



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 87

Date of Decision: 2024-05-02

IN THE MATTER OF OPPOSITIONS

Opponent: Canadian Tire Corporation, Limited

Applicant: 9285-1096 Quebec Inc.

Applications: 1913318 – ARCTIC SQUAD
1960967 – ARCTIC SNOW

INTRODUCTION

[1] Canadian Tire Corporation, Limited (“the Opponent”), opposes registration of the trademarks ARCTIC SQUAD and ARCTIC SNOW that are the subject of application Nos. 1913318 and 1960967 (collectively the Marks), filed by 9285-1096 Quebec Inc. (the Applicant). The ARCTIC SQUAD application is applied for in association with “children’s clothing namely, coats, dresses, jackets, pants, swimsuits and t-shirts” and the ARCTIC SNOW application is applied for in association with “clothing, footwear and accessories, namely, baselayers, boots, caps, coats, gloves, hats, jackets, neck warmers, pants, scarves, ski masks, ski pants, snow boots and snow pants”.

[2] The Opponent opposes both applications primarily on the basis that the Marks are confusing with the Opponent's registration No. UCA34865 for the trademark ARCTIC, previously used or made known in Canada in association with sleeping bags and jackets, sleeping robes, and registration No. TMA321266 for the trademark ARCTIC & Design, shown below, previously used or made known in Canada by the Opponent in association with jackets, down jackets and down vests (the Opponent's Trademarks).

The logo for 'Arctic' features the word in a bold, sans-serif font. The letter 'A' is stylized with a semi-circle underneath it, resembling a snow cap or a mountain peak.

[3] For the reasons that follow, both applications are refused.

THE RECORD

[4] The applications for the Marks were filed and opposed at two different times. Specifically:

- Application No. 1913318 for ARCTIC SQUAD was filed on August 3, 2018, and advertised in the *Trademarks Journal* on November 24, 2021.
- Application No. 1960967 for ARCTIC SNOW was filed on May 3, 2019, and advertised in the *Trademarks Journal* on November 24, 2021.

[5] The Opponent filed a statement of opposition against the ARCTIC SQUAD application on January 4, 2022, and against the ARCTIC SNOW application on January 11, 2022. The grounds of opposition pleaded against each are almost identical and are based on non-registrability under section 12(1)(d), non-entitlement under section 16(1)(a), non-distinctiveness under section 38(2)(d) and section 2, and non-compliance with sections 38(2)(e) and 38(2)(f) of the *Trademarks Act*, RSC 1985, c T-13 (the Act). All of the Opponent's grounds (except for section 38(2)(e)) turn on a determination of the likelihood of confusion between the Marks and the Opponent's Trademarks.

[6] The Applicant filed and served a counter statement denying the grounds of opposition for both oppositions.

[7] The Opponent filed the affidavits of James Prescott, Vice-President of Global Sourcing & Procurement of the Opponent. The Applicant filed the affidavit of Mr. Abraham Toledano, Chief Executive Officer of the Applicant. Mr. Toledano was cross-examined and the transcript and answers to undertakings form part of the record. As its evidence in reply, the Opponent filed the evidence of Sazia Aftab, Law Clerk with the Opponent's agent.

[8] Both parties filed written representations and were represented at an oral hearing.

PRELIMINARY RULING AT THE HEARING

[9] At the hearing, the Opponent objected to the Applicant's intention to appear for the reason that the Applicant failed to request a hearing pursuant to section 58 of the *Trademark Regulations*, SOR/2018-227 (the Regulations) and section IX of the *Practice in Trademark Opposition Proceedings* (the Practice Notice) nor respond to the Registrar's notice of the hearing dated January 2, 2024.

[10] On March 18, 2024, the Opponent filed the list of case law it intended to rely upon with respect to the oral hearing scheduled for April 2, 2024. It was only on March 19, 2024, that the Applicant indicated by email that it would be making representations for the Applicant at the hearing scheduled for April 2, 2024, and filed a list of the Applicant's case law.

