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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 103

Date of Decision: 2021-05-28

IN THE MATTER OF AN OPPOSITION

Degil Safety Products (1989) Inc.

Opponent

and

Jose Luis Castro Inzunza

Applicant

**1,776,506 for Castro's Fall-Pro
Solutions Ltd.**

Application

INTRODUCTION

[1] Jose Luis Castro Inzunza (the Applicant) has applied for registration of the trademark Castro's Fall-Pro Solutions Ltd. (the Mark), the particulars of which are set out below:

Trademark	Application No.	Services
	1,776,506	(1) Distribution of fall protection equipment; Procurement services in the form of purchasing fall protection equipment; advice and information concerning commercial business management; business management; business management assistance for industrial and commercial companies; commercial business management. (2) Import and export cargo handling services (3) Design and engineering of fall protection equipment
Claims		
Used in Canada since November 20, 2008		
Disclaimer		
The applicant disclaims the right to the exclusive use of the 11-point maple leaf		

[2] Degil Safety Products (1989) Inc. (the Opponent) owns a registration for the trademark FALLPRO (TMA990,919) in association with fall protection equipment (the Opponent's Registered Trademark) and has opposed the application mainly on the basis that the Mark is confusing with its registration for and use of this trademark. The particulars of the Opponent's Registered Trademark are set out below:

Trademark	Registration No.	Goods
FALLPRO	TMA990,919	(1) Fall protection equipment for fall restraint and fall arrest, namely, body harnesses, lanyards, rope grabs, lifelines, rebar assemblies and slings. (2) Fall protection equipment for fall restraint and fall arrest, namely, shock pack lanyards, Y lanyards, cable slings, carabiners, anchor slings, anchor straps, roof brackets, connector anchors, vertical lifelines. (3) Fall protection equipment for fall restraint and fall arrest, namely, self-retracting lifelines.
Claims		
Used in Canada since at least as early as June 2001 on goods (1) Used in Canada since at least as early as June 2004 on goods (2) Used in Canada since at least as early as March 2006 on goods (3)		

[3] At the outset, I note that numerous amendments to the Act came into force 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 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 before that date).

[4] For the reasons that follow, the application is refused.

FILE RECORD

[5] The application for the Mark was filed on April 8, 2016 and was advertised for opposition purposes in the *Trademarks Journal* on March 15, 2017. On August 14, 2017, the Opponent filed a statement of opposition which was subsequently amended on August 20, 2018.

[6] The Opponent raises grounds of opposition based upon non-compliance with section 30; non-registrability under section 12; non-entitlement under section 16; and non-distinctiveness under section 2 of the Act.

[7] The Applicant filed and served a counter statement denying each allegation contained in the statement of opposition. I note that the counter statement also includes references to matters which have not been properly set out in evidence and, as such, I confirm having disregarded all such portions of this document.

[8] In support of its opposition, the Opponent filed:

- Certified copies of the file histories for the Mark and for the Opponent's Registered Trademark.
- A certified copy of Manitoba Articles of Incorporation for Castro's Fall-Pro Solutions Ltd. showing that this entity was incorporated on November 13, 2008 by the Applicant.
- The affidavit of Alan Booth, a trademark searcher employed by Trade Mark Research Ltd., sworn February 7, 2018 along with Exhibits A to C (the Booth affidavit). Mr. Booth introduces state of the register evidence in the form of a search he performed of the Canadian Trademarks Database for marks containing both "FALL" and "PRO" in no set order using proprietary search software, corresponding register excerpts, as well as a page from the *Trademarks Journal* wherein one of the three active trademarks he located was advertised.
- The affidavit of H  l  ne Deslauriers, a trademark analyst employed by CompuMark, sworn February 7, 2018 along with Exhibit HD-1 (the Deslauriers affidavit). Ms. Deslauriers introduces into evidence the results of the "CompuMark Canadian Dilution Search for Domain Names" she performed for domains incorporating the terms "FALLPRO", "FALL-PRO" or "FALL" and "PRO" with any other symbol between them.
- The affidavit of Leila Ashurov, a lawyer employed by the firm representing the Opponent, sworn February 9, 2018 along with Exhibits 1 to 18 (the Ashurov affidavit). Ms. Ashurov introduces into evidence the results of various Internet searches, including

printouts from *fall-pro.com*, *castro-solutions.com*, *castro-solutions.homestead.com* and *degilsafety.com* as well as archived versions of pages from these websites.

