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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2019 TMOB 119

Date of Decision: 2019-10-31

IN THE MATTER OF AN OPPOSITION

We Buy UR Ride Franchise Inc.

Opponent

and

RideBuyers Enterprises Inc.

Applicant

1,739,231 for RIDEBUYERS

Application

INTRODUCTION

[1] We Buy UR Ride Franchise Inc. (the Opponent) opposes registration of the trademark RIDEBUYERS (the Mark), which is the subject of application No. 1,739,231 by RideBuyers Enterprises Inc. (the Applicant).

[2] The application for the Mark, as last amended, is in association with the following goods (Goods) and services (Services):

Goods:

(1) Downloadable mobile application for the purchase and sale of vehicles

Services:

(1) Procurement services in the form of purchasing vehicles; motor vehicle damage appraisal services; providing information on vehicles for sale via a global

communications network, namely, vehicle valuations; providing an online database featuring vehicles for sale; providing a website for the purchase and sale of vehicles; software as a service, namely, providing use of non-downloadable software by way of a website for the purchase and sale of vehicles; online auction services

[3] The application is based on proposed use in Canada.

[4] A key issue in this proceeding is the likelihood of confusion with the Opponent's trademark WE BUY UR RIDE in association with services including "vehicle buying service of all vehicles/automobiles...; purchase and sale of vehicles..."

[5] For the reasons that follow, the opposition is rejected.

THE RECORD

[6] The application for the Mark was filed on July 27, 2015, and was advertised for opposition purposes in the *Trademarks Journal* of March 23, 2016.

[7] On August 19, 2016 the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition pleaded include sections 12(1)(d), 16(3)(a), 16(3)(b) and 2 of the Act, all of which turn on the issue of a likelihood of confusion between the applied for Mark and the Opponent's trademark. The Opponent has also pleaded a ground of opposition under section 30(i) of the Act. As 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 (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 before this date).

[8] The Applicant denied each of the grounds of opposition in a counter statement filed on October 17, 2016.

[9] In support of its opposition, the Opponent filed the affidavit of Brett Bade. In support of its application, the Applicant filed the affidavit of Zachary Gray Bonham, and two affidavits of Joanne Grison. None of the affiants were cross-examined.

[10] Both parties submitted a written argument and attended a hearing.

ONUS AND MATERIAL DATES

[11] 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 [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[12] The material dates that apply to the grounds of opposition pleaded are:

- Sections 38(2)(a)/30 – the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- Sections 38(2)(b)/12(1)(d) - the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trademarks* (1991), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c) and 16(3) – the filing date of the application [section 16(3) of the Act]; and
- Sections 38(2)(d) and 2 – the date of filing of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 2004 FC 1185 (CanLII), 34 CPR (4th) 317 (FC)].

OVERVIEW OF THE EVIDENCE

[13] The Opponent's evidence consists of the affidavit of Brett Bade (sworn February 17, 2019), CEO and Authorized Signing Officer of the Opponent. The Bade affidavit primarily discusses the origin of the Opponent's business, with a focus on Mr. Bade's business dealings with Ken Bonham, the father of Zachary Gray Bonham, who is the President and CEO of the Applicant.

[14] As its evidence, the Applicant filed the affidavit of Zachary Gray Bonham (sworn June 14, 2017). The Bonham affidavit provides information on the creation of the Applicant's business and its use and advertisement of the Mark in association with the Services. The Applicant also filed the affidavits of Joanne Grison (both sworn June 16, 2017), the owner of

Grison IP Services. One of the Grison affidavits contains a copy of the file wrapper for the Opponent's registration for the trademark WE BUY UR RIDE; the other contains a copy of the file wrapper for the Applicant's application.

[15] While I have considered all of the evidence and submissions of record, I note that my decision only addresses the evidence and submissions which I find are directly relevant to my ultimate findings on each of the pleaded grounds of opposition.