[11] At the hearing, I asked the Applicant's agent for his submissions regarding why it had not properly requested a hearing pursuant to the Regulations and the Practice Notice. The Applicant's agent advised that he had contacted the Trademarks Opposition Board by telephone to ask if he could still participate in the hearing scheduled for April 2, 2024, and if he needed to take any further steps in order to do so. By error, the Applicant's agent was told that he could still participate and that did not have to take any further steps in order to do so. The Applicant then sent an email to the

Hearing Co-ordinator indicating that he would participate in the hearing and also sent a copy of the case law that the Applicant would be relying upon.

[12] I agreed with the Opponent that the Applicant did not comply with section 58 of the Regulations or the Practice Notice. Notwithstanding that, I advised the parties of my decision to allow the Applicant to make oral representations at the hearing. In this regard, I exercised my discretion under section 47 of the Act to grant the Applicant an extension of time to request to make representations at the hearing. I would add that, aside from considerations of formal procedural requirements, in view of the office errors in this case, as well as the fact that the Opponent had been made aware that the Applicant would be making representations two weeks prior to the hearing, I found that the Applicant's conduct in this case and the possible prejudice to the Opponent were not so egregious as to disentitle the Applicant to its right to an oral hearing as provided for in the Act.

LEGAL ONUS AND EVIDENTIAL BURDEN

[13] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the applications comply with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all the evidence, then the issue must be decided against the Applicant. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

ANALYSIS OF THE GROUNDS OF OPPOSITION

[14] I will now consider the grounds of opposition beginning with the section 12(1)(d) ground of opposition.

Registrability Ground – Section 12(1)(d)

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

[16] The Opponent pleads that the alleged trademarks ARCTIC SNOW and ARCTIC SQUAD are not registrable having regard to the provisions of section 38(2)(b) and section 12(1)(d) of the Act because they are each confusing with the Opponent's Trademarks which were both previously used in Canada. These marks are registered in association with the following goods:

ARCTIC – Registration No. UCA34865

(1) Sleeping bags.

(2) Jackets, sleeping robes.

ARCTIC & Design – Registration No. TMA321266

(1) Jackets, down jackets, down vests.

Test for Confusion

[17] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold or leased by the same person, whether or not the goods and services are of the same general class or Nice Class. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5). The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc* (2006), 1 SCR 772 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) at para 49, where the Supreme Court of

Canada states that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis.

Inherent Distinctiveness and Extent Known

[18] Neither of the Opponent's Trademarks are inherently strong as the word ARCTIC is the name of a geographic location and therefore suggestive that the associated goods are designed for a cold climate. I do not find either of the Marks to be inherently strong either for similar reasons. In this regard, both Marks are also suggestive that their associated goods are designed for a cold climate.

[19] With respect to the extent known of the trademarks, there is no evidence that the Marks have been used in Canada or that either of them have become known to any extent in Canada.

[20] The Opponent's Trademarks, on the other hand, have become known to a considerable extent in Canada. In this regard, Mr. Prescott explains that the name ARCTIC was first applied to outerwear in 1913 by the Opponent's predecessor-in-title, Woods Manufacturing Co. Ltd., when the ARCTIC branded parka was specifically designed and developed for the five year long Canadian Arctic Expedition. Today, the Opponent is a famous Canadian retailer of a broad variety of goods and services. The Opponent sells its ARCTIC branded products through its 504 Canadian Tire Associate Stores as well as through its subsidiary retail brands including SportChek, with over 190 stores across all Canadian provinces except Quebec and Atmosphere, with over 19 locations across 4 provinces (the Opponent's Subsidiary Retail Brands).

[21] Mr. Prescott further states that the Opponent's Trademarks make up one of the Opponent's leading in-house outerwear and clothing marks. The trademark ARCTIC is used in association with an array of clothing, and many other goods, and there have been substantial sales of products bearing the Opponent's Trademarks in Canada since the acquisition of the Opponent's Trademarks in 2014. For example, sales of the Opponent's goods marked with the Opponent's Trademarks throughout Canada have generated significant revenue, including over \$2.5 million in 2019, over \$1.1 million in 2020 and 2021, and over \$400,000 in the first six months of 2022.

