



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2014 TMOB 21**  
**Date of Decision: 2014-02-03**

**IN THE MATTER OF AN OPPOSITION  
by Kellogg Company to application  
No. 1,477,253 for the trade-mark  
KIMBERLEY'S OWN & DESIGN in the  
name of Catering by Kimberley Inc.**

[1] On April 16, 2010, Catering by Kimberley Inc. (the Applicant) applied to register the trade-mark KIMBERLEY'S OWN & DESIGN (the Mark), shown below:



[2] The application for the Mark is based upon use in association with breakfast cereal, cereal based bars, cereal based snack foods, cakes and breads since September 1, 2009 and based upon proposed use in association with nut based snack food, seed based snack foods, nut based snack bars and seed based snack bars. The application for the Mark is also based upon use in association with catering services, since September 1, 2009.

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 13, 2010.

[4] Kellogg Company (the Opponent) has opposed the application under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) on the grounds that: (i) it does not conform to the requirements of section 30(b) of the Act; (ii) the Applicant is not the person entitled to registration of the Mark under sections 16(1)(a) and 16(3)(a) of the Act, in view of the Opponent's prior use of the trade-marks as set out in Schedule "A" attached hereto; (iii) the Mark is not registrable under section 12(1)(d) of the Act, in view of the Opponent's registered trade-marks as set out in Schedule "A" attached hereto; and (iv) the Mark is not distinctive within the meaning of section 2 of the Act.

[5] In support of its grounds of opposition, the Opponent has filed the affidavit of Wendy Woods, the Director of Marketing Operations for Kellogg Canada Inc., a wholly owned subsidiary and licensee of the Opponent, sworn November 25, 2011.

[6] In support of its Application, the Applicant has filed the affidavit of Kimberley Lugsdin, the owner of Catering By Kimberley Inc. and Kimberley's Own, a subsidiary of Catering By Kimberley Inc., sworn May 28, 2012.

[7] Both of the parties filed written arguments and attended an oral hearing.

#### Onus

[8] 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 [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

#### Preliminary Matter

[9] In its written submissions, the Opponent noted a discrepancy between the spelling of the Applicant's name in the application and the spelling of the Applicant's name in the evidence. In the application as originally filed, the Applicant's name was shown as Catering by Kimberly Inc. (with one "e" in "Kimberly"). However, in the evidence on file, the Applicant's name was shown as Catering by Kimberley Inc. (with a second "e" appearing in "Kimberly"). The

Applicant took steps to correct the typographical error shortly after the oral hearing and the Applicant's name is now correctly shown as "Catering by Kimberley Inc."

### Analysis

#### Section 30(b)

[10] The Opponent alleges that contrary to section 30(b) of the Act, the Applicant has not used the Mark in Canada in association with the wares and services in the application since the September 1, 2009 claimed date of first use.

[11] The initial burden on the Opponent with respect to this ground is light because the facts regarding an applicant's first use are particularly within the knowledge of an applicant [*Tune Masters v Mr P's Mastertune Ignition Services Ltd* (1986) 10 CPR (3d) 84 (TMOB) at 89].

[12] The Opponent's burden can be met by reference not only to the Opponent's evidence but also to the Applicant's evidence [see *Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) (FCTD) 216 at 230]. However, while the Opponent may rely upon the Applicant's evidence to meet its evidential burden in relation to this ground, the Opponent must show that the Applicant's evidence is clearly inconsistent with the Applicant's claims as set forth in its application [see *Ivy Lea Shirt Co v 1227624 Ontario Ltd* (1999), 2 CPR (4th) 562 at 565-6 (TMOB), affirmed 11 CPR (4th) 489 (FCTD)].

[13] In this case, the Opponent has not filed any evidence in support of its section 30(b) ground of opposition. Thus, it relies exclusively upon the Applicant's evidence to meet its burden. I will therefore proceed to review the Applicant's evidence in detail below.

[14] The Applicant's evidence consists of the affidavit of Ms. Kimberley Lugsdin, the owner of both the Applicant and a company called Kimberley's Own, which Ms. Lugsdin refers to in paragraph 1 of her affidavit as being a subsidiary of the Applicant.