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 12(1)(d) ground

[16] The Opponent has pleaded that the Mark is not registrable because it is confusing with the Opponent's registration No. TMA936,882 for the trademark WE BUY UR RIDE. Having exercised the Registrar's discretion to check the Register [*Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)], I confirm that the registration, which covers the following services, is in good standing:

(1) Vehicle buying service of all vehicles/automobiles, free market evaluation/appraisal service of all vehicles/automobiles and resale services of all vehicles/automobiles namely cars, trucks and sport utility vehicles (SUVs), commercial/heavy tractors, trailers, recreational vehicles (RVs), airplanes, motorcycles and all-terrain vehicles (ATVs), snowmobiles, watercraft, yachts, ships, boats, heavy equipment, farm equipment; Purchase and sale of vehicles; Membership and referral services providing the purchase, appraisal, resale of automobiles; Advertisement services for others advertising vehicles and automobiles by way of website advertisements, referral program services and printed and electronic flyers; Operation of a website providing information about automobiles/vehicles and related membership and referral services; Live and online auction service (through all media of communication) for all types of vehicles; Provision of financing, rental and lease services for all types of vehicles.

[17] The Opponent has therefore met its initial burden with respect to this ground.

[18] As the Opponent has satisfied its initial burden, I now have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's trademark WE BUY UR RIDE.

Test to determine confusion

[19] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[20] Accordingly, 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 purchasers of the Applicant's Goods and Services, provided under the trademark RIDEBUYERS, would believe that those Goods and Services were being provided by the Opponent, or that the Applicant was authorized or licensed by the Opponent who offers services, including vehicle buying services, under the trademark WE BUY UR RIDE.

[21] 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 trademarks 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 trademarks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [*Mattel, Inc v 3894207 Canada Inc* (2006), 2006 SCC 22 (CanLII), 49 CPR (4th) 321 (SCC); *Masterpiece v Alavida Lifestyles Inc* (2011), 2011 SCC 27 (CanLII), 92 CPR (4th) 361 (SCC) (*Masterpiece*)]. However, as noted by the Supreme Court of Canada in *Masterpiece*, although the degree of resemblance is the last factor cited in section 6(5) of the Act, it is the statutory factor that is often likely to have the greatest effect in deciding the issue of confusion (*Masterpiece*, para 49).

Inherent distinctiveness and the extent known

[22] The Applicant's trademark RIDEBUYERS is a coined word consisting of two ordinary dictionary words. The Merriam Webster Dictionary (online at www.merriam-webster.com) includes among its definitions for the word "ride" (as a noun) "a means of transportation" and informally "one's personal vehicle". The word "buyer" is defined as "one who buys something" [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]. Given that the Goods and Services relate to the purchase of vehicles, I find the Mark to be highly suggestive and thus to possess a limited degree of inherent distinctiveness.

[23] The Opponent's trademark WE BUY UR RIDE is similarly suggestive of the Opponent's services which include "vehicle buying service of all vehicles/automobiles". Accordingly, I find it also possesses a limited degree of inherent distinctiveness. I do not consider the inclusion of the pronouns 'we' and 'your' - depicted in SMS/texting language as 'UR' - to increase, to any significant extent, the inherent distinctiveness of the Opponent's mark as a whole.

[24] The strength of a trade-mark may be increased by means of its becoming known through promotion or use. In this regard, both the Opponent and the Applicant filed affidavit evidence, which is summarized below.

Summary of the Opponent's evidence – affidavit of Brett Bade

[25] Brett Bade is the CEO of the Opponent, and has been in the automotive business as an automotive broker since 2008 (paras 1, 3). On or about 2010 after being inspired by "Trade Rev", an online auto auction service in the United States, and the TV Show "The Profit" – (episode) Car Cash, Mr. Bade started to "investigate the idea of starting an online vehicle bidding system which had never been done before in Canada" (para 5).