- The affidavit of Gary Cox, Operations Manager of the Opponent, sworn February 12, 2018 along with Exhibits 1 to 17 (the Cox affidavit). Mr. Cox provides information regarding the Opponent's business, including the use and promotion of its trademark in Canada. Mr. Cox further opines on a number of issues, including on the Mark's distinctive character, on the Mark's ability to distinguish the Applicant's services, and on the likelihood of confusion with the Opponent's Registered Trademark. I confirm having disregarded any such opinion or conclusion statements made by M. Cox on issues of fact and law that are to be determined by the Registrar in the present proceeding.

[9] The Opponent's affiants were not cross-examined.

[10] The Applicant elected not to file any evidence. Only the Opponent filed a written argument and no hearing was held.

MATERIAL DATES AND ONUS

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

- Sections 38(2)(a) and 30 of the Act – the filing date of the application, namely, April 8, 2016 [*Delectable Publications Ltd v Famous Events Ltd*, (1989) 24 CPR (3d) 274 (TMOB); *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB); *Tower Conference Management Co v Canadian Exhibition Management Inc*, (1990) 28 CPR (3d) 428 at 432-433 (TMOB)].
- Sections 38(2)(b) and 12(1)(a) of the Act – the filing date of the application, namely, April 8, 2016 [*Calvin Klein Trademark Trust v Wertex Hosiery Inc* (2004), 41 CPR (4th) 552 (TMOB); *Jurak Holdings Ltd v Matol Biotech Laboratories Ltd* (2006), 50 CPR (4th) 337 (TMOB)].

- Sections 38(2)(b) and 12(1)(d) of the Act – the date of the Registrar’s decision [*Park Avenue Furniture Corp v Wickers/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c) and 16 of the Act – the date of use claimed in the application, namely, November 20, 2008 [section 16(1) of the Act]. However, if this date of first use is successfully challenged, the material date then becomes the filing date of the application [*Everything for a Dollar Store (Canada) Inc v Dollar Plus Bargain Centre Ltd* (1998), 86 CPR (3d) 269 (TMOB)].
- Sections 38(2)(d) and 2 of the Act – the filing date of the opposition, namely, August 14, 2017 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185].

[12] 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 Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD)]. If this burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that his application complies with the requirements of the Act.

GROUND SUMMARILY REJECTED

[13] The grounds of opposition below raised under sections 30(a), 30(b), 30(g), 30(i), 12(1)(a) and 16(1)(c) of the Act are rejected either because they are invalid, improperly pleaded and/or on the basis that the Opponent has failed to meet its evidential burden.

Section 30(a) – Statement in ordinary commercial terms

[14] This ground of opposition fails because the Opponent did not file any evidence or make any representations in its support, other than stating that Services (1) and (3) are not in ordinary commercial terms.

Section 30(b) – Date of first use

[15] This ground of opposition fails because the Opponent's evidence does not effectively put into question the Applicant's use of the Mark or the correctness of his claimed date of first use.

[16] First, the various website excerpts provided through the Ashurov affidavit do not speak to the truth of their contents and even if they did, they would be of little assistance to the Opponent under this ground. For example, I note that the domain name *fall-pro.com* included in Ms. Ashurov's searches is registered in the name of a Mexican company, FALL PRO DE MEXICO S.A. DE C.V. [Deslauriers affidavit, Exhibit HD-1, pp. 16-17] and there is no evidence clearly establishing a relationship between this entity and the Applicant.

