

IN THE MATTER OF AN OPPOSITION by Chum Limited to application No. 859,085 for the trade-mark VT and Design filed by BBS Incorporated (and now standing in the name of CTV Television Inc.)

On October 20, 1997, the applicant, BBS Incorporated, filed an application to register the trade-mark VT and Design, a representation of which appears below, based on use of the trade-mark in Canada by the applicant itself and/or through its licensee since September 26, 1997, in association with the following services:

“Entertainment services namely the production, broadcast, recording, transmission and distribution of television programs, and the operation of a television station”.



The present application was advertised for opposition purposes in the Trade-marks Journal of April 22, 1998, and the opponent, Chum Limited, filed a statement of opposition on June 22, 1998, a copy of which was forwarded to the applicant on July 30, 1998. The applicant served and filed a counter statement in response to the statement of opposition on August 14, 1998. The opponent submitted as its evidence the affidavit of Denise Cooper, Director of Business Affairs of CHUM Limited. Ms. Cooper was cross-examined on her affidavit and the cross-examination transcript forms part of the record in this proceeding. The applicant filed as its evidence the affidavit of Grace Shafran, Vice-President and General Counsel of CTV Television Inc., the successor corporation to the applicant in this proceeding. As evidence in reply, the opponent submitted the affidavit of Imtyaz Sattar,

Trade-Mark Agent of the opponent. Both parties filed a written argument and both were represented at an oral hearing.

During the opposition, the applicant submitted a Certificate of Amalgamation dated September 1, 1998, showing the amalgamation between BBS Incorporated and CTV Television Inc. The application therefore now stands in the name of CTV Television Inc.

The following are the grounds of opposition asserted by the opponent in its statement of opposition:

(a) Pursuant to Section 38(2)(a) of the Trade-marks Act, R.S.C. 1985, c. T-13 (hereinafter the Act), namely that the application does not comply with the requirements of Section 30(b) in that the applicant has not used the trade-mark as a trade-mark within the meaning of the Act in association with the services set out in its application, since September 26, 1997, as alleged.

(b) Pursuant to Section 38(2)(a) of the Act, the application does not comply with Section 30(i) of the Act, in that the applicant could not and cannot be satisfied of its entitlement to use the trade-mark in Canada in association with the services identified in the application, by reason of either its knowledge of the opponent's trade-marks described herein or of its failure to apprise itself of them by conducting a registrability search of the Trade-marks Office, reviewing its own file history in this application and/or making other reasonable inquiries, for the reasons set out herein.

(c) Pursuant to Section 38(2)(b) of the Act, the trade-mark is not registrable pursuant to Section 12(1)(d) of the Act, since it is confusing within the meaning of Sections 2 and 6 of the Act with the registered trade-marks of the opponent which are:

TVT TV THE TELEVISION RESOLUTION	Regn. No. 439,280	Appln. No. 744,363
TVT TV THE TELEVISION RESOLUTION Design	Regn. No. 464,681	Appln. No. 733,119
VTV Design	Regn. No. 478,239	Appln. No. 814,155

which are registered for various wares and entertainment, television broadcasting and telecommunications services and used by the opponent.

(d) Pursuant to Section 38(2)(c) of the Act, the applicant is not the person entitled to registration of the trade-mark, pursuant to Section 16(1)(a) of the Act, in that at the date of first use claimed in the application, namely

September 26, 1997, the trade-mark was confusing with the trade-marks as follows:

TVT TV THE TELEVISION RESOLUTION	Regn. No. 439,280	Appln. No. 744,363
TVT TV THE TELEVISION RESOLUTION Design	Regn. No. 464,681	Appln. No. 733,119
VTV Design	Regn. No. 478,239	Appln. No. 814,155
TELEVISION VANCOUVER and Design		Appln. No. 817,319
VANCOUVER TELEVISION		
VTV Design (II)		

that had been previously used in Canada by the opponent in association with the wares and/or services as set out in the registrations or application referred to above, and which trade-marks had not been abandoned by the opponent at the date of advertisement of the applicant's application.