[26] Mr. Bade states that he started the first business of this type in Canada (para 5), and that he saw a need because of his experience in the automotive sales business, to connect customers, auto brokers, and auto wholesalers within a simple online system which would connect people with the potential value of their used cars. The vision came from a software platform which

would generate a bid (or valuation process) for used vehicles in real time for consumers and brokers (para 6).

[27] After taking steps to prepare the business concept for franchise developments, Mr. Bade incorporated the company Express Auto Cash Franchise Inc. on April 12, 2014 (paras 10, 11). The trademark EXPRESS AUTO CASH was then created and an application was filed for this trademark (para 11). In April 2014, Mr. Bade also purchased a franchise document template package to start franchising Express Auto Cash (para 12).

[28] On or about October 2014, Mr. Bade met with his marketing team, and the decision was made to select a new trademark for the business. Mr. Bade settled on the trademark WE BUY UR RIDE. The company name was then changed from Express Auto Cash Franchise Inc. to We buy Ur Ride Franchise Inc., and an application for the trademark WE BUY UR RIDE was filed (para 13). The application was filed by the Opponent on October 6, 2014, and issued to registration on May 4, 2016 (para 15, Exhibit E).

[29] Exhibit J is described as a copy of the web page for WEBUYURRIDE.com (para 34). I note that the printout is dated February 16, 2017 and displays the word trademark and/or trade name WE BUY UR RIDE. In so finding, I also consider the use of the trademark shown below, which consists of the word mark combined with additional design elements and the descriptive element ‘.com’, to constitute use of the Opponent’s trademark [see *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB) in support of the proposition that the use of a trade-mark in combination with additional words or features constitutes use of the registered mark if the public, as a matter of first impression, would perceive the trade-mark *per se* as being used, and *Star Island Entertainment LLC v Provent Holdings Ltd*, 2013 TMOB 84 (CanLII), where mansioncasino.com was held to be used of the mark MANSION for casino services]:



While there is minimal written content on the printouts, I note that the phrases “free valuation → free inspection→” and “Payment Guarantee – We buy your vehicle instantly with the full

payment made on the spot” are included on the printout. I note that Mr. Bade does not indicate the number of Canadians that may have viewed (or used) this website. While the notation “63 Shares” appears on the left side of the printout, it is unclear where or through what mechanism these ‘shares’ were made. I also note that the phrase “Follow @WeBuyUrRideInc” appears at the bottom of the page citing 221 followers, though no printouts showing this Twitter feed are provided.

[30] Mr. Bade states that he has secured significant business relationships, partnerships and nationwide vendors which have all taken much time and effort, some of which include: Adesa Auto Auctions (which he identifies as the largest auto auction company in Canada), Car Proof (which he describes as a damage appraisal service) and Trade Rev in the United States. Mr. Bade submits that these are significant business developments (para 39).

[31] Exhibit L is described as a “copy of our brochure which has been available to customers since December 2015” (para 40). However, I note that the brochure is titled “Franchise Information” and so would therefore appear to be an advertisement of the Opponent as a potential franchise opportunity to consumers looking to buy into a franchise, instead of to consumers seeking the Opponent’s vehicle buying services.

[32] Mr. Bade states that in January 2017, the Opponent opened another office in Mississauga, Ontario which includes a store front, training facility and software development team, and that the Opponent now has 12 employees (para 41).

[33] Mr. Bade states that the Opponent became a member of the Canadian Franchise Association and in February 2017 would be participating in The Franchise Show in Toronto. Mr. Bade states that since 2016, the Opponent has sold franchises in British Columbia, Alberta, and Ontario. As of January 2017, the Opponent has sold 19 franchises in Ontario alone (para 42).

[34] Exhibit M is described as a screenshot of the Opponent’s advertisement on the *lookforafranchise.ca* - automotive section of the Canadian Franchise Association web site and a copy of an article featuring the Opponent and the trademark WE BUY UR RIDE (para 43). I do not consider the inclusion of the Opponent’s trademark and/or trade name in this list and in the

article to be an advertisement of the services listed in the Opponent's registration. Rather, these serve to advertise the Opponent as a franchise opportunity to potential franchisees.