[22] In addition to sales, the Opponent advertises the Opponent's Trademarks extensively in Canada. The Opponent's goods marked with the Opponent's Trademarks have been advertised, sold, and made available on the website located at <https://www.woods.ca/> and on the websites of the Opponent's Subsidiary Retail Brands. Additionally, the Opponent's advertising for the Opponent's goods includes in-store merchandising displays, social media, print-media, digital media and targeted national public relations initiatives.

[23] In view of the above, I find that overall this factor favours the Opponent.

Length of Time in Use

[24] The Opponent has shown use of its trademarks in Canada since its acquisition of these marks in 2014. The Applicant, on the other hand, has not provided any evidence or statements regarding how long it has used the Marks in association with its goods in Canada.

[25] This factor therefore favours the Opponent.

Nature of Goods and Services and Trade

[26] When considering sections 6(5)(c) and (d) of the Act, it is the statement of goods as defined in the registrations relied upon by the Opponent and the statement of goods in the application for the Marks that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*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)].

[27] I agree with the following statements made by the Opponent in its written representations:

The Applicant's Goods consist of children's clothing namely, coats, dresses, jackets, pants, swimsuits and t-shirts. In the absence of any specified restrictions in the Application, the Applicant's Goods, as set out therein, directly and unambiguously overlap with the Opponent's Goods. Since the Applicant did not file any evidence of use of the ARCTIC SNOW Mark, there is nothing on the record to even suggest that the

goods differ from those of the Opponent or that the parties' goods would not involve the same channels of trade.

...Here, the Applicant's Goods are identical to or otherwise directly overlap with the Opponent's Goods. In terms of the parties' channels of trade, the Applicant provided no evidence of the channels of trade through which it sells or proposes to sell the Applicant's Goods, and there is no restriction on the channels of trade listed in the Application. As such, the analysis of the nature of the Applicant's trade must consider that the Applicant's Goods can be sold through any channels open to it. The parties' channels of trade which would normally be considered as being associated with the parties' goods, clearly directly overlap.

[28] I therefore find that these factors also favour the Opponent.

Degree of Resemblance

[29] When considering the degree of resemblance between trademarks, the trademarks must be considered in their totality; it is not correct to lay the trademarks side by side and compare and observe similarities or differences among the elements or components of the trademarks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20].

[30] There is a significant degree of resemblance between the trademarks at issue in appearance and sound as the Applicant has adopted the word portion of the Opponent's Trademarks in its entirety as the first component for each of the Marks. I also find the ideas suggested by the Opponent's Trademarks and the Applicant's ARCTIC SNOW Mark to be quite similar, *i.e.*, clothing designed for cold climates. There is slightly less similarity in ideas suggested between the Opponent's Trademarks and the Applicant's ARCTIC SQUAD Mark, however, because the element SQUAD in the Applicant's ARCTIC SQUAD trademark suggests that its clothing is to be worn by a group of people in a cold climate, rather than the general idea of clothing designed to be worn in a cold climate.

Surrounding Circumstances – State of the Register Evidence

[31] Mr. Toledano states that he is the CEO of the Applicant and that he conducted a search of the trademarks register. His search revealed 47 trademarks containing the

word ARCTIC registered in Canada for use with respect to clothing and clothing accessories. In addition, attached as Exhibits 3-8 of his affidavit are various screenshots from the following websites, which Mr. Toledano states are representative of such goods sold in Canada: *arctic-bay.ca* (re: registered mark ARCTIC BAY); *www.arcticnorth.ca* (re: registered mark ARCTIC AN NORTH); *arcticexpedition.ca* (re: registered trademark Arctic Expedition); *www.canadagoose.com* (re: registered mark Canada Goose Arctic Program & Design); *www.arcticcatparts.ca* (re: registered mark Arctic Cat); and *arcticwear.ca* (re: registered mark Arctic Wear). The Opponent made numerous submissions regarding this evidence which will be discussed further below.

[32] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features, therefore decreasing the likelihood of confusion [*McDowell v Laverana GmbH & Co. KG*, 2017 FC 327 at para 42 (the first *McDowell* case)]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the trademarks at issue, and (iii) include the element at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197, aff'd 2017 FC 38].