(e) Pursuant to Section 38(2)(c) of the Act, the applicant is not the person entitled to registration of the trade-mark, pursuant to Section 16(1)(a) of the Act, in that at the date of first use claimed in the application, namely September 26, 1997, the trade-mark was confusing with the trade-marks as follows:

TVT TV THE TELEVISION RESOLUTION	Regn. No. 439,280	Appln. No. 744,363
TVT TV THE TELEVISION RESOLUTION Design	Regn. No. 464,681	Appln. No. 733,119
VTV Design	Regn. No. 478,239	Appln. No. 814,155
TELEVISION VANCOUVER and Design		Appln. No. 817,319
VANCOUVER TELEVISION		
VTV Design (II)		

that have been previously made known in Canada by the opponent in association with the wares and/or services as set out in the registrations or application referred to above, and which trade-marks had not been abandoned by the opponent at the date of advertisement of the applicant's application.

(f) Pursuant to Section 38(2)(c) of the Act, the applicant is not the person entitled to registration of the trade-mark, pursuant to Section 16(1)(b) of the Act, in that at the date of first use claimed in the application, namely September 26, 1997, the trade-mark was confusing with the following trade-mark:

TELEVISION VANCOUVER

(g) Pursuant to Section 38(2)(d) of the Act, the applicant's said trade-mark is not distinctive within the meaning of Section 2, in that it does not distinguish nor is adapted to distinguish nor capable of distinguishing the services of the applicant as described in application no. 859,085 from the wares and services of others, including those of the opponent and others.

Preliminary Matters

As a preliminary matter, I would like to address the additional written argument and evidence which was submitted by the opponent on March 15, 2002, approximately 2 weeks before the scheduled date for the oral hearing. The additional written arguments are with respect to a decision of the Opposition Board regarding the mark TELEVISION VANCOUVER and Design (Application No. 837,319) that was rendered July 25, 2001, and how it relates to the present opposition matter. Attached to these written arguments was the decision itself, along with a copy of part of the evidence that was considered in such decision.

I agreed with the applicant that there is no provision in the Act or Regulations that permits the filing of either additional evidence or additional written arguments at this stage without leave of the Registrar. Even if leave had been requested by the opponent to file such material, given the late stage of the proceedings, and the prejudice that would be suffered by the applicant, leave would not likely have been granted. Although the opponent is entitled to rely on case law in making its written or oral submissions, case law is to be only relied upon for the principles of law set out therein and not for evidentiary purpose. The Board will only have regard to evidence filed before it in the present proceeding. I therefore decided at the oral hearing that the further written arguments and

evidence were inadmissible and thus would not be considered part of the record in the present proceeding.

As a further preliminary matter, it should be noted that I have not considered the opponent's reply evidence. The Sattar affidavit serves to introduce into evidence a video tape used in the opponent's presentation before the CRTC in its bid for a Television License for the Vancouver area in September, 1996. Although Ms. Shafran testifies that she was aware that the opponent had filed an application with the CRTC to obtain a license for the Vancouver market, it was Ms. Cooper who had originally referred to the video tape in her affidavit. At paragraph 6 of her affidavit, Ms. Cooper stated as follows:

6. On May 30, 1996, my Company submitted its application to the CRTC to obtain a license to operate a Vancouver television station. This hearing commenced on September 23, 1996. Throughout the hearing and in all publicity in association therewith, the trade-mark VTV became distinctive of my Company. *The trade-mark VTV was prominently displayed in a tape played during the CRTC hearings in September, 1996....(emphasis added)*

Since the video tape attached to the Sattar affidavit was originally referred to in the affidavit of Denise Cooper, I consider that this evidence should properly have been submitted as part of the opponent's evidence in chief. In this regard, I have been assisted by the decision of Cattanach J. in **Bombardier Ltd. v. Restrictive Trade Practices Com'n** (1980), 48 C.P.R. (2d) 248 at 257.

As a final preliminary matter, it was revealed at the oral hearing that there were some discrepancies between the exhibits identified by Ms. Shafran in her affidavit and those that were attached to her affidavit. In this regard, it appears that the videotape attached as Exhibit B to Ms.

Shafran's affidavit that was filed with the Opposition Board includes all the content that was identified as being included in the videotapes that she stated were attached as Exhibits B, C and D to her affidavit. The opponent stated at the oral hearing that the videotape it received as Exhibit B to the Shafran affidavit contained the contents of both Exhibits B and D but the contents of Exhibit C were missing.

