

(2) Intercommunication apparatus, namely, telephones, radios and cellular phones; vehicle radios; electro-dynamic apparatus for the remote control of signals, namely, electric transformers, pressure sensors, current rectifiers, power distributing boxes for the remote control of signals; monitoring apparatus (electric), for monitoring the status of industrial equipment, namely electric control panels; camcorders; camera lenses; close-up camera lenses; shutter releases for cameras; camera shutters; photographic cameras; bags for cameras and photographic equipment; surveying instruments; level measuring machines for surveying; clothing for protection against work-related accidents, namely stabs, scratches, contusions, irradiation, corrosion and fire; fire protective clothing; radiation protective clothing; electric theft prevention installations, namely burglar alarms and personal security alarms; eyeglasses; general purpose batteries;

(3) Aeroplanes; aircraft; vehicles for locomotion by land, air, water or rail, namely, motorcycles, automobiles, trucks, buses, trains, boats, ships and airplanes; automatic guided vehicles; electric cars; tires for automobiles; compact cars; hubs for vehicle wheels; traction engines; airships; aeronautical apparatus, machines and appliances, namely, space vehicles, lunar rovers and space shuttles; suspension shock absorbers for vehicles; direction signals for vehicles.

[3] The opposition is primarily based on an allegation that the Mark is confusing with the Opponent's trademark VISION previously used in association with similar goods.

THE RECORD

[4] The application for the Mark was filed on December 31, 2015 on the basis of proposed use in Canada.

[5] The application was advertised for opposition purposes on February 22, 2017. Numerous amendments to the *Trademarks Act*, RSC 1985, c T-13 (the Act) came into force on June 17, 2019. As the application was advertised prior to this date, pursuant to section 70 of the Act, the grounds of opposition will be assessed based on the Act as it read immediately before June 17, 2019, an exception being that, with respect to confusion, sections 6(2) to (4) of the Act as it currently reads will be applied.

[6] On April 24, 2017, the Opponent opposed the application by filing a statement of opposition under section 38 of the Act. The grounds of opposition were based on sections 30(a), 30(e), 30(i), 16(3)(a), and 2 of the Act.

[7] The Applicant submitted a counter statement denying each of the grounds set out in the statement of opposition.

[8] In support of its opposition, the Opponent filed the affidavit of Curtis Landherr, sworn November 9, 2017 in Duluth, Minnesota [the Affidavit]. Mr. Landherr was not cross-examined.

[9] The Applicant submitted a statement that it would not be filing evidence.

[10] Both parties submitted written representations but only the Opponent was represented at an oral hearing. In lieu of participating at the hearing, the Applicant submitted brief supplemental written representations regarding jurisprudence relied upon by the Opponent, discussed further below.

[11] At the hearing, the Opponent confirmed withdrawal of the grounds of opposition based on section 30 of the Act. Before assessing the remaining two grounds of opposition, I will first provide an overview of the Opponent's evidence, the evidential burden on the Opponent, and the legal onus on the Applicant.

OVERVIEW OF THE OPPONENT'S EVIDENCE

[12] The Affidavit provides an overview of the Opponent's business and its alleged use of the VISION trademark worldwide and in Canada. It can be summarized as follows:

- Mr. Landherr is Senior Vice President and General Counsel of the Opponent [para 1].
- The Opponent is a Wisconsin-based corporation that manufactures, sells and distributes aircrafts as well as aircraft structural parts and components [paras 2 and 3].
- The Opponent produces a number of aircrafts that are sold under various brands and trademarks [para 5].
- Mr. Landherr asserts that aircraft sold in association with the VISION trademark are the "flagship" of the Opponent's "current" product offerings, stating that the "Cirrus Vision Jet is the world's first 'personal' jet - a single engine turboprop that is designed to be flown by its owner", which "received FAA certification (approval) in October 2016" [para 6].
- The Opponent started selling "purchase positions" for the Opponent's Vision Jet worldwide in 2006 and Mr. Landherr asserts that the Opponent began using the VISION

trademark in 2008 in advertising and in connection with such “purchase positions” [para 7].