[15] In paragraph 2 of her affidavit, Ms. Lugsdin states that "The evidence set out in Schedule A(i) and Schedule A(ii) are examples of the Kellogg logo." Schedule A(i) consists of a photocopy of the packaging for "fruit crisps" and clearly shows the trade-marks KELLOGGS

and SPECIAL K. Schedule A(ii) consists of a photocopy of the packaging for “cereal bars” and also clearly shows the trade-marks KELLOGGS and SPECIAL K.

[16] In paragraph 3 of her affidavit, Ms. Lugsdin states that “The evidence set out in Schedule B are examples of how I have been using the letter k in both of my companies”. Schedule “B” consists of two business cards and a label.

[17] The first business card features a different trade-mark than the Mark. Beside the business card, there is a hand written notation which indicates that it has been used since 2009. Since there is no information regarding when in 2009 the business card was in use, I must conclude that the use would have been as of December 31, 2009.

[18] The second business card, which does feature the Mark, has a hand written notation beside it which indicates that it has been used since 2010.

[19] The label also features the Mark and there is a hand written notation beside it which indicates that it has also been used since 2010.

[20] In paragraph 7, Ms. Lugsdin states that the Applicant had less than \$24,000 in sales for the calendar year of 2011.

[21] It is not necessary for me to discuss the remainder of Ms. Lugsdin’s affidavit as it has no relevance in relation to this ground of opposition or any of the other grounds of opposition which have been raised in these proceedings.

[22] As the Opponent pointed out in its written submissions, the Applicant did not deny the allegations made in the section 30(b) ground of opposition in its counterstatement and the evidence of use provided by Ms. Lugsdin all post-dates the September 1, 2009 claimed date of first use in the application.

[23] At the oral hearing, the Opponent submitted that the handwritten dates appearing beside the business cards and label attached as Schedule “B” should be taken as unequivocal statements about what was used when. The Opponent submitted that Ms. Lugsdin clearly put her mind to when the marks were first used when making her affidavit and that the dates which she provided in her affidavit don’t support the claims made in the application. The Opponent takes the

position that the Applicant's evidence is therefore clearly inconsistent with the claims made in its application for the Mark.

[24] The handwritten notations in Schedule "B" do cause one to query whether the September 1, 2009 claimed date of first use in the application is accurate. However, while it may have been preferable for the Applicant to provide evidence of use and details pertaining to use of the Mark dating back to the September 1, 2009 claimed date of first use, it was not under any obligation to do so and the fact that it did not do so does not, in my view, amount to a clear inconsistency.

[25] A fair reading of Ms. Lugsdin's affidavit as a whole suggests that the examples of use provided in Schedules A(i), A(ii) and B were intended to show examples of the manner in which the parties' marks have been used, rather than to establish a dates of first use. The fact that the particular business cards and label attached as Schedule "B" to Ms. Lugsdin's affidavit may have been in use since the specified dates does not necessarily mean that the Applicant did not also properly use the Mark in association with the applied for wares and services since the claimed date of first use.

[26] I am therefore unable to conclude that the Opponent has met its initial evidential burden.

[27] Accordingly, this ground of opposition is dismissed.

#### Analysis of Remaining Grounds of Opposition

##### Registrability - Section 12(1)(d) of the Act

[28] The Opponent has pleaded that the Mark is not registrable under section 12(1)(d) of the Act, in view of the Opponent's registered trade-marks as set out in Schedule "A" attached hereto.

[29] At the outset, I wish to note that throughout its evidence and written submissions, the Opponent referred to all of its trade-marks collectively as its "K Marks". However, some of its trade-marks consist solely of a stylized "K" design (registration Nos. TMA469,633 and TMA455988) and others consist of the word mark SPECIAL K (registration Nos. TMA627,693 and TMA722577) or a design version of SPECIAL K (registration Nos. TMA565330, TMA287207, TMA459391, TMA108069 and an unregistered mark).