The Registrar does not adhere strictly to the rules of practice of the Federal Court and, where no objection is raised to minor deficiencies in one party's evidence when the affidavit is filed, or at least at a point in time where the party who filed the evidence has the opportunity to correct the deficiency, the Registrar will not generally allow the opposite party to subsequently take advantage of such a technical objection. In the present case, since the applicant was not alerted to the discrepancies in its evidence until the oral hearing, and since the videotape filed as Exhibit B to the Shafran affidavit contained the contents of what she identified as having been included in Exhibits B, C and D to her affidavit, I am prepared to overlook the discrepancies in the materials filed with the Shafran affidavit.

Chronology of Events

The chronology of events in the present case may be summarized as follows.

May 30, 1996 - The opponent filed an application to the CRTC for a license to operate a Vancouver television station. The opponent undertook extensive promotional efforts to promote its proposed new station. (Cooper Affidavit, paras. 6 & 18)

- August -
- September, 1996 - Articles about the upcoming CRTC hearing were published in various Canadian newspapers. The opponent's mark was referred to as VTV and the applicant's mark was referred to as CIVT - TV.(Cooper Affidavit, para. 8)
- September 23, 1996 - CRTC Hearing. Opponent plays promotional videotape at hearing in which VTV was prominently displayed (Cooper Affidavit, para. 6)
- January 31, 1997 - CRTC approves the application by Vancouver Television Inc. (VTI) (the applicant's predecessor) for a broadcasting license to carry on a new, independent, English-language (television) programming undertaking to serve Vancouver. (Shafran Affidavit, para. 3 & Exhibit A)
- Sept. 26, 1997 - The date the applicant began using the VT and Design mark (Shafran Affidavit, para. 5)
- October 20, 1997 - The date the applicant applied for registration of the mark VT and Design.
- October, 1997 - The opponent claims to have started using VTV Design in association with a segment appearing in the tv program titled MuchWest which is broadcast on the opponent company's MUCH MUSIC station. The opponent submits that the VTV Design is shown to have been used for a segment which features a reporter who speaks to the people of Vancouver on non-topical or topical events of the day (Cooper Affidavit, paras.18-24 and Cooper Cross-Examination, p. 7-9)
- April 22, 1998 - Date of advertisement of the applicant's mark.
- June 22, 1998 - Filing date of statement of opposition.
- December 4, 1998 - The applicant filed a Certificate of Amalgamation in which the amalgamating corporations are identified as BBS Incorporated and CTV Television Network Ltd. The amalgamation was stated to have taken place September 1, 1998.

Grounds of Opposition

The first and second grounds of opposition are based on subsections 30(b) and 30(i) of the Act. While the legal burden is on the applicant to show that its application complies with section 30 of the Act, there is an initial evidential burden on the opponent to establish the facts relied upon by it in support of its section 30 grounds (see **Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd.**, 3 C.P.R. (3d) 325, at pp.329-330; and **John Labatt Ltd. v. Molson Companies Ltd.**, 30 C.P.R.(3d) 293).

In the present case, the opponent submits that use of the applied for mark has not been shown. In this regard, the opponent relies on the testimony of its affiant Ms. Cooper who stated that she had not seen use of the applicant's mark VT and Design other than in the tapes attached to Ms. Shafran's affidavit. She also stated that based on her personal knowledge and the knowledge of other executives of her company who had been in the Vancouver region on or before the date she swore her affidavit, the mark being used in association with the television station was VTV and not the applied for mark, VT and Design.

The opponent further submitted that even if use of the mark VT and Design had been shown, it had not been shown by the applicant, BBS Incorporated. In this regard, the opponent points to the fact that the CRTC license was granted to Vancouver Television Inc. ("VTI") and not BBS Incorporated. Although VTI is identified by Ms. Shafran to be a predecessor to the applicant BBS Incorporated, there is no indication that VTI ever sold its assets or transferred its CRTC license to BBS Incorporated. The opponent also relies on the unreported Opposition Board decision in **Baton Broadcasting Incorporated and BBS Incorporated v. CHUM Limited** (Application No. 817,319;

July 25, 2001 (hereinafter “**BBS v. CHUM**”), wherein former Chairman Partington considered it unclear who was using the marks VANCOUVER TELEVISION and VTV prior to the date of opposition in that case. At page 5 of that decision, Mr. Partington made the following comments:

Initially, I would note that Ms. Boyce asserts in her affidavit that CTV TELEVISION INC. has, since the new station officially went on the air on September 22, 1997, made extensive and continuous use of the trade-marks VANCOUVER TELEVISION and VTV. However, in their correspondence dated December 4, 1998, the opponents filed the Certificate of Amalgamation referred to above in which the amalgamating corporations are identified as BBS INCORPORATED and CTV TELEVISION NETWORK LTD. As the amalgamation did not take place until September 1, 1998, either one or both of the amalgamating corporations or some other entity may, in fact, have been using the trade-marks VANCOUVER TELEVISION and VTV prior to the date of the amalgamation as a predecessor of the second opponent. It is unclear, therefore, as to who, in fact, was using the marks VANCOUVER TELEVISION and VTV in association with broadcasting services prior to the date of opposition.

With respect to the opponent’s submission that use of the applicant’s mark had not been shown, I agree with the applicant that Ms. Cooper has not established herself as an expert in the area of broadcasting. That being said, I do not consider that her observations about the Vancouver marketplace are sufficient to cast doubt on the applicant’s claimed date of first use. Further, I am not prepared to give any weight to the personal knowledge of other executives of her company of the Vancouver region as this information is clearly hearsay and inadmissible as such.

With respect to the applicant’s own evidence of use of its mark, although the applicant may also have shown use for marks other than the applied for mark, I am satisfied from the evidence as a whole that the applicant has also shown use of the applied for mark VT and Design in association with the applied for services. In this regard, Grace B. Shafran, Vice-President and General Counsel of CTV Television Inc., explains that VTI, which she has identified as a predecessor corporation of CTV TELEVISION INC., was granted a license on or about January 31, 1997 by the CRTC permitting it to carry on a new television undertaking to serve Vancouver, British Columbia. Ms.

Shafran states that the new station officially went on the air on September 22, 1997, and the applicant has made extensive and continuous use of the trade-marks VT and Design, VANCOUVER TELEVISION and VTV since at least as early as September 26, 1997, in association with entertainment services, namely the production, broadcast, recording, transmission, and distribution of television programs, and the operation of a television station.

The affiant further states that the mark VT and Design has been used in association with the promotion of the television station and its programming. Attached as an exhibit to Ms. Shafran's affidavit is a copy of a videotape which includes: 1) a promotion for the airing of a music program and movie which allegedly features the VT and Design mark and which aired on the television station on September 26, 1997; 2) the opening to a technology feature "VT Interactive" which aired on the 6:00 p.m. and 11:00 p.m. news programs between November 13, 1997 and July 24, 1999; and 3) excerpts from the television segment "Vancouver Alive" featuring the VT and Design trade-mark which aired on the television station on October 2, 1997 and November 21, 1997. Attached as Exhibit E to Ms. Shafran's affidavit is a sample of labels used since September, 1997, on promotional material and on air material distributed to viewers and customers on videotape featuring the VT and Design mark on the label.

With respect to the second argument made by the opponent under this ground, although I agree with the opponent that it is not clear how the applicant, BBS Incorporated, became the party using the mark when the CRTC license was granted to VTI, I agree with the applicant that the issue of which party may have had the license to provide broadcasting services in Vancouver is not relevant to the present proceeding. Further, the evidence that is before me in the present case is different from the evidence that was before Chairman Partington in **BBS v. CHUM**, *supra*. In that case, the opponent was relying on use of the mark VTV since September 22, 1997, by CTV

Television Inc., a company which resulted from an amalgamation which had occurred September 1, 1998, which was after the opponent's alleged date of first use. In the present case, Ms. Shafran's uncontradicted evidence is that the applicant, BBS Incorporated, has made extensive and continuous use of the trade-marks VT and Design, VANCOUVER TELEVISION, and VTV since at least as early as September 26, 1997, in association with the applied for services. This ground of opposition is therefore unsuccessful.

With respect to the second ground of opposition, the opponent alleges that the applicant was not satisfied that it was entitled to use the applied for trade-mark in association with the services covered in the present application. As the use by the applicant of its VT and Design mark commenced almost 16 months after the opponent's VTV and Design mark had started to become known in Canada, the applicant must be considered to have had at least constructive notice of the opponent's VTV mark. However, even had the applicant been aware of the opponent's trade-mark prior to filing the present application, such a fact is not inconsistent with the statement in the present application that the applicant is satisfied that it is entitled to use the trade-mark in Canada on the basis, *inter alia*, that its trade-mark is not confusing with the opponent's trade-marks. Thus, the success of this ground is contingent upon a finding that the applicant's trade-mark is confusing with one or more of the opponent's trade-marks as alleged in the remaining grounds of opposition (see **Consumer Distributing Co. Ltd. v. Toy World Ltd.**, 30 C.P.R. (3d) 191 at 195; and **Sapodilla Co. Ltd. v. Bristol-Myers Co.**, 15 C.P.R. (2d) 152 at 155). I will therefore consider the remaining grounds of opposition relied upon by the opponent.