[35] Based on the foregoing, I am unable to draw any conclusions on the extent to which the Opponent's trademark has become known in association with its listed services in Canada. The Opponent's evidence of use of its trademark in association with the services listed in its registration is limited to a single website printout dated 2017, and there is no clear indication of the number of Canadians that may have seen it. While the Bade affidavit provides information on the Opponent's franchising efforts, including sample advertisements for the Opponent as a franchise opportunity, and information on a growing number of franchisees, there is no indication of the value of sales or quantity of the vehicle buying services provided by or on behalf of the Opponent.

Summary of the Applicant's evidence – affidavit of Zachary Gray Bonham

[36] Through the affidavit of Zachary Gray Bonham, President and CEO of the Applicant, the Applicant provides evidence explaining its business and showing use of the applied for Mark. To this end, pertinent portions of the Bonham affidavit are summarized below.

[37] Mr. Bonham states that prior to the opening of the Applicant's business, the domain names *ridebuyers.com* and *ridebuyers.ca* were reserved through Go Daddy (para 3). On December 23, 2014, the Applicant was incorporated (para 4, Exhibit B). Mr. Bonham states that following a preliminary search of the Trademarks Database to clear the trademark by his trademark agent, and confirmation from her that the registry was clear, an application for the subject mark was filed on July 27, 2015 (paras 6-7, Exhibit D).

[38] On February 3, 2015, the *ridebuyers.com* website went live (para 5). Exhibit C is described as a copy of pages from the website as it exists today. These printouts are not dated, however a copyright notice dated 2017 is included at the bottom of the last page. I find that the trademark and/or trade name appears on these pages. For the same reasons outlined above with respect to the use of the Opponent's trademark, I also consider the use of the trademark shown below, which consists of the Mark combined with additional design elements and the descriptive element '.com', to constitute use of the applied for Mark:



[39] Mr. Bonham states that from January 2015 until April 2016, the Applicant was working with investors on pilot projects to refine their business model. Attached as Exhibit E is a document described as an invoice showing the first sale of a vehicle dated May 10, 2016 (para 8).

[40] Mr. Bonham states that the RIDEBUYERS trademark is used to promote a vehicle buying service. He explains that:

- A customer goes to *www.ridebuyer.com* and fills out a form with the vehicle details (para 9). Exhibit F is described as a copy of a form from the website. I note that the Mark appears on the top left hand corner of the page;
- An estimated valuation of the vehicle is then presented to the customer and if the customer is interested in selling their vehicle through the RIDEBUYERS service then a profile of the vehicle is developed. The profile is then sent to a number of dealerships and if a dealership is interested they will send an offer to the Applicant who in turn forwards the offer to the customer. If the offer is accepted, the customer takes the vehicle to the dealership that made the offer and the dealership pays the customer directly. The Applicant charges the dealership for the use of the RIDEBUYERS service (para 10).
- The Applicant has contracts with a number of associated dealerships. Exhibit G is described as redacted copies of invoices from some of the associated dealerships that have purchased vehicles through the RIDEBUYERS services. I note that the three invoices that have been provided are dated from 2017 and feature the Applicant's trade name and the Mark, and invoice the dealership for services described as "Vehicle Purchase/Trade Lead" or "Vehicle Purchase Lead" (para 11).

- The services provided under the Mark are available online through the Applicant's website. The Applicant has designed its buying process for customers to be simple, fast and safe (para 12).

[41] Mr. Bonham states that most of the advertising and marketing for RIDEBUYERS is done through social media. Attached as Exhibit H and I are pages from the Applicant's Instagram and Facebook accounts, respectively, promoting the RIDEBUYERS services (paras 13, 14). I note that the Applicant appears to have 163 Instagram followers and 158 Facebook followers as of the date of printing of the pages, which I understand to be June 9, 2017, the date noted in the bottom right hand corner of the printouts.

