

**IN THE MATTER OF AN OPPOSITION  
by Prospectus Investment and Trade Partners Inc.  
to application No. 633,850 for the trade-mark  
PROSPECTUS & Design filed by M.C. Foisy**

**On June 9, 1989, the applicant, M.C. Foisy, filed an application to register the trade-mark PROSPECTUS & Design (illustrated below) for "a weekly publication of advertisements for careers" based on proposed use in Canada. The application was amended to include a disclaimer to the word PROSPECTUS and was subsequently advertised for opposition purposes on June 6, 1990.**

**The opponent, Prospectus Investment and Trade Partners Inc., filed a statement of opposition on June 27, 1990, a copy of which was forwarded to the applicant on July 18, 1990. The first ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3) of the Trade-marks Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the trade-marks PROSPECTUS and P & PROSPECTUS & Design and the trade-name Prospectus Investment and Trade Partners Inc. previously used in Canada by the opponent in association with publications. The second ground is that the applied for trade-mark is not distinctive because it is confusing with the opponent's two trade-marks.**

**The applicant filed and served a counter statement. In her counter statement, the applicant makes reference to a publication entitled "Prospectus Investment & Trade Quarterly" and its publisher Prospectus Investment and Trade Partners Inc. She does not, however, admit any use of the trade-marks and trade-name relied on by the opponent.**

**Neither party filed evidence. Both parties filed a written argument and an oral hearing was conducted at which only the applicant was represented.**

**As for the ground of prior entitlement, in view of the provisions of Sections 16(3) and 16(5) of the Act, it was incumbent on the opponent to evidence use of its trade-marks and trade-name prior to the applicant's filing date and to show that its trade-marks and trade-name were not abandoned as of the applicant's date of advertisement (i.e. - June 6, 1990). Since the opponent did not file evidence, it has failed on both counts and the first ground is therefore unsuccessful.**

**In its written argument, the opponent contended that the applicant admitted prior use of the opponent's trade-marks and trade-name in her counter statement. As discussed, the applicant has not made any such admission. Even if the counter statement could be construed as having admitted prior use of the opponent's marks and name, the first ground would still have been unsuccessful. It was incumbent on the opponent to show non-abandonment of at least one mark or name as of the applicant's advertisement date and the opponent failed to do so.**

**As for the second ground of opposition, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares and services from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Furthermore, the material time for considering the circumstances respecting this issue is as of the filing of the opposition: see Re Andres Wines Ltd. and E. & J. Gallo Winery (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.) and Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.). Finally, there is an evidential burden on the opponent to prove the allegations of fact in support of its ground of non-distinctiveness.**

**Since the opponent did not file evidence, it failed to prove the allegations that it had**

**used its two trade-marks. Furthermore, as discussed, the applicant's counter statement does not contain an admission that the opponent has used those two marks. Even if it could be construed otherwise, any such admission would not lead to a conclusion that there had been sufficient use to have any effect on the distinctiveness of the applicant's mark. The second ground is therefore unsuccessful.**

**In view of the above, I reject the opponent's opposition.**

**DATED AT HULL, QUEBEC, THIS 30th DAY OF September, 1994.**

**David J. Martin,  
Member,  
Trade Marks Opposition Board.**