[30] At the oral hearing, the Opponent elected to focus on the likelihood of confusion between the Mark and the trade-marks which are the subject of registration Nos. TMA455,988 and TMA469,633 (the “K Design trade-marks”), as it felt that a confusion analysis between these trade-marks and the Mark would represent the Opponent’s best chance of success. However, in the Opponent’s evidence, the K Design trade-marks are almost exclusively shown in combination with the word SPECIAL, often in the unregistered form of the mark or in one of the other registered forms of the SPECIAL K marks shown in Schedule “A” attached hereto. The Opponent is of the view that the evidence supports use of its K Design trade-marks, as well as its SPECIAL K marks, even though the word SPECIAL appears almost exclusively in conjunction with the stylized “K” throughout the evidence.

[31] It is well established 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 as being used. This is a question of fact which is dependent on whether the trade-mark stands out from the additional material and whether the trade-mark remains recognizable [*Nightingale*, above; *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)].

[32] I am satisfied that the K Design trade-marks have been used in such a way that they have maintained their identity and remain recognizable as the registered K Design trade-marks *per se*. The stylized K is the largest and most dominant feature of the marks as used and appears in the same distinctive stylized manner as it does in the Opponent’s registrations. I am of the view that upon a comparison of the trade-marks as registered and the trade-marks as used, an unaware purchaser would be likely to infer that the marks, in spite of their differences, namely, the addition of the word SPECIAL, identify goods having the same origin [see *Canada (Registrar of Trade Marks) v Cie internationale pour l’informatique CII Honeywell Bull, S.A.* (1985), 4 CPR (3d) 523, 4 CIPR 309, 61 NR 286, (FCA); and *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[33] Even if I am wrong in coming to this conclusion, I note that the outcome of my confusion analysis would have been the same whether I assessed confusion between the Mark and the Opponent’s K Design trade-marks or between the Mark and the Opponent’s other trade-marks,

as I do not find there to be a sufficient degree of resemblance between any of the Opponent's trade-marks and the Mark for there to be a likelihood of confusion.

[34] I will now turn to my analysis regarding the likelihood of confusion between the Mark and the Opponent's K Design trade-marks which are the subject of registration Nos. TMA455,988 and TMA469,633.

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

[36] Having exercised the Registrar's discretion, I confirm that each of the alleged registrations is extant in the name of Kellogg Company and so the Opponent has met its evidentiary burden. The issue is therefore whether the Applicant has satisfied its legal onus to show that the Mark is not reasonably likely to cause confusion with either of the Opponent's registered K Design trade-marks.

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

[38] 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 trade-marks and the extent to which they have become known; b) the length of time the trade-marks have been in use; c) the nature of the wares, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al* (2006), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC) for a thorough discussion of the general principles that govern the test for confusion.]

*Section 6(5)(a): the inherent distinctiveness of the trade-marks and the extent to which they have become known*

[39] The Opponent's K Design trade-marks essentially consist of the letter K in stylized form, as shown below.



[40] The difference between registration No. TMA469,633 and TMA455,988 is that registration No. TMA469,633 contains a color claim which states that “the entire letter mark is red”.

[41] Letters *per se* are not inherently distinctive and are not entitled to a wide ambit of protection [*GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FC)]. Although the stylization and the color claim add some inherent distinctiveness to the Opponent's K Design trade-marks, overall the marks are not particularly inherently distinctive in view of the fact that they primarily consist of a letter of the alphabet. I find that the Mark possesses a higher degree of inherent distinctiveness than the Opponent's trade-marks. Although it also features a letter “K”, it contains other elements, namely, the words Kimberley's Own and a circle design which in combination with the letter “K” result in increased inherent distinctiveness.

[42] A trade-mark may also acquire distinctiveness by means of it becoming known through promotion or use. Based upon the Opponent's evidence, I can conclude that the Opponent's K Design trade-marks have become extremely well known in Canada.