[42] Mr. Bonham states that additional advertising for the RIDEBUYERS services is done through signage painted on a Fiat. The Fiat is branded with the RIDEBUYERS trademark and has been in use since February 28, 2015 (para 15). Exhibit J consists of pictures of the Fiat bearing the RIDEBUYERS trademark. I note that no information is provided on the frequency and locations where the Fiat was driven.

[43] Mr. Bonham describes as Exhibit K a "post from Facebook that shows the RIDEBUYERS services being promoted on Craigslist from July 7, 2016". I note that the Facebook post refers to the Applicant's 'television commercial', and displays two screenshots (presumably from this commercial), one of which displays the word 'Craigslist', and the other displaying the Mark.

[44] Attached as Exhibit L is the first page of a Google search for "Ridebuyers"; Mr. Bonham notes that all of the search hits for the RIDEBUYERS trademark are owned by or is associated with the Applicant (para 17). Attached as Exhibit M are Google reviews from customers who have used the RIDEBUYERS services. As hearsay, and in the absence of the Applicant establishing necessity and reliability, I have accorded these reviews no weight.

[45] I find that the Bonham affidavit establishes that, at best, the Mark has become known only to a limited extent since commencing use. The Applicant has provided minimal evidence of sales (four invoices). Further, while the Applicant has provided a printout of its website, there is no information on the number of Canadians that may have accessed the site. While some social

media information is provided, without more, it is difficult to adequately quantify the extent of the Applicant's use.

[46] In view of the foregoing, I find that the first factor, which is a combination of inherent and acquired distinctiveness, does not significantly favour either party. In the event that I am wrong in concluding that this factor does not slightly favour the Applicant, I note that this factor is not determinative of the outcome of the present opposition.

Length of time the trademarks have been in use

[47] The Opponent's application for the trademark WE BUY UR RIDE was filed on October 6, 2014 on the basis of proposed use; a Declaration of Use was filed on May 4, 2016. The Applicant's application for the Mark was filed on July 27, 2015, on the basis of proposed use, and the Applicant's evidence indicates that sales associated with the Mark commenced on May 10, 2016.

[48] In its written argument, the Opponent submits that while neither trademark has been used for a significant period, the Opponent is the first user of its trademark and has established use of its trademark since at least May 4, 2016. The Opponent notes that having regard to the Opponent's *prima facie* evidence of registration No. TMA936,882, its "unrefuted affidavit evidence and lightweight evidence submitted by the Applicant", that this factor strongly favours the Opponent.

[49] I disagree and find that this factor does not significantly favour either party. First, and as acknowledged by the Opponent, neither of the parties' marks has been used for a significant period of time. Second, notwithstanding that the Opponent owns a registration for its trademark, the Opponent has not filed evidence showing use of its mark as of May 4, 2016 but has instead filed only minimal evidence of use dated to February 2017 (Bade affidavit, para 34, Exhibit B). Even if the Opponent had also provided a certified copy of its registration, and I had given at least *de minimis* weight to the date of use claimed in the Opponent's registration, this would not affect my finding on this factor. In this regard, I note that *de minimis* use does not support a conclusion that the trademark has been used continuously since the date stated [see *Krauss-*

Maffei Wegmann GmbH & Co KG v Rheinmetall Defence Electronics GmbH, 2017 TMOB 50 (CanLII)].

Nature of the services and trade

[50] It is the statement of goods and services in the application for the Mark and the statement of services in the Opponent's registration that must be taken into consideration when assessing the section 6(5)(c) and (d) factors under the section 12(1)(d) ground of opposition [see *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); and *Miss Universe, Inc v Bohna* (1994), 1994 CanLII 3534 (FCA), 58 CPR (3d) 381 (FCA)].