[17] In addition, even were I (1) to accept that Castro's Fall-Pro Solutions Ltd. is a business or trade name used by the Applicant, (2) to infer from the references to Luis Castro, Castro's Fall-Pro Solutions Ltd. as well as to the Mark found amongst Ms. Ashurov's search results that the websites *castro-solutions.com* and *castro-solutions.homestead.com* are owned and/or operated by the Applicant and, lastly, (3) to accept Ms. Ashurov's search results as evidence establishing that the Mark was not displayed on these websites at the claimed date of first use (which they are not), the Opponent would still fall short of meeting its evidential burden respecting the issue of non-conformity with section 30(b) of the Act.

[18] As the display of the Mark solely in advertising (on the Applicant's website, for example) would be insufficient to establish its use pursuant to section 4(2) of the Act, it follows that the sole absence of such display would not necessarily suggest non-use. Besides, given the nature of the Services in the instant proceeding, I am not convinced that even the absence of a website operated by the Applicant would in and of itself evidence non-use of the Mark or would otherwise put the claimed date of first use into issue.

[19] Finally, it should be recalled that the Applicant is under no obligation to substantiate the use claim contained in his application unless his claim is first put into question by the Opponent meeting its initial evidential burden [*Kingsley v Ironclad Games Corp*, 2016 TMOB 19]. I would add that the absence of evidence of the Applicant's use of the Mark in the circumstances of the present case does not suffice to discharge the Opponent's burden.

Section 30(g) – Address

[20] This ground of opposition fails because the Opponent's evidence does not substantiate its allegations that the application for the Mark did not contain the address of the Applicant's principal office or place of business in Canada or that this address was somehow incorrect.

[21] The fact that there are different addresses listed on the Internet for Castro's Fall-Pro Solutions Ltd., which differ from its registered office per the evidenced incorporation records, is irrelevant as this entity is not the Applicant and has not applied for registration of the subject Mark. In addition, while the evidence suggests that the Applicant may have had more than one address, it does not show that the address provided in the application was not his *principal* office or place of business at the time. [Opponent's written argument, pp. 20, 26 and 29-30; Ashurov affidavit, Exhibits 6, 7, 10; and Manitoba Articles of Incorporation for Castro's Fall-Pro Solutions Ltd.]

[22] Lastly, there is no evidence before me showing that the address contained in the application is incorrectly stated.

Section 30(i) – Statement of entitlement

[23] This ground of opposition fails because mere knowledge of the existence of the Opponent's trademark FALLPRO or confusion with the Opponent's trademark FALLPRO alone, does not support the allegation that the Applicant could not have been satisfied of his entitlement to use the Mark.

[24] Section 30(i) of the Act requires that an applicant include a statement in its application that it is satisfied that it is entitled to registration of its trademark. Where this statement has been provided, a section 30(i) ground should only succeed in exceptional cases, such as where there is evidence of bad faith [*Sapodilla Co Ltd v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB)]. I note that the application for the Mark contains the required statement. I also note that the pleading of this ground does not include an allegation of bad faith. In any event, the evidence at hand would not substantiate such allegation.

[25] Further, while the Registrar has recently held that a combination of sections 30(i) and 22 of the Act can form a valid ground of opposition [*McDonald's Corporation and McDonald's Restaurants of Canada Limited v Hi-Star Franchise Systems, Inc*, 2020 TMOB 111 at paras 25-30], the Opponent has failed to meet its initial evidential burden with respect to its allegation that the Applicant could not be satisfied he was entitled to use the Mark in view of the Applicant "depreciating the value of the goodwill attaching to the Opponent's [trademark] FALLPRO" [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at paras 46, 63-68 which sets out the elements required to establish a section 22 violation].

Section 12(1)(a) – Name or surname

[26] This ground of opposition fails because the Opponent's evidence does not establish that the Mark, as a whole, will be seen as being primarily merely a name or surname.