- As of the date of the affidavit, there are over 600 “position orders or reservations for aircraft in association with the trademark VISION” [para 7].
- In Canada, the Opponent’s first sale “of an aircraft that would be provided under the trademark VISION took place in November 2006 to a purchaser in Quebec”; as of the Applicant’s December 31, 2015 filing date, the Opponent had sold eight “aircraft positions in Canada in association with the trademark VISION” [paras 8 and 10, Exhibit A].
- Mr. Landherr asserts that, given the nature, specialization and price of the aircraft goods in question, the sale of eight aircraft over a ten-year period in the Canadian marketplace “is considered successful in the personal aircraft industry” [para 9].
- Exhibit A to the Affidavit is a spreadsheet listing the eight purported sales of VISION aircraft to Canadian customers between November 2006 and the end of 2015 [para 10];
- Exhibit B to the Affidavit are purchase orders and related documents regarding “some” of the aforementioned sales to Canadian customers [para 11]. The “model/serial no.” on two of the orders is “CIRRUS VISION” or “Cirrus Vision”, whereas the remaining documents display “THE - JET BY CIRRUS” or otherwise have no reference to “VISION”. I also note that the “Delivery Location” on five of the order documents is identified as an address in Duluth, Minnesota.
- The last page of Exhibit B appears to be the terms and conditions for the purchase orders, which includes the following:

TRANSFER OF TITLE/RISK OF LOSS

4.01 At the time of delivery after receipt of the full Purchase Price including adjustments, Cirrus shall transfer the Aircraft title to the Purchaser together with an “FAA Certificate of Airworthiness” and an “FAA Aircraft Bill of Sale”. CIRRUS warrants that the aircraft will be free and clear of all encumbrances except those created by or for the Purchaser.

4.02 The risk of loss shall pass from Cirrus to Purchaser upon signing the Cirrus “Final Acceptance” document at the time of delivery.

- The Opponent markets its aircraft around the world, including through sales centers located in Canada and the distribution of brochures and leaflets advertising VISION aircraft [paras 12 to 14, Exhibits C to E]
- The Opponent’s VISION aircraft have been promoted in industry publications, including in the publication *Plane & Pilot*, which “heralded CIRRUS’ VISION JET as the ‘Plane of the Year’ in 2017” [paras 15 and 16, Exhibits F to H];
- The Opponent attended several marketing events and trade shows in Canada between 2010 to 2014 to promote its aircraft, including those sold in association with the VISION trademark [para 17];
- The Opponent’s VISION aircraft are also promoted through its website, *www.cirrusaircraft.com* [para 18, Exhibit I];
- The Opponent’s VISION brand is also promoted through the distribution of jackets, hats, and coffee cups featuring the VISION trademark [para 19, Exhibit J].

[13] As a preliminary matter, the Applicant notes that the Affidavit does not indicate that Mr. Landherr has *personal* knowledge of the facts therein, and submits that the Opponent’s evidence is inadmissible and of no weight [citing in support, *Espanola Alimetaria Alcoyana, SA v Aceites Del Sur SA* (2005), 51 CPR (4th) 123 (TMOB) at 125; and *Econospan Structures Corp v Pioneer Steel Manufacturing Ltd* (2010), 81 CPR (4th) 393 (TMOB)] [Applicant’s written representations, paras 5 and 17 to 19]. As addressed further below, I agree that there is a degree of vagueness in the Affidavit. However, to the extent the Applicant asserts that “it is implausible that Mr. Landherr would have *any* knowledge whatsoever of the information provided in his affidavit”, given Mr. Landherr’s position with the company and the nature of the statements in his affidavit, I do not consider Mr. Landherr’s affidavit to be inadmissible hearsay. The Applicant’s concerns can be addressed by the weight given to Mr. Landherr’s statements and the necessary restraint from making inferences favourable to a party when confronted with such vague evidence.

EVIDENTIAL BURDEN AND LEGAL ONUS

[14] Before considering the grounds of opposition, it is necessary to review the basic requirements with regard to (i) the evidential burden on an opponent to support the allegations in the statement of opposition and (ii) the legal onus on an applicant to prove its case.

[15] With respect to (i), in accordance with the usual rules of evidence, there is an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053, 30 CPR (3d) 293 (FCTD)]. The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

[16] With respect to (ii), the legal onus is on the applicant to show that the application does not contravene the provisions of the Act as alleged by an opponent in the statement of opposition (for those allegations for which the opponent has met its evidential burden). The presence of a legal onus on an applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against the applicant.

SECTION 30 GROUNDS OF OPPOSITION - APPLICATION REQUIREMENTS

[17] As noted above, the Opponent withdrew the grounds of opposition based on section 30 of the Act. Indeed, the Opponent submitted no evidence in support of its grounds of opposition related to compliance with sections 30(a), 30(e) or 30(i) of the Act.

[18] Accordingly, the grounds of opposition based on section 30 are summarily dismissed.