[43] The Opponent's evidence consists of the affidavit of Ms. Wendy Woods, sworn November 25, 2011. Ms. Woods is the Director of Marketing Operations at Kellogg Canada Inc., a wholly owned subsidiary and licensee of the Opponent. In her affidavit, Ms. Woods



provides the following information regarding the Opponent and its use of its K Marks (which includes use of the K Design trade-marks) in Canada:

- Cereals bearing the Opponent’s K Marks have been offered for sale, sold and distributed across Canada since at least as early as 1957. The Opponent has also offered for sale, sold and distributed cereal bars and fruit crisps across Canada in association with its K Marks since at least as early as 2002 (cereal bars) and 2009 (fruit crisps). The Opponent’s cereals, cereal bars and fruit crisps have been sold in various grocery stores, convenience stores, drug stores, department stores, restaurants, cafeterias and to the foodservice industry. The retail channels include stores such as Loblaws, Costco, Sobeys, Walmart, Metro, Shoppers Drug Mart and Mac’s Convenience Stores [see paras 4 and 10].
- Since 2002, the Opponent has sold in excess of \$520 million of cereal and in excess of \$130 million of cereal bars in Canada in association with its K Marks [see paras 8, 13, 14 and 15].
- Since 2002, the Opponent has spent in excess of \$97 million in advertising and in excess of \$23 million in consumer promotions for cereal, cereal bars and fruit crisps in association with its K Marks [see paras 16, 20 and 21].

[44] In addition to the above information, Ms. Woods has also provided numerous representative examples of use of the K Marks on packaging for cereal, cereal bars and related products [see Exhibits B1, B2, D1 and D2] and examples of how the Opponent’s wares have been advertised in association with its K Marks in various media including television commercials, print media, brochures and booklets, in-store advertising and the internet [see Exhibit E]. Ms. Woods also provides details regarding various nationwide marketing campaigns and contests which the Opponent has carried out in association with its K Marks, including the “Special K KICK START PROGRAM”, the “Special K START SOMETHING FABULOUS CONTEST and the “SPECIAL K CHALLENGE” [see paras 22-24 and Exhibits “H” – “J”]. The Opponent’s K-marks and associated products have also been promoted by celebrities such as Cindy Crawford and Carson Kressley in past years [see para 25 and Exhibit “K”].

[45] In view of the foregoing, I am satisfied that the Opponent has acquired substantial reputation in its K Marks (including its K Design marks) and that the marks have become extremely well known in Canada.

[46] By contrast, the Mark appears to have become known to a much lesser extent. As previously discussed, the only evidence of use which the Applicant has put forward is a label and one business card featuring the Mark, both of which have a handwritten notation beside them indicating that they have been “used since 2010” [see para 3 and Exhibit “B” to Ms. Lugsdin’s affidavit]. In addition, in paragraph 7 of her affidavit, Ms. Lugsdin indicates that for the calendar year of 2011, the Applicant’s sales were under \$24,000. Based upon this limited information, I can conclude that the Mark has become known to only a minimal extent.

[47] Overall, I am of the view that the first factor in section 6(5), which is a combination of inherent and acquired distinctiveness, favours the Opponent owing to the greater acquired distinctiveness of the Opponent’s marks.

*Section 6(5)(b): the length of time each trade-mark has been in use*

[48] There is no need to discuss this factor, as it also clearly favours the Opponent.

*Sections 6(5)(c) and (d): the nature of the wares, services or business and the nature of the trade*

[49] When considering sections 6(5)(c) and (d) of the Act, it is the statement of wares and services in the application for the Mark and the statement of wares and services in the Opponent’s registration Nos. TMA455,988 and TMA469,633 that govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA) and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[50] In the present case, although there isn’t any overlap in the parties’ services, there is clear overlap in parties’ wares, as both cover “cereals” and other snack foods. The Opponent’s wares are sold through a wide range of retail outlets, including grocery stores, drug stores and convenience stores, as well as in the foodservice industry [see paras 4 and 10 of the Woods affidavit]. The Applicant has not filed any evidence regarding the nature of its business or

normal course of trade. However, in view of the fact that at least some of the parties' wares are essentially identical, it is reasonable to conclude that their channels of trade would overlap.

[51] Accordingly, this factor also favours the Opponent.

*Section 6(5)(e): the degree of resemblance between the marks in appearance or sound or in the ideas suggested by them*

[52] For ease of reference, I have reproduced the parties' marks below. However, I note that it is not correct to lay the trade-marks side by side to compare and observe the similarities or differences between them, as the test for confusion is one of first impression and imperfect recollection.