Section 16(1)(c) – Non-entitlement based on trade name use

[27] This ground, as pleaded, does not raise a proper ground of opposition. The Opponent here bases its claim on prior use of a trade name owned by a third party, namely Castro's Fall-Pro Solutions Ltd. This corporation is not a party to the present proceeding and has no established connection to the Opponent.

[28] Section 17 of the Act provides that no application for the registration of a trademark shall be refused due to previous use or making known of a confusing trademark or trade name by a person other than the applicant or his predecessor in title, except at the instance of that other person or his successor in title. Therefore, an opponent can only rely upon prior use or making known of its own trademark or trade name. In other words, the non-entitlement ground of opposition based upon prior use of a third party's trade name is an invalid ground of opposition.

REMAINING GROUNDS OF OPPOSITION

[29] The remaining grounds of opposition turn on the issue of confusion between the Mark and the Opponent's trademark FALLPRO.

Section 12(1)(d) – Confusion with the Opponent’s Registered Trademark

[30] An opponent meets its initial onus with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing. In this regard, the Registrar has the discretion to check the register in order to confirm the existence of the registration relied upon by an opponent [*Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Having exercised the Registrar’s discretion, I confirm that registration No. TMA990,919 for the Opponent’s Registered Trademark is extant.

[31] The Applicant must now establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and the Opponent’s Registered Trademark.

Test for confusion

[32] The test to determine the issue of confusion is set out in section 6(2) of the Act which stipulates 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 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. Therefore, section 6(2) of the Act does not concern confusion of the trademarks themselves, but confusion of the goods or services from one source as being from another.

[33] In applying the test for confusion, I must take into consideration all the relevant surrounding circumstances, including those listed 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 they have 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 including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context-specific assessment [*Veuve Clicquot; Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22].

Inherent distinctiveness and extent known

[34] The Opponent submits that the words in the Mark are identical to a corporate name and that, in any event, “Castro” is a name or surname; that “Solutions” is an ordinary English term describing services (and in particular the Applicant’s Services); that “Ltd.” is no more than a corporate designation, resulting in “[t]he most distinctive feature of the Applicant’s mark [being] the Opponent’s mark, namely FALLPRO, a coined term and inherently strong mark on its own” and “deserving of broad protection” [Opponent’s written argument, pp. 10-11, 23-24; Cox affidavit, para 14].

[35] In my view, the trademarks at issue possess some degree of inherent distinctiveness as, while they are both suggestive in the context of the fall-protection goods and services that they respectively cover, there is no evidence before me that “fall pro” is a term common to the trade. While individually, the additional elements in the Mark are not inherently distinctive, in combination, they result in a mark with greater inherent distinctiveness than that of the Opponent.

[36] However, the strength of a trademark may be increased by it becoming known through promotion or use. As mentioned above, the Applicant has not presented any evidence that his Mark has been used or become known to any extent in Canada. The Opponent, on the other hand, has adduced evidence of use and promotion for the trademark FALLPRO in the Cox affidavit, which can be summarized as follows:

- The Opponent, located in Ontario, was founded in 1989 and specializes in the manufacture and wholesale of personal protective equipment. [paras 5, 7]
- The Opponent’s FALLPRO branded fall protection products are available for purchase online at *degilsafety.com* by way of telephone orders, fax orders, or email order requests [para 20]. Mr. Cox attaches archived versions of pages from this website from 2001, 2007, 2008, 2012, 2015 and 2016, some of which contain mentions of the trademark FALLPRO or show FALLPRO branded goods. [paras 29-36, Exhibits 10-16]