[33] Previously, where a large number of relevant trademarks were identified on the register, at least some use of the common element could have been inferred [see, for example, *Kellogg Salada Canada Inc v Maximum Nutrition Ltd*, 1992 CanLii 14792 (FCA) where the evidence showed at least 47 trademarks and 42 trade names as of the filing date of the application that contained the component NUTRI as part of the mark]. More recently, however, the Federal Court of Appeal has confirmed that inferences based on the Register should only be drawn if there is a large number of relevant registrations *and* actual use [*Tweak-D Inc v Canada (Attorney General)*, 2023 FCA 238 at para 14]:

The “state of the Register” may, in some cases, demonstrate a pattern of registrability of similar marks. We adopt the Federal Court’s reasons at paras. 28-29 that inferences based on the Register should only be drawn if there is a large number of relevant registrations and evidence of actual

use: *McDowell v. Laverana GmbH & Co. KG*, 2017 FC 327 at paras. 42-46; *Tokai of Canada Ltd. v. Kingsford Products Company, LLC*, 2021 FC 782 at para. 56; *Puma* at para. 48.

[34] This reasoning, in my view, confirms the difficulty the Court has had in the past of finding that an element of a mark was commonly adopted as a component of trademarks used in association with the relevant goods or services based solely on the state of the register evidence. For example in *Hawke & Company Outfitters LLC v Retail Royalty Company*, 2012 FC 1539 at para 44, Montigny J. (as he then was) explained the difficulty with the state of the register evidence as follows:

“[A] search of the Trade-marks Office Register is not the best way to establish the state of the marketplace or the actual use of a mark. The fact that a mark appears on the register does not show that it is currently in use, was in use as of the relevant material dates, is used in relation to wares or services similar to those of the parties, or the extent of any such use [...]” [para 40].



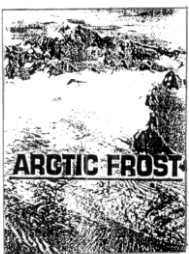






[35] In *Vital Source Inc v Vital Life Pharmaceutical Inc*, 2020 TMOB 21 (*Vital Source*), former Member Fung provided a good summary of the law regarding state of the register and state of the marketplace evidence. In that decision, she commented as follows at paragraphs 75-77:



In *Canada Bread Company, Limited v Dr Smood ApS*, 2019 FC 306, ...Roy J. noted that two other Federal Court decisions [*McDowell v Laverana GmbH & Co KG* 2017 FC 327 and *McDowell v The Body Shop International PLC*, 2017 FC 581] agreed with de Montigny J.’s observations in the *Hawke* decision where “the evidence of the use of a common element becomes relevant only where the registered marks are commonly used in the market in question”. He added that “it remains very much unclear what inference may legitimately be drawn without evidence of the use made by third parties in the marketplace of a common element” [para 61].

Examples of evidence of actual use of a common element that have been discussed by the Federal Court include phone directories showing trade names of businesses in Canada, websites from which Canadians can order relevant products, purchase of relevant products in Canada [see *Alticor*], online advertising and sample flyers [see *Clearnet Communications*], websites showing trademarks of businesses operating in the same field [see *Eclectic Edge Inc v Victoria’s Secret Store Branch Management, Inc* 2015 FC 453], and information about the annual sales of the goods [see *Hawke & Company Outfitters*].

However, all evidence of actual use is not made equal. In *Ecletic Edge Inc v Gildan Apparel (Canada) LP* 2015 FC 1332, the Court cautioned that “it is not the quantity or sheer numbers that count but rather the quality of evidence showing actual use of the common [element] in the relevant industry in Canada” [para 91]. By way of examples, websites that are inactive or inaccessible to Canadians, the inclusion of marks registered with unrelated categories of goods and services, the lack of information about sales and/or operations in Canada, and evidence of enforcement actions, oppositions, or settlements that would have discontinued the use of the common element by third parties in the marketplace, could all impact the probative value of the evidence in question [see *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 and *Ecletic Edge Inc v Gildan Apparel (Canada) LP*].