[51] In its written argument, the Opponent submits that the registered services of the Opponent, while worded differently, are identical to the goods and services of the Applicant. The Opponent states, at para 6.2.3 of its written argument:

The parties' goods and services are clearly identical and overlapping; the Applicant and the Opponent both provide the estimate, purchase and sale of vehicles. Both parties' trademarks are associated with an online platform for the purchase and sale of vehicles.

[52] In its written argument, the Applicant acknowledges that the nature of the services offered by the parties is similar, though only with respect to the fact that they are both providing vehicle buying services. As I understand it, the Applicant takes the position that the nature of the business for the Applicant and the Opponent is completely different because of way the parties' vehicle buying services are structured and provided. In this regard, the Applicant emphasizes that:

- it acts as the “middle man” between the customer and the car dealerships (as described in paragraph 40 above), and that the customer never deals directly with the Applicant and only through the RIDEBUYERS website.
- Although the Opponent has provided very little evidence of how its business model is structured, the Applicant submits that the evidence of record indicates that the Opponent's model involves direct contact between the Opponent and the prospective consumer seeking to sell their vehicle.

[53] I find that there is overlap in the nature of the services provided by the parties, namely in that they both generally relate to the provision of online vehicle buying services - the application includes the goods “downloadable mobile application for the purchase and sale of vehicles” and “procurement services in the form of purchasing vehicles” while the Opponent’s registration includes “vehicle buying service of all vehicles/automobiles”. There is also overlap with respect to the Applicant’s vehicle valuation services (with the Opponent’s “free market evaluation/appraisal service of all vehicles/automobiles...”), the Applicant’s services “providing an online database featuring vehicles for sale” (with the Opponent’s “advertisement services for others advertising vehicles and automobiles by way of website advertisement”), and the Applicant’s “online auction services” (with the Opponent’s “live and online auction services (through all media of communication) for all types of vehicles”).

[54] While it may well be that the Applicant and the Opponent’s businesses are differently structured (as discussed above), I note that both parties nonetheless share a common consumer, namely individuals turning to online based vehicle buying service providers to find a purchaser for their vehicles.

[55] Further, while there may currently be differences in the structure of the parties’ business models, there is nothing to prevent this from changing. Indeed, there do not appear to be any such restrictions in the parties’ respective statements of goods and services.

[56] Accordingly, I find that these factors favour the Opponent.

Degree of resemblance

[57] When considering the degree of resemblance between trademarks, they 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 marks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* 2006 SCC 23 (CanLII) at para 20].

[58] The preferable approach when comparing trademarks is to begin by determining whether there is an aspect of the marks that is particularly striking or unique [*Masterpiece, supra* at para 64]. In the present case, I find that there is nothing particularly striking or unique about the Opponent’s trademark WE BUY UR RIDE given that the words BUY and RIDE are descriptive

of the Opponent's services and the remaining elements WE and YOUR - depicted in SMS/texting language as 'UR' - are simply pronouns that help to form the phrase (which suggests that it is the Opponent that would be buying the consumer's vehicle).

[59] Similarly, with respect to the applied for trademark RIDEBUYERS, there is nothing particularly striking or unique about the words RIDE and BUYERS, given that they are descriptive of the Applicant's goods and services. Instead, I find the combination of these words to be the most striking or unique part of the trademark, with the result that this contributes in distinguishing the Mark from the Opponent's trademark in appearance and when sounded.

[60] With respect to the ideas suggested, while the parties' trademarks both suggest that the associated goods and services involve the provision of vehicle (*ie* 'ride') buying services, I note that there can be no monopoly in this idea [*American Assn of Retired Persons v Canadian Assn of Retired Persons/Assoc Canadienne des Individus Retraites* (1998), 1998 CanLII 8908 (FC), 84 CPR (3d) 198 at para 34 (FCTD)].