- Mr. Cox states that the Opponent’s channels of trade for the FALLPRO branded fall protection product line include wholesale distribution, industrial purchasers, as well as construction company purchasers of fall protection equipment, parts therefor and related advice regarding fall protection in the industry. Mr. Cox also states that the Opponent’s products are available for purchase in retail stores in Canada, including RONA, Inc and its company owned franchised retailers. [para 19]
- Mr. Cox states that the Opponent has continuously sold FALLPRO branded fall protection products in Canada since 2001. [paras 15, 17, 18 and 38]
- Mr. Cox explains that when FALLPRO branded fall protection products are purchased, they are featured in clear plastic packaging containing a “Technical Sheet” which displays the trademark FALLPRO and is visible to the purchaser through the clear plastic. Mr. Cox attaches copies of various such “Technical Sheets” from 2001, 2009, 2013 and 2017 used by the Opponent, depicting harnesses, lanyards, rope grabs, and carabiners amongst other goods. [paras 21-25, Exhibits 2-6]
- Mr. Cox also attaches a picture of current FALLPRO lanyard product packaging which he states is representative of how the Opponent’s goods under this trademark are sold and have been sold to purchasers over the years [para 21, Exhibit 2], a copy of packaging artwork from December 2005 for a FALLPRO branded “Roofer’s Kit” [para 27, Exhibit 8], pictures of 2016 FALLPRO vertical lifeline product packaging [para 28, Exhibit 9], as well as an order catalogue for FALLPRO branded products that he states is used since 2014. [para 26, Exhibit 7]
- Mr. Cox provides a chart outlining the location of the Opponent’s sales of FALLPRO branded fall protection products in Canada, specifically setting out the provinces in which they were sold directly to purchasers in 2004-2017. There is sales data in Ontario and Quebec in 2004, growing to sales in all ten Canadian provinces starting 2013. Sales are documented in all Canadian provinces except Newfoundland and Labrador between 2005-2012. [para 38; Opponent’s written argument, p. 13]

- The Opponent’s sales of FALLPRO branded fall protection products across Canada approximate just over \$9.3 million for 2004-2017. Mr. Cox attaches a sampling of copies of invoices from 2007-2017 issued by the Opponent to Canadian consumers, which include FALLPRO branded fall protection product(s) in the list of items sold. I note that some of these documents contain the term “Fallpro” in the body of the invoices, while some others contain a code that starts with the letters “FP” which, Mr. Cox asserts, stand for “Fall Protection”. Mr. Cox further asserts that the trademark FALLPRO appeared on the packaging of these items identified with the “FP Code” on the invoices. [paras 38-40, Exhibit 17]

[37] Notwithstanding the summary above, I note that the Opponent’s evidence presents some deficiencies. For example, Mr. Cox provides little information with respect to advertising. While the Opponent seems to have assured a continuous online presence through its website over the years, there is no indication of the number of Canadian visitors to *degilsafety.com* at any time. There is also no mention of where or how the Opponent’s order catalogue was distributed or made available to consumers as of 2014. There is no mention of other means of advertising or promotion of the Opponent’s relied-upon mark over the years nor of any corresponding expenditures. This prevents me from concluding that the Opponent’s trademark FALLPRO has become well-known in Canada.

[38] That being said, the Opponent’s evidence nonetheless shows over \$9.3 million in sales of FALLPRO-branded products. As such, I am satisfied (mainly due to the sales information provided by Mr. Cox including the fact that the Opponent’s mark appears on the packaging and on related materials such as “Technical Sheets” and invoices) that the Opponent has shown that its trademark FALLPRO has been used and become known to some extent in Canada. Therefore, overall, I find that this factor favours the Opponent.

Length of time in use

[39] In view of my comments above, this factor also favours the Opponent.