[36] In this case, out of the 47 trademark registrations evidenced by the Applicant, I find that at least 11 of these trademarks do not include the element ARCTIC in a material way. In this regard, as noted by the Opponent, the word ARCTIC is, in many cases, subordinate or barely even visible in the trademarks listed by Mr. Toledano. For example, the following are included among the marks listed in the Toledano affidavit:

Reg No.	Trademark	Reg No.	Trademark	Reg No.	Trademark
TMA953171		TMA1112388		TMA597473	
TMA818643		TMA1090727		TMA750591	
TMA293187		TMA1132603		TMA1023590	

TMA1069876		TMA601185			
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[37] Other objections to Mr. Toledano’s evidence raised by the Opponent include the following:

- While Mr. Toledano also included trademark application No. 1692849 for ARCTIC KINGDOM, this registration was expunged for non-use on November 16, 2020.
- Mr. Toledano provides no evidence as to the nature or business of the third parties, no evidence that these parties have the same channel of trade as the Opponent, no evidence regarding the extent if any to which these entities have any reputation in Canada.
- There is no evidence of even of a single sale of the products referenced. In this regard, the Toledano Affidavit contains no receipts, invoices or other sales documentation for any of the products shown in the website screenshots demonstrating them actually being sold in Canada at any time.
- The website printouts, being hearsay, merely show that the websites existed at the time they were printed but are not proof of the content of the website.
- Mr. Toledano admitted that the website printouts relate to only nine marks owned by six owners of all of the 47 trademarks he presented.

[38] The Applicant, on the other hand, cites the *Vital Source* decision, *supra*, at para 76 as support for its argument that examples of evidence of actual use of a common element that have been discussed by the Federal Court include websites from which Canadians can order relevant products and websites showing trademarks of businesses operating in the same field. The Applicant maintains that since its evidence of the extracts from the websites show how you can order these products in Canada, this

evidence, combined with the state of the register evidence, should be sufficient to infer use of these marks in the marketplace in Canada.

[39] What the Applicant failed to also mention, however, is that the quality of the evidence showing actual use in the relevant industry is also very important. In this regard, the decision in *Vital Source* also notes that the lack of information about sales and/or operations in Canada could impact the probative value of the evidence in question [*Eclectic Edge Inc v Gildan Apparel (Canada) LP*, 2015 FC 1332, and *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707].

[40] In this case, I am not satisfied that the evidence furnished is sufficient to demonstrate use of any third party marks in the marketplace in association with relevant goods pursuant to section 4(1) of the Act. Even setting aside the evidentiary issues with printouts from third party websites, the Applicant provided no evidence of even of a single sale of the products referenced. In this regard, the Toledano Affidavit contains no receipts, invoices or other sales documentation for any of the products shown in the website screenshots demonstrating them actually being sold in Canada at any time. Therefore, even if I were to find at least 35 relevant ARCTIC trademarks in Mr. Toledano's evidence, in the absence of evidence of use of these trademarks in the marketplace, I am unable to make the inference that consumers would pay more attention to the other features of the marks in the marketplace in order to distinguish them.

[41] This surrounding circumstance therefore does not favour the Applicant to any significant extent.

Conclusion

[42] The question posed by section 6(2) of the Act is whether customers of the goods provided with the Marks ARCTIC SNOW or ARCTIC SQUAD would believe that these goods are provided, authorized, or licensed by the Opponent owing to its ARCTIC Trademarks. I have assessed this as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees either of the Marks, at a time when they have no more than an imperfect recollection of either of the Opponent's Trademarks, and

does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[43] Having considered all of the surrounding circumstances and applying the test of confusion as a matter of first impression and imperfect recollection, I find that at best for the Applicant the probability of confusion between the ARCTIC SNOW and ARCTIC SQUAD Marks and the Opponent's Trademarks is evenly balanced between a finding of confusion and no confusion. I reach this conclusion because, notwithstanding the inherent weakness of the parties' trademarks, the Opponent's Trademarks have become known to a considerable extent in Canada, the Applicant has not established any use or reputation of either of its Marks, the parties' goods overlap and there is a considerable degree of resemblance between the trademarks. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the trademarks, I must therefore find against the Applicant.

