

**IN THE MATTER OF AN OPPOSITION  
by Norben Products Inc. / Produits Norben  
Inc. to application No. 676,125 for the trade-  
mark EASTER MAGIC filed by Imasco  
Retail Inc. / La Societe de Detail Imasco Inc.**

**On February 7, 1991, the applicant, Imasco Retail Inc. / La Societe de Detail Imasco Inc., filed an application to register the trade-mark EASTER MAGIC based on proposed use in Canada with the following wares:**

novelty items, namely baskets, egg decorating kits, pegged novelty items, namely plastic eggs, rabbits and chickens, figurines; playthings, namely dolls, stuffed animals, colouring books; decorating materials, namely tags, bows, ribbons, paper; confectionary, namely candy, chocolate figures, jelly beans.

**The application was amended to include a disclaimer to the word EASTER and was subsequently advertised for opposition purposes on December 8, 1993.**

**The opponent, Norben Products Inc. / Produits Norben Inc., filed a statement of opposition on January 31, 1994 and a revised statement on April 18, 1994. A copy of the revised statement was forwarded to the applicant on May 5, 1994. The first ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3) of the Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the trade-mark HAPPY MAGIC EASTER & Design (illustrated below) previously used in Canada by the opponent with the following wares:**

books, annuals, catalogues, calendars, display albums, diaries, toys namely, colouring sets, playsets, balls for games, jack-in box, squeeze toys, string operated toys, dolls, toy card games, toy masks, musical toys, wind-up toys, waterballs, puzzles, balloons, badges, dolls consisting of Easter figures; decorating kits namely, decoration for walls, Easter decorated eggs namely, equipment and dyes; mobiles, bean bags, jump robes, costumes, shredded excelsior, empty baskets, empty candy containers, plastic eggs, plastic rabbits; baskets with toys and candy.



**The second ground is that the applicant's trade-mark is not distinctive because it is confusing with the trade-mark HAPPY MAGIC EASTER & Design used by the opponent.**

**The applicant filed and served a counter statement. As its evidence, the opponent submitted an affidavit of its President, Barry Katz. As its evidence, the applicant submitted an affidavit of Gary Mulholland, a Vice-President of the applicant. As evidence in reply, the opponent submitted a second affidavit of Barry Katz. Both parties filed a written argument and no oral hearing was conducted.**

**In its written argument, the applicant objected to the form of the two Katz affidavits submitted by the opponent. The applicant submitted that they are not affidavits since there is no indication that an oath was administered. The applicant further submitted that they are not statutory declarations since the wording used (i.e. - "I...hereby declare...") does not fully comply with Section 41 of the Canada Evidence Act which also requires a declarant to acknowledge that his solemn declaration is equivalent to having made the statements under oath. Since the affidavits were executed in Montreal, the wording used may be acceptable under the Quebec Civil Code. Even if it is not, however, I consider that it substantially complies with Section 41 of the Canada Evidence Act in view of the provisions of Section 32 of the Interpretation Act which reads as follows:**

32. Where a form is prescribed, deviations from that form, not affecting the substance or calculated to mislead, do not invalidate the form used.

**The applicant also objected to the additional materials filed with the first Katz affidavit. In paragraph six of that affidavit, Mr. Katz simply states that he is filing additional evidence comprising two invoices and several hang tags. Accompanying Mr. Katz' first affidavit are materials which appear to be hang tags and photocopies of invoices. However, as noted by the applicant, those materials have not been specifically marked or identified by Mr. Katz. Furthermore, there is no indication that he identified those items while under oath or its equivalent.**

If there had been no objection from the applicant, I might have been prepared to overlook the deficiencies in the materials filed with the first Katz affidavit. However, the opponent was alerted to those deficiencies when it received a copy of the applicant's written argument almost a year ago and it chose to take no steps to rectify the situation. Thus, I consider that the materials filed with the first Katz affidavit are inadmissible in this proceeding.

As for the first ground of opposition, there is an initial burden on the opponent under Section 16(3) of the Act to evidence use of its trade-mark prior to the applicant's filing date. This the opponent has failed to do. The first Katz affidavit contains nothing more than bare allegations of use of the opponent's trade-mark with no admissible evidence to support those allegations. Even if I had considered the materials filed with the first Katz affidavit, they would not have advanced the opponent's case. One of the two invoices filed is dated after the applicant's filing date and the second does not clearly relate to any wares bearing the opponent's mark HAPPY MAGIC EASTER & Design. Thus, the first ground is unsuccessful.

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 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 (i.e. - January 31, 1994): 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 opponents to prove the allegations of fact in support of their ground of non-distinctiveness.

As noted, the first Katz affidavit only contains bare allegations of use of the opponent's mark. Thus, the opponent has failed to evidence any reputation for its mark in Canada which would have any effect on the distinctiveness of the applicant's mark. Even if I had considered the materials filed with the first Katz affidavit, they would not have advanced the opponent's

case. As noted, the first invoice does not clearly relate to any wares bearing the mark **HAPPY MAGIC EASTER & Design**. The second invoice (dated March 4, 1993) is barely legible and it, too, does not clearly relate to any wares bearing the opponent's mark. There is a reference to "Magic Decor Flock Eggs" which suggests that the items may have borne the opponent's mark but Mr. Katz fails to clarify this. In any event, the sale in question is for such a minor amount that it would not have had any measurable effect on the distinctiveness of the applicant's mark. Thus, the second ground is also unsuccessful.

In his first affidavit, Mr. Katz indicates that the opponent is the owner of registration No. 434,757 for the mark **HAPPY MAGIC EASTER & Design**. Inexplicably, however, the opponent did not seek leave to amend its statement of opposition to add a ground of opposition based on confusion with its registered mark pursuant to Section 12(1)(d) of the Act. If it had, such a ground might well have been successful.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I reject the opponent's opposition.

**DATED AT HULL, QUEBEC, THIS 3rd DAY OF OCTOBER, 1997.**

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