Nature of the goods, services, businesses and trade

[40] When considering the nature of the goods and services and the nature of the trade, I must compare the Applicant's statement of services with the statement of goods contained in the registration relied upon by the Opponent [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)]. However, these 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. Evidence of the parties' actual trades is useful in this respect [*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); *American Optional Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[41] With this in mind, I find that there is overlap between the Opponent's fall protection goods and those portions of Services (1) and (3) which are described as specifically pertaining to fall protection equipment. Further, while Services (2) as well as the Applicant's advice and information, business management, business management assistance, and commercial business management services do not specifically refer to fall protection equipment, absent any evidence to the contrary from the Applicant, I find that they could be connected or somehow related to fall protection. In fact, given that the Mark contains the words "Castro's Fall-Pro Solutions", it could portray (i) the Applicant as a "fall professional" (*i.e.* one with solutions against falls) or as having ties, dealings or expertise in the field of fall protection, and (ii) all of the Services as being related to fall protection. In the absence of evidence or submissions regarding the consumers targeted by the Applicant's services or the nature of his trade, there is also no reason to conclude that the parties' goods and services would not travel through the same channels of trade and be directed to the same type of clientele.

[42] Thus, these factors favour the Opponent.

Degree of resemblance

[43] When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality. The appropriate test is not a side-by-side comparison but an

imperfect recollection in the mind of a consumer of an opponent's trademark [*Veuve Clicquot* at para 20]. The preferable approach is to begin the confusion analysis by determining whether there is an aspect of each trademark that is particularly striking or unique [*Masterpiece* at para 64].

[44] With this in mind, I find that there is at least some resemblance between the trademarks at issue as the dominant element of the Opponent's Registered Trademark forms part of the Mark. Thus, there is some resemblance visually and when sounded, notwithstanding the additional elements of the Mark. Conceptually, FALLPRO arguably suggests fall protection or professional-grade fall-related equipment and the Mark arguably suggests a Canadian company run by someone named Castro who offers professional solutions in the field of fall protection. In my view, the visual and aural differences that exist between the trademarks due to the presence of additional elements in the Mark, are somewhat offset by the idea of fall protection that both marks strongly convey as a whole.

Conclusion on the likelihood of confusion

[45] Having considered all of the surrounding circumstances and, in particular, the extent to which the Opponent's Registered Trademark has become known, the close connection between the parties' goods and services and the potential for overlap in their channels of trade, I find that the Applicant has failed to establish, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent's registered trademark FALLPRO.

[46] Accordingly, the section 12(1)(d) ground of opposition succeeds.

Section 16(1)(a) – Non-entitlement based on trademark use

[47] The Opponent has also alleged that the Applicant is not the person entitled to registration pursuant to section 16(1)(a) of the Act, because the Mark is confusing with its trademark FALLPRO previously used in Canada in association with fall protection goods.

[48] To succeed with respect to this ground, the Opponent has to show that its relied upon trademark had been used in Canada as of November 20, 2008, and had not been abandoned as of March 15, 2017 [section 16(5) of the Act]. As per my summary above, based on a fair review of

the whole of Mr. Cox' evidence, I am satisfied that that the Opponent has met this burden. In my view, the difference in material dates here does not favour the Applicant enough so as to definitively tip the balance of probabilities in his favour. At best for the Applicant, due to the lesser extent to which the Opponent's relied upon trademark was known as of the relevant date, I find that the probability of confusion between the Mark and the trademark FALLPRO is evenly balanced between a finding of confusion and of no confusion. As the onus is on the Applicant to show, on a balance of probabilities, that there is no reasonable likelihood of confusion, I must find against the Applicant.

[49] Accordingly, the section 16(1)(a) ground of opposition also succeeds.

Section 2 – Non-distinctiveness

[50] Considering that I have already refused the application under two grounds, I will not address the remaining ground of opposition based upon non-distinctiveness.

[51] However, I will note that, notwithstanding the differences in the material date, to the extent that this ground turns on the issue of confusion between the parties' marks, in the absence of any evidence or representations from the Applicant, I would likely have reached the same conclusion above regarding the likelihood of confusion for reasons similar to those discussed under the section 12(1)(d) ground of opposition and would likely have found that the Applicant has not met its onus under this ground.

DISPOSITION

[52] Having regard to the foregoing, 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.

Iana Alexova
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

No Hearing Held

AGENTS OF RECORD

LEDGLEY LAW

For the Opponent

FILLMORE RILEY LLP

For the Applicant