[67] Having considered all of the surrounding circumstances, for the reasons set out above, I find that at best for the Applicant, the probability of confusion between the Mark and the Opponent’s trademark RAPPORT CREDIT UNION is evenly balanced between a finding of confusion and no confusion. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the trademarks, I must therefore find against the Applicant.

[68] The section 16(3)(b) ground of opposition is therefore successful.

Section 2 Ground of Opposition

[69] Paragraph 1(e) of the amended statement of opposition alleges that the Mark is not distinctive, within the meaning of section 2, as the Mark cannot distinguish the Goods and Services with which it is proposed to be used by the Applicant from the goods and services of the Opponent by reason of the Opponent's use of its trademarks and trade names described above.

[70] In order to meet its initial evidential burden under this ground of opposition, an opponent must show that its trademarks had a substantial, significant or sufficient reputation in Canada in association with relevant goods and/or services so as to negate the distinctiveness of the applied for trademark [see *Motel 6, Inc v No 6 Motel Ltd*, (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427].

[71] As discussed above with respect to the section 16(3)(a) ground of opposition, while in my view the Opponent has not demonstrated use of its trademarks prior to the Application filing date, it has demonstrated use of its trademarks in Canada since at least as early as April 2015, and has thus demonstrated use of its trademarks in association with the operation of a credit union prior to the material date for the section 2 ground of opposition, namely, April 11, 2016.

[72] The Opponent's evidence includes multiple examples of use of its trademarks RAPPORCREDIT UNION, RAPPORCREDIT UNION and RAPPORCREDIT UNION & Design in association with, *inter alia*, credit union services, prior to April 11, 2016, including the following:

Exhibit "E" – newsletter bearing the Opponent's trademarks dated "April 2015" which was published by the Opponent in April 2015 in hard copy and online.

Exhibit "Q" – promotional booth displaying the Opponent's trademarks at the Kingston Home Show held in Kingston, Ontario in March 2016.

Exhibit "S" – photograph of a float displaying the Opponent's trademarks that was part of the Thunder Bay, Ontario Santa Clause parade in December 2015.

Exhibit “X” – 2015 Annual Report of the Opponent bearing the Opponent’s trademarks and describing on page 7 “[...] our first full year of operation as Rapport Credit Union”. The summarized financial statements included in this document were signed by the auditors on March 10, 2016.

[73] In addition, I am satisfied based on the Opponent’s evidence that by April 11, 2016, the Opponent had been providing credit union services to its members in Ontario for approximately one year in association with its trademarks RAPPOR CREDIT UNION, RAPPOR and RAPPOR & Design, and that a substantial portion of the operating income and advertising expenditures identified in paragraphs 16 and 17 of the Leak Affidavit, were conducted in association with the Opponent’s trademarks prior to the April 11, 2016 material date.

[74] Consequently, I am satisfied that the Opponent has met its initial evidential burden under the section 2 ground of opposition. As the Applicant did not file any evidence, I find that this ground of opposition is successful based on the same analysis of confusion as set out above with respect to the section 16(3)(b) ground of opposition. Indeed, because of the later material date for the section 2 ground of opposition, the Opponent’s position is stronger as it is able to rely on its evidence of use of its trademarks prior to April 11, 2016, and so the extent to which the marks have become known, and the length of time the marks have been in use, are factors which favour the Opponent under this ground of opposition. The section 2 ground of opposition is therefore successful.

DISPOSITION

[75] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Application No. 1,686,591 (TMA978,235)

Goods

(1) Electronic and printed publications, namely handbooks, newsletters, bulletins, brochures, pamphlets, flyers, reports and manuals in the field of financial services.

Services

(1) Financial services, namely the operation of a credit union; personal and commercial financial services, namely tax free savings accounts and chequing account services; line-of-credit services, loan services, deposit account services, monetary and currency exchange services, bill payment services, safety deposit box services, money order services, issuing of travellers' cheques, wire transfer services, financial management services, financial planning services, financial analysis and consultation services; investment services, namely investment management services, investment consultation services, sales and purchases of investments, providing advice concerning financial products and investments, property investment services and advice, investment lending, borrowing and financing services, investment brokerage services and the purchasing, selling and trading of financial products and investments; automated teller machine services; insurance services; mortgage lending services; mortgage brokerage services; mortgage securitization services; credit card services; retirement planning services, and RRSP and RRIF services; education savings plan services, and RESP services; tax planning services; tax advice services; services for businesses, namely business planning, cash management and payroll services; operating a website providing information in the field of finance; advertising and promotional services, namely advertising and promoting the services of others via direct mailing and the internet and providing advertising space in a newsletter.

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2019-09-17

APPEARANCES

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