SECTION 16 GROUND OF OPPOSITION – NON-ENTITLEMENT

[19] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark pursuant to section 16(3)(a) of the Act because at the date of filing, the Mark was confusing with the Opponent's VISION trademark that had been previously used in Canada by the Opponent. In this respect, the Opponent alleges that the applied-for goods overlap with the

VISION goods of the Opponent, namely, “aircraft and structural parts therefor; airplanes and structural parts therefor; aeroplane, and all goods and services related thereto”.

[20] To meet its initial burden with respect to a section 16(3)(a) ground of opposition based on prior use of a trademark, the Opponent was required to demonstrate use of its VISION trademark in Canada prior to the material date, December 31, 2015.

[21] The definition of “use” is set out in section 4 of the Act as follows:

4(1) A trademark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

4(2) A trademark is deemed to be used in association with services it is used or displayed in the performance or advertising of those services.

4(3) A trademark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[22] In their representations, both parties focused on the definition of use per section 4(1) of the Act, with respect to the Opponent’s aircraft.

[23] For its part, the Applicant submits that the Opponent has not met its initial burden because it has not demonstrated use of the VISION trademark within the meaning of section 4(1) of the Act with respect to the transfer of goods in Canada [paras 20 to 24]. In this respect, the Applicant notes that there is no assertion that the Mark appears on the Opponent’s aircraft goods; that the Affidavit does not include any photographs of the Opponent’s goods bearing the VISION trademark; that the Affidavit does not indicate that any purchase orders or promotional materials (that may have displayed the VISION trademark) accompanied the Opponent’s goods when they were delivered to purchasers in Canada; and that, in any event, there is no evidence of transfers in Canada prior to the material date.

[24] I agree with the Applicant that the evidence regarding association of the VISION trademark with the Opponent’s goods is weak at best. As noted by the Applicant, while the VISION trademark appears on advertising materials, the Affidavit leaves the extent to which

such materials were distributed in Canada unclear. One is left to speculate as to whether these materials were used or referenced by Canadian purchasers when placing orders for the Opponent's aircraft. As for the purchase orders, based on the evidence before me, I do not agree with the Opponent that display of CIRRUS VISION in plain text on such order forms constitutes display of the VISION trademark with the Owner's "house mark" CIRRUS. CIRRUS is not set apart from the word VISION in any meaningful way, and while the Affidavit indicates that the Opponent markets aircraft under other trademarks, the extent to which CIRRUS is used by the Opponent as a house mark is unclear, as is the extent to which Canadian consumers would recognize it as such.

[25] Indeed, the questions surrounding whether the VISION trademark was associated with the Opponent's goods are due to a more fundamental issue – the absence of evidence of transfers of the Opponent's aircraft goods. Clearly, no transfer in possession of any of the Opponent's aircraft occurred in Canada prior to the material date. Nonetheless, in its representations, the Opponent submits that the purchase orders show transfers *in property* that satisfies the requirements of section 4(1) of the Act. The Opponent cites *Hudson's Bay Co v Sklar-Pepler Furniture Corp* (2007), 60 CPR (4th) 174 (TMOB), in support of its position that some proprietary right in the subject aircraft was transferred to the Canadian customers given the payments reflected in the purchase orders. In that decision, the Registrar maintained the subject registration pursuant to section 45 of the Act. The evidence in that case showed that transfers during the relevant period had occurred and turned on whether the advertising and promotional material used to place orders for customized furniture constituted use of the trademark in question. The Opponent argues that the exhibited purchase orders and advertising materials are similar to the materials in that case and, in particular, refers to the following paragraph from that decision [at 176]:

The affidavit of Mr. Modjeski establishes that the trade-mark appears on leaflets and product literature prominently displayed at retailers and used at the time that consumers place an order and purchase the wares. I note that the materials in question refer to the trade-mark and to style numbers for the furniture. Considering that the furniture associated with the trade-mark is "customized furniture" I am prepared to conclude, based on the particular facts of this case, that the leaflets and product literature bearing the trade-mark which are used by the consumers when placing an order and purchasing the wares would provide the required notice of association between the trade-mark and the wares to the purchaser. In my view, as there would most likely be an agreement in

place between the purchaser and the seller of the wares at the time of purchase of the wares, I accept that at that time some property rights in the furniture would be transferred to the purchaser of the wares. Thus, I accept that the use shown meets the requirement of s-s. 4(1) of the Act.