The third ground of opposition is based on allegations of confusion between the applicant's trade-mark and the registered trade-marks of the opponent identified above, the most pertinent of which is the opponent's VTV trade-mark, Registration No. 171,294 (shown below). The material

date for the Section 12(1)(d) ground is the date of my decision (see **Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.** (1991), 37 C.P.R. (3d) 413 (F.C.A.)). In assessing whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including, but not limited to, the criteria which are specifically enumerated in s.6(5) of the Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks of the parties as of the material dates noted above.

With respect to Section 6(5)(a) of the Act, the applicant's VT and Design mark possesses a slightly higher degree of inherent distinctiveness than the opponent's VTV and Design mark. In this regard, the opponent's mark includes the acronym "tv" which is descriptive of the television services covered by the registration. The letters VT which comprise the applicant's mark do not suggest anything about the nature of the applicant's services, although the appearance of the letters on what could be perceived as a television screen is somewhat suggestive of the applicant's services.

As for the extent to which the trade-marks have become known, I am satisfied from Ms. Cooper's evidence about the extensive promotional efforts undertaken by her company of her company's intention to use the mark VTV and Design for the proposed television station, as well as Ms. Cooper's evidence of use of the mark VTV and Design in association with the Much West television segment, that the opponent's mark had become known to some extent in Canada. In this regard, although I agree with the applicant that there are differences between the VTV and Design registration and the VTV and Design mark used on the Much West video, I do not consider that the

mark was used in such a way that it lost its identity. In my view, the opponent's registered mark remained recognizable in spite of the differences between the form in which it was registered and the form in which it was used.

As for the applicant's mark, although Ms. Shafran has stated that the mark has been used continuously since September 26, 1997, and has provided evidence of excerpts from television programs on which the mark has appeared, she did not provide details about the extent to which the trade-mark has become known. I am therefore only able to conclude that the applicant's mark has become known to some extent in Canada.

With respect to s.6(5)(b) of the Act, Ms. Cooper admitted on cross-examination that the only two "uses" of the opponent's VTV and Design mark upon which the opponent is relying in this proceeding are: 1) the promotion of the mark during the course of the CRTC hearing; and 2) the use of the mark on the MuchWest television segments. Given that the opponent was not granted the CRTC license to use the VTV and Design mark in association with the Vancouver television station, I agree with the applicant that any promotional activities during the course of the CRTC hearing relating to the VTV and Design mark would not have qualified as trade-mark use in association with television broadcasting services within the scope of Section 4(2) of the Act. With respect to the alleged use of the mark on the MuchWest television segments, as discussed above, I am satisfied that the opponent has shown use of its VTV and Design mark since October of 1997. As the applicant's mark has been in use since at least as early as September, 1997, this factor slightly favours the applicant.

As for Sections 6(5)(c) and Sections 6(5)(d) of the Act, since the services of the parties are almost identical, the parties' channels of trade would presumably overlap.

With respect to Section 6(5)(e) of the Act, the marks are similar in appearance and sound. In this regard, the first component of both parties' marks are the letters "VT". As held in **Conde Nast Publications v. Union Des Editions Modernes** (1979), 46 C.P.R. (2d) 183 at 188, the first portion of a mark is often the most important for purposes of distinction. As for the ideas suggested by the marks, the opponent's mark has no inherent meaning while the applicant's mark suggests the idea of some kind of television associated with the letter "V".

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. Further, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. In view of my conclusions above, and particularly in view of the extent to which the opponent's mark has become known and the degree of resemblance between the marks at issue as applied to almost identical services that could travel through same channels of trade, I find that the applicant has failed to meet the legal burden on it in respect of the issue of confusion. Thus, the third ground of opposition is successful in this case.