Surrounding circumstances – evidence of actual confusion

[61] At the hearing, the Opponent pointed to Mr. Bade's evidence of a single instance of confusion experienced by Mr. Nick Kabani, an automotive dealer (Bade affidavit, paras 8, 36). Hearsay issues aside, given the circumstances of this case, I do not consider this one instance of confusion to be a determinative factor nor to be sufficient to tip the balance in favour of the Opponent. As noted in *WIC TV Amalco Inc et al v ITV Technologies, Inc* (2005), 2005 FCA 96 (CanLII), 38 CPR (4th) 481 (FCA) at 501:

... While it is true that the Court can draw an adverse inference from the absence of evidence of actual confusion in certain cases (see *Dion Neckwear Ltd v Christian Dior, S.A.*, [2002] 3 FC 405, 2002 FCA 29 (CanLII), 20 CPR (4th) 155, 216 DLR (4th) 451 (CA)), it does not follow that a single instance of confusion is conclusive.

Conclusion

[62] Notwithstanding that the parties' marks have some degree of similarity in appearance, sound and ideas suggested in view of the shared descriptive words RIDE and BUY(ER), I consider the differences in the appearance and sound of the parties' marks when viewed as a whole to be the determining factor in this case, especially in view of the jurisprudence on weak

marks. As noted by the Federal Court in *Provigo Distribution Inc v Max Mara Fashion Group SRL* (2005), 2005 FC 1550 (CanLII), 46 CPR 4th) 112 at para 31 (FC):

The two marks being inherently weak, it is fair to say that even small differences will be sufficient to distinguish among them. Were it otherwise, first use of words in common use would be unfairly allowed to monopolize these words. A further justification given by courts in coming to this conclusion is that the public is expected to be more on its guard when such weak trade names are used...

[63] While it is possible for the degree of distinctiveness attributable to a weak mark to be enhanced through extensive use [*Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 at para 6 (FCTD)], I do not consider that the Opponent has provided such evidence.

[64] Considering all of the factors as discussed above, and in particular, taking into account that the Opponent's mark is a weak mark entitled to a narrow ambit of protection, I find that the balance of probabilities between finding that there is no reasonable likelihood of confusion, and that there is a reasonable likelihood of confusion falls slightly in favour of the Applicant. Accordingly, this ground of opposition is rejected.

Section 16(3)(b) ground

[65] The ground of opposition pleaded under section 16(3)(b) of the Act alleges that the Applicant is not the person entitled to registration of the Mark because, at the date of filing the application, the Mark was confusing with the Opponent's previous application No. 1,696,960 for the trademark WE BUY UR RIDE.

[66] To meet its initial burden under section 16(3)(b), the Opponent must show that its application for the trademark WE BUY UR RIDE was filed prior to the filing date of the Applicant's application, and that its application was still pending at the date of advertisement of the Mark, namely March 23, 2016 [see section 16(4) of the Act]. Having reviewed a copy of the Opponent's registration (Bade affidavit, Exhibit E), I confirm that the application for the Opponent's trademark WE BUY UR RIDE was filed prior to the filing date of the Applicant's application and that the Opponent's application was pending as of the date of advertisement of the Mark, having not proceeded to registration until May 4, 2016. The Opponent has therefore met its initial burden.

[67] That being said, in the present case, the material date at which the issue of confusion is to be considered does not affect the result of my confusion analysis. Accordingly, although the Opponent has met its initial burden, it fails for reasons similar to those set out with respect to the section 12(1)(d) ground of opposition.

[68] Accordingly, the section 16(3)(b) ground of opposition is rejected.

Sections 16(3)(a) and 2 grounds

[69] The ground of opposition pleaded under section 16(3)(a) of the Act alleges that the Applicant is not the person entitled to register the Mark because, at the date of filing of the application, the Mark was confusing with the Opponent's trademark WE BUY UR RIDE, which was previously used and made known by the Opponent. To satisfy its evidential burden, the Opponent must evidence use and/or making known of its trademark prior to the material date of July 27, 2015 (the date of filing of the application). As the Opponent's evidence falls short (as discussed above, the earliest evidence of use of the Opponent's mark is on a copy of the Opponent's webpage printed on February 16, 2017, which postdates the material date), it has failed to meet its burden and this ground of opposition is rejected.