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

Entitlement to Register – Section 16(1)(a) and Distinctiveness – Sections 38(2)(d) and 2

[45] With respect to the grounds of opposition based on section 16(1)(a) of the Act, since the Applicant has not shown any use of the Marks, the material dates are the filing dates of the applications (August 3, 2018 and May 3, 2019). The material dates for assessing the non-distinctiveness ground are the dates of opposition (January 4, 2022, and January 11, 2022). The Opponent's section 16(1)(a) and section 2 grounds of opposition rely on the prior use and reputation of the Opponent's Trademarks as well as the Opponent's prior use and reputation in Canada of the Opponent's Trademarks.

[46] The Opponent's case regarding confusion is strongest under its section 12(1)(d) ground of opposition because the later material date allows all of the Opponent's evidence concerning its reputation to be considered. Further, there is no other evidence from the Applicant as of the earlier material dates that would tip the balance in favour of

it. Therefore, as the Opponent has succeeded under the section 12(1)(d) ground, it also succeeds under its section 16(1)(a) and section 2 grounds of opposition.

No Use or Intention to Use – Section 38(2)(e)

[47] The Opponent further pleads that, at the filing dates of the applications in Canada, the Applicant was not using and did not propose to use the Marks in Canada in association with the applied for goods. In support of this assertion, the Opponent relies on the evidence of Mr. Prescott.

[48] Mr. Prescott conducted a Google search for the name of the Applicant. He did not locate any website for the Applicant nor any products associated with either of the Applicant's Marks. In fact, he was unable to identify any references to the Applicant beyond corporate directories.

[49] Relying on the decisions in *Indigo Books & Music Inc v Preferred One Inc*, 2010 TMOB 100 at para 54; *Molson Canada c Anheuser-Busch Inc*, 2003 FC 1287, at paras. 56-57, the Opponent submits that its evidence is sufficient to meet its light initial evidential burden in respect of this ground for two reasons: 1) the requisite facts that the Applicant used or proposed to use either of the Marks are uniquely within the knowledge of the Applicant; and 2) it is difficult to prove a negative, especially in a case of an application based on proposed use.

[50] Under section 38(2)(e) of the Act, which is still a relatively new ground of opposition, an opponent must allege not only that the applicant *was not using* the trademark at issue in Canada but also that the applicant *did not propose to so use it*. In this case, it is debatable whether the Opponent's evidence puts into issue whether the Applicant was using the Marks as of the filing dates of the applications. In this regard, I find it unusual that a company which is using a trademark in association with clothing goods in this modern era does not appear to have any commercial presence on the Internet. On the other hand, the failure to find any commercial presence on the Internet for goods has not been sufficient in the past on its own to raise doubt about whether or not a mark was in use under the former section 30(b) of the Act [see, for example, *MMS Enterprise Holdings Inc v Vertica Resident Services Inc*, 2015 TMOB 154].

[51] Regardless, the Opponent has not provided any evidence to put into issue whether the Applicant did not propose to use either or both of its Marks as of the filing dates of the applications. I appreciate that it is indeed difficult to prove a negative, as in a case of an application based on proposed use. However, I do not consider the absence of any reference on the Internet to the Applicant's business or its goods associated with either of its Marks as of the filing dates of the applications to be sufficient to suggest that the Applicant did not propose to use either of its Marks at a later date.

[52] In view of the above, I am not satisfied that the Opponent has met its initial burden under this ground. This ground is therefore rejected.

Non-Entitlement to Use – Section 38(2)(f)

[53] As the Opponent has already succeeded under three grounds of Opposition, it is not necessary to address this remaining ground of opposition.

DISPOSITION

[54] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the applications pursuant to section 38(12) of the Act.

Cindy R. Folz
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2024-04-02

APPEARANCES

For the Opponent: Sebastien Beck-Watt

For the Applicant: Mark Sumbulian

AGENTS OF RECORD

For the Opponent: Cassels Brock & Blackwell LLP

For the Applicant: Mark Sumbulian