The fourth, fifth and sixth grounds of opposition are all based on non-entitlement. The fourth and fifth grounds are based on Section 16(1)(a) of the Act, the opponent alleging that at the date of first use claimed in the applicant's trade-mark application, namely September 26, 1997, the applicant's trade-mark was confusing with a number of trade-marks which had allegedly previously been used or made known by the opponent in Canada. The sixth ground is based on Section 16(1)(b) of the Act, the opponent alleging that at the date of first use claimed in the applicant's application the trade-mark was confusing with the opponent's trade-mark TELEVISION VANCOUVER and Design, in respect of which an application had been previously filed in Canada.

The opponent's burden under the fourth and fifth grounds is to show previous use or making

known of its marks as of the applicant's date of first use (i.e. September 26, 1997) as well as non-abandonment of such marks at the date of advertisement of the applicant's application (i.e. April 22, 1998). The opponent's burden under the sixth ground is to show that it had filed its application prior to the applicant's date of first use, and that such application was pending at the date of advertisement of the applicant's application.

With respect to the fourth and fifth grounds of opposition, from the evidence furnished, I am not satisfied that the opponent has shown use of any of its trade-marks in association with its wares or services, in the manners contemplated by s.4(1) and s.4(2) of the Act, or making known of any of its trade-marks in the manner contemplated by s.5 of the Act, prior to the applicant's date of first use. As the opponent has failed to meet its burden under this grounds, these grounds of opposition are therefore unsuccessful.

With respect to the sixth ground of opposition, I am satisfied that the opponent has met its evidential burden under this ground. In this regard, the opponent has shown that it had filed its application for the mark TELEVISION VANCOUVER and Design (shown below) prior to the applicant's date of first use, and that such application was pending at the date of advertisement of the applicant's application. This ground of opposition therefore also turns on the determination of the likelihood of confusion between the applicant's mark and the opponent's mark.



With respect to Section 6(5)(a) of the Act, the applicant's VT and Design possesses a higher degree of distinctiveness than the opponent's TELEVISION VANCOUVER and Design. In this

regard, the opponent's mark is descriptive of the television broadcasting services covered by the opponent's application. As noted above, the letters VT which comprise the applicant's mark do not suggest anything about the nature of the applicant's services, although the appearance of the letters on what could be perceived as a television screen is somewhat suggestive of the applicant's services.

The extent to which the trade-marks have become known slightly favours the applicant as the applicant had used its VT and Design almost 1 month prior to its filing date while the opponent did not show any use of its TELEVISION VANCOUVER and Design mark. The length of time the marks have been in use therefore also favours the applicant. With respect to Sections 6(5)(c) and (d) of the Act, the applicant's "Entertainment services namely the production, broadcast, recording, transmission and distribution of television programs, and the operation of a television station" are similar to the opponent's television broadcasting services, entertainment services via the media of television, and the production and recording of television programs. The parties' channels of trade would therefore likely overlap for these services.

With respect to Section 6(5)(e) of the Act, there is not much resemblance between the marks in appearance or sound as the opponent's mark comprises the words TELEVISION and VANCOUVER which are separated in the middle by a large letter V while the applicant's mark is comprised of the letters VT in the design of what could be seen as a television screen. The ideas suggested by the marks are somewhat similar as the opponent's mark suggests the idea of television in Vancouver while the applicant's design mark is somewhat suggestive of the idea of television in general.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. Having regard to my conclusions above, and particularly in view of the low

degree of inherent distinctiveness of the opponent's mark, the acquired distinctiveness of the applicant's mark and the low degree of resemblance between the marks in appearance and in sound, I find that the applicant has satisfied the onus on it to show that its applied for mark would not likely be confused with the opponent's mark. This ground of opposition is therefore unsuccessful.

In view of the foregoing, I do not propose to consider the final ground of opposition in detail. However, having regard to the above comments concerning the likelihood of confusion between the applicant's VT and Design mark and the opponent's VTV and Design registered trade-mark, I am satisfied that the non-distinctiveness ground, which is based on allegations of confusion between the applicant's mark and the opponent's trade-marks, would also have been found to be successful even though the material date for considering this ground, that is, the date of opposition, differs from the material date for assessing the likelihood of confusion in relation to the s. 16(1)(a) and s.12(1)(d) grounds.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application, pursuant to s.38(8) of the Act.

DATED AT HULL, QUEBEC, THIS 21st DAY OF May, 2002.

C. Folz
Hearing Officer
Trade-marks Opposition Board.