[53] In *Masterpiece, supra*, the Supreme Court of Canada discusses the importance of the degree of resemblance between trade-marks in conducting an analysis of the likelihood of confusion. In the reasons for judgment, Mr. Justice Rothstein states at paragraph 49:

[...] the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis [...] if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar [...].

[54] In the present case, the parties' marks are clearly not identical and in my view they are significantly more different than they are alike.

[55] In his discussion of the approach to take in assessing the degree of resemblance between trade-marks, Mr. Justice Rothstein states, at paragraph 64: "While the first word may, for the purposes of distinctiveness, be the most important in some cases, I think the preferable approach

is to first consider whether there is an aspect of the trade-mark that is particularly striking or unique.”

[56] The stylized letter “K” is clearly the most striking aspect of the Opponent’s K Design trade-marks, as it is the only element of the marks. While the Applicant’s trade-mark also contains a letter “K”, it is not, in my view any more or less unique or striking than the other features of the Mark, namely, the shaded circular background and stitched border which surrounds the letter and the words “Kimberley’s Own”, which appear in relatively large font below the design.

[57] When considering the degree of resemblance between two trade-marks, the law is clear that they must be considered in their totality. In my view, the combination of the words “Kimberley’s Own” and the design features of the Mark create an overall visual impression which serves to distinguish the Mark from the Opponent’s K Design trade-marks.

[58] The marks also differ in terms of sound. In this regard, I note that the letter “K” in the Mark does not stand alone. It appears in conjunction with the words “Kimberly’s Own” and it is likely these words in the Mark that the consumer would process, read and pronounce first.

[59] The ideas suggested by the marks in question also differ, in my view. In contrast to the Opponent’s K Design trade-marks, the letter “K” in the Mark appears in signature style font, such that when read in conjunction with the words “Kimberley’s Own”, is suggestive of a signature and/or signature product of “Kimberley”.

#### *Conclusion on the likelihood of confusion*

[60] In applying the test for confusion, I have considered the parties’ marks as a matter of first impression and imperfect recollection. Even though my assessment of the circumstances of this case leads me to conclude that the section 6(5)(a) through (d) factors favour the Opponent, in my opinion the differences between the Mark and the Opponent’s K Design trade-marks in appearance, sound and in the ideas suggested by them are significant enough to shift the balance of probabilities in favour of the Applicant. As mentioned previously, these other factors only become significant once the trade-marks are found to be identical or very similar and for the

reasons previously mentioned, I do not find the parties' trade-marks to be very similar at all in the present case.

[61] In view of the foregoing, I conclude that the Applicant has discharged the legal onus resting upon it to show that confusion between the Mark and the Opponent's K Design trade-marks is not likely. Further, as I previously indicated, I find that comparing the Mark with the Opponent's K Design trade-marks effectively decides the outcome of this ground of opposition.

[62] The section 12(1)(d) ground of opposition is therefore dismissed.

#### Non-entitlement - Sections 16(1)(a) and 16(3)(a) of the Act

[63] The Opponent has pleaded that the Mark is confusing with its previously used trade-marks, as set out in the Schedule "A".

[64] With respect to the ground of opposition which has been raised under Section 16(1)(a) of the Act, there is an initial burden upon the Opponent to prove that at least one of its trade-marks was used in Canada prior to the Applicant's claimed date of first use and had not been abandoned at the date of advertisement of the application for the Mark [section 16(5) of the Act].

[65] With respect to the ground of opposition which has been raised under Section 16(3)(a) of the Act, there is an initial burden upon the Opponent to prove that at least one of its trade-marks was used in Canada prior to the date of filing of the application for the Mark and had not been abandoned at the date of advertisement of the application for the Mark [section 16(5) of the Act].

[66] Once again, I find that comparing the Mark with the Opponent's K Design trade-marks will effectively decide this ground of opposition.