[26] However, given that the registered owner in that case “sold a highly significant volume of such HOMESTYLES wares throughout Canada during the relevant period” [at 174], implicit was that the subject furniture goods i) existed and ii) existed in Canada during the relevant period. Therefore, any relevant transfer in property occurred while the goods were in Canada.

[27] Here, as noted by the Applicant, the Opponent merely sold “purchase positions” prior to the material date. There is no evidence that the Opponent’s aircraft had yet been manufactured prior to the material date, much less were present in Canada. For purposes of “use” under section 4 of the Act, I do not consider the sale of “purchase positions” to constitute a transfer of property in goods when those goods do not exist. Furthermore, for a transfer to have occurred in Canada, it is the location of the goods in which possession or property is transferred that is determinative, not necessarily the location of the purchaser.

[28] In any event, in this case, the terms and conditions regarding title to the aircraft, reproduced above, contradict the Owner’s submissions. It would appear that transfer in property only occurs at the time of transfer of possession, with such transfers occurring in Minnesota.

[29] As there is no evidence of transfers of the Opponent’s goods in Canada prior to the material date (in association with the VISION trademark or otherwise), I am not satisfied that the Opponent has satisfied its initial evidential burden with respect to this ground of opposition.

[30] I would note that the Opponent’s evidence would not have satisfied the requirements for “making known” in section 5 of the Act, even if it had plead that its VISION trademark had been previously made known in Canada. In this respect, the evidence does demonstrate that the Opponent’s VISION trademark was used in a country of the Union prior to the material date, and I would also find that the Opponent’s evidence falls short of establishing that such mark was “well known” in Canada in any event.

[31] Furthermore, even if I were to accept that the statement of opposition was pleaded so as to include the *services* of “sale of aircraft” or the like, the evidence of display of the VISION

trademark would fall short of demonstrating use in Canada in association with such services prior to the material date.

[32] In this respect, first, the evidence of actual distribution of the advertising and marketing materials in Canada is vague at best. More importantly, for the display of a trademark in advertising to constitute use pursuant to section 4(2) of the Act, the services must be available to be performed in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)]. In this case, the Opponent could not effect sales of its aircraft – none existed to be sold prior to the material date. At most, it was accepting “purchase positions” or down payments for the sale of aircraft, which would occur only later when the Opponent had finished developing the aircraft and obtained the necessary FAA approvals. Even then, such sales could only be completed in Minnesota, the apparent delivery location for any aircraft.

[33] While the Opponent accepted deposits prior to the material date, by the Opponent’s own evidence, it was clear that the Opponent was not able to perform the service of “sale of aircraft” or the like until 2016.

[34] In view of the foregoing, the ground of opposition based on non-entitlement is rejected.

[35] Even if I were to accept that the Opponent used the trademark CIRRUS VISION in association with the Opponent’s aircraft sold in Canada (per its appearance on some of the evidenced purchase orders), I would find that the degree of resemblance between the parties’ trademarks in appearance, when sounded and in the ideas suggested favours the Applicant. In this respect, i) the important first portion of both trademarks differ; ii) while both marks incorporate the word VISION, it is a dictionary word with low inherent distinctiveness iii) and the evidence of actual use and display of the Opponent’s CIRRUS VISION mark in Canada is minimal.

[36] As such, I would find no likelihood of confusion with respect to the Mark and CIRRUS VISION based on the evidence before me, notwithstanding the overlap in the nature of some of the applied-for goods and the potential for overlap in the parties’ trades.

SECTION 2 GROUND OF OPPOSITION – NON-DISTINCTIVENESS

[37] The Opponent pleads that the Mark is not distinctive within the meaning of section 2 of the Act as it is not adapted to distinguish the goods of the Applicant from the goods of the Opponent because of the Opponent's prior and continuous use in Canada of the VISION trademark.

[38] The material date for this ground of opposition is the filing date of the opposition, namely, April 24, 2017 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317 at para 25].

[39] In order to meet its initial evidential burden under this ground of opposition, an opponent must show that its trademark had a substantial, significant or sufficient reputation in Canada in association with the relevant goods and/or services as of the filing of the opposition [see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657 at para 34].

[40] Based on the evidence submitted and in view of my findings above, I am not satisfied that the Opponent has met its initial evidential burden with respect to this ground.

[41] Accordingly, the ground of opposition based on non-distinctiveness is rejected.

DISPOSITION

[42] In view of all of the foregoing and pursuant to section 38(1) of the Act and the authority delegated to me under section 63 of the Act, I reject the opposition.

Andrew Bene
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE: 2020-06-08

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