[70] The ground of opposition based on section 2 of the Act is also rejected on the basis that the Opponent has failed to meet its evidential burden. The Opponent's evidence is insufficient to establish that its trademark had become known sufficiently in Canada as of the material date of August 19, 2016 (the date of filing of the statement of opposition), so as to negate the distinctiveness of the Mark [*Motel 6, Inc v No 6 Motel Ltd (1981)*, 1981 CanLII 2834 (FC), 56 CPR (2d) 44 (FCTD); *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd (2006)*, 2006 FC 657 (CanLII), 48 CPR (4th) 427 (FC)].

Section 30(i) ground

[71] The Opponent has pleaded that contrary to section 30(i), the Mark is not registrable because, at the date of filing of the application, the Applicant could not properly have been satisfied that it was entitled to use the trademark RIDEBUYERS in Canada, in particular based

on its prior knowledge of the Opponent's business operations and because of the Opponent's prior application No. 1,696,960 (now registered under No. TMA936,882).

[72] In its written argument, the Opponent submits the Applicant "had an opportunity to clarify its relationship with the Opponent and a fiduciary duty which exists in the work performed for and paid by the Opponent", but that "instead, this matter was left unaddressed by the Applicant", whereas "the Opponent has shown the prior relationship between the Applicant's Director Zachary Gray Bonham and his father, Ken Bonham, the payee for the domain name ridebuyers.ca." Indeed, as previously noted, a significant portion of the Bade affidavit details Mr. Bade's business history and dealings with Ken Bonham, including information about a potential partnership in the Opponent's business, attempts to secure the requisite funds needed to buy-in to the partnership, and involvement by Ken Bonham's son Zachary Bonham (through allegedly providing computer services to get the software platform up and running, and in seeking out potential investors on behalf of his father's interest) (Bade affidavit, paras 17-34).

[73] It has been established that the mere knowledge of the existence of an Opponent's trademark does not in and of itself support an allegation that the Applicant could not have been satisfied of its entitlement to use the Mark [*Woot, Inc v WootRestaurants Inc/ Les Restaurants Woot Inc* 2012 TMOB 197 (CanLII)]. In this case, I find that the Applicant's knowledge of the Opponent's trademark would not preclude the Applicant from truthfully making the statement required by section 30(i) *inter alia* on the basis that it believed its Mark was not confusing with it [see also *Yogen Friüz, Canada Inc v Industries Lassonde Inc*, 2014 TMOB 169 at paras 119 – 121]. As discussed above, I have also concluded that a likelihood of confusion does not exist between the parties' marks.

[74] With respect to the Opponent's allegation of non-entitlement based on the Applicant's prior knowledge of the Opponent's business operations, assuming that the Applicant had such knowledge, in the absence of evidence, for instance, of a contractual arrangement preventing the Applicant from lawfully commencing use of its RIDEBUYERS trademark, this prior knowledge would not preclude the Applicant from truthfully making the statement required by 30(i) of the Act.

[75] Where an applicant has provided the statement required by section 30(i) of the Act, 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]. I do not consider there to be such evidence in this case. Accordingly, as the Opponent has not met its initial onus, the section 30(i) ground of opposition is rejected.

[76] As an aside, I note that at the hearing, the Opponent also made submissions challenging the claim of proposed use in the application, and arguing that the Applicant's evidence shows use of the Mark predating the filing date of the Application. However, as the Opponent did not plead non-compliance with section 30(e) as a ground of opposition, I have not considered these submissions [*Massif Inc v Station Touristique Massif du Sud (1993) Inc* (2011), 95 CPR (4th) 249 (FC)].

DISPOSITION

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

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2019-06-20

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