[67] I am satisfied that the Opponent has discharged its evidentiary burden to show prior use and non-abandonment of at least one of its K Design trade-marks prior to the applicant's April 16, 2010 filing date [section 16(3)(a)] and prior to the September 1, 2009 claimed date of first use [section 16(1)(a)]. However, assessing each of the section 6(5) factors as of these dates, rather than as of today's date, does not significantly impact my previous analysis of the surrounding circumstances of this case.

[68] Accordingly, the sections 16(1)(a) and 16(3)(a) grounds of opposition are dismissed for reasons similar to those expressed in relation to the section 12(1)(d) ground of opposition.

Non-distinctiveness – Section 2 of the Act

[69] The Opponent has pleaded that the Mark does not distinguish and is not adapted to distinguish the wares of the Applicant from the wares or services of others and in particular, those of the Opponent.

[70] The material date to assess this ground of opposition is the filing date of the statement of opposition, namely, March 14, 2011 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

[71] As I find that comparing the Mark with the Opponent's K Design trade-marks will effectively decide the outcome of this ground of opposition, it is not necessary to consider whether the Opponent has discharged its evidentiary burden for any of its other alleged trade-marks.

[72] I am satisfied that the Opponent has met its evidentiary burden to establish that its K Design trade-marks had become known sufficiently in Canada as of March 14, 2011, to negate the distinctiveness of the Mark [see *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

[73] Assessing each of the section 6(5) factors as of March 14, 2011 does not significantly impact my analysis of the surrounding circumstances of this case. For reasons similar to those previously expressed, I am satisfied that the Applicant has discharged the legal onus resting upon it to show that, as of March 14, 2011, the Mark was not reasonably likely to cause confusion with any of the Opponent's trade-marks. In view of this, I am satisfied that as of the material date, the Mark distinguished or was adapted to distinguish the wares and services of the Applicant from those of the Opponent.

[74] In view of the foregoing, the non-distinctiveness ground of opposition is also dismissed.



Disposition

[75] 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.



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Lisa Reynolds  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**Schedule "A"**

Trade-mark	Registration No.	Wares
SPECIAL K	TMA627,693	Dehydrated fruit snacks
SPECIAL K	TMA722,577	(1) Breakfast cereal (2) Cereal based snack foods (3) cereal-based food bars
 <p>The logo features the word "Special" in a serif font at the top left, a large stylized "K" in the center, and the word "Plus" in a serif font at the bottom right. The "K" has a textured, slightly 3D appearance.</p>	TMA565,330	Grain-based ready-to-eat cereals, cereal-based snack foods and cereal-based food ingredients for use in the manufacture and preparation of food
 <p>The logo features the word "Special" in a cursive font at the top left and a large, solid black stylized "K" in the center.</p>	TMA287,207	Food products, namely breakfast cereals and snack foods



<p>Special </p>	<p>TMA459,391</p>	<p>(1) Food products namely, cereals.  (2) Food products namely, cereal based snack food.  (1) Advertising and promotional services in association with the sale of food products through advertisements in radio and television broadcasts, newspaper advertisements, coupon programs, flyers, and in-store displays.</p>
	<p>TMA469,633</p>	<p>(1) Food products namely, cereals.  (2) Food products namely, cereal based snack food.  (1) Advertising and promotional services in association with the sale of food products through contests and sweepstakes, in-store displays, point of sale materials, television and radio broadcasts, newspaper advertisements and coupon programs; the distribution of promotional merchandise, namely clothing, sunglasses, jewellery, watches and clocks bearing the trade-mark.</p>

	<p>TMA455,988</p>	<p>(1) Cereals.  (2) Snack food.</p> <p>(1) Advertising and promotional services in association with the sale of food products through contest and sweepstakes, in-store displays, point of sale materials, television and radio broadcasts, newspaper advertisements and coupon programs; the distribution of promotional merchandise, namely clothing, sunglasses, jewellery, watches and clocks bearing the trade-mark.</p>
<p><b>SPECIAL</b></p> 	<p>TMA108,069</p>	<p>Ready-to-eat cereal food.</p>
<p><i>Special</i></p> 	<p>Unregistered</p>	<p>Breakfast cereal, cereal based snack food, food bars, promotional services, website services</p>