

**IN THE MATTER OF AN OPPOSITION  
by Acklands Limited to applica-  
tion No. 647,019 for the trade-  
mark ACKLAND & Design filed by  
Commercial Vent Cleaning Co. Ltd.**

**On December 18, 1989, the applicant, Commercial Vent Cleaning Co. Ltd., filed an application to register the trade-mark ACKLAND & Design (illustrated below) for the following services:**

- (1) cleaning of ventilation systems**
- (2) general cleaning and power washing of commercial, residential and industrial buildings.**

**The application is based on use of the mark in Canada since May of 1986 for the services marked (1) and on proposed use in association with the services marked (2). The application was amended to include a disclaimer to the word ACKLAND and was subsequently advertised for opposition purposes on August 21, 1991.**

**The opponent, Acklands Limited, filed a statement of opposition on September 17, 1991, a copy of which was forwarded to the applicant on October 29, 1991. By letter dated February 5, 1993, the opponent was granted leave pursuant to Rule 42 of the Trade-marks Regulations to amend its statement of opposition in accordance with a revised statement filed with its letter of December 22, 1992. The grounds of opposition include, among others, one based on Section 38(2)(d) of the Trade-marks Act, namely that the applied for trade-mark is not distinctive in that it is confusing with the opponent's trade-mark ACKLANDS and its trade-name Acklands Limited both used in association with the business of distributing**

**industrial supplies and automotive parts.**

**The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of its Senior Vice-President, Walter Fedorak. The applicant did not file evidence. Only the opponent filed a written argument and no oral hearing was conducted.**

**As for the ground of opposition based on Section 38(2)(d) of the Act, 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. - September 17, 1991): 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.**

**Much of the Fedorak affidavit is of little use in determining the extent to which the opponent's trade-mark and trade-name have been used in Canada. However, Mr. Fedorak did indicate that the opponent acts as a distributor of industrial equipment and supplies and of welding equipment and supplies and he appended as exhibits to his affidavit copies of his company's catalogues for such items. As noted by Mr. Fedorak, pages 67 and 68 of his company's catalogue for the former wares includes cleaning products and steam cleaning products. Mr. Fedorak also provides photographs of his company's 29 locations across Canada, each of those locations having a sign prominently featuring the opponent's trade-mark. He goes on to state that Acklands Limited has spent approximately \$1.3 million on advertising its trade-mark and trade-name in each of the two years immediately preceding the date of his affidavit. Finally, he states that his company has had significant sales in British Columbia, the applicant's home province.**

**In view of the above, I find that the opponent has satisfied the evidential burden on it to show that the applicant's mark is not distinctive. The applicant's mark is very similar to the opponent's trade-mark and trade-name (particularly when sounded). Furthermore, the opponent's mark and name have acquired a fair reputation in many parts of Canada including the province of British Columbia. Finally, the opponent has shown that it sells various cleaning compounds including industrial cleaning compounds. Thus, the opponent has made out its case that consumers might well assume that the applicant's services are performed by or otherwise associated with the opponent's business.**

**The onus or legal burden is therefore on the applicant to show that its mark is distinctive. Since the applicant has failed to file evidence, I must find that it has failed to meet that burden. The ground of opposition based on Section 38(2)(d) of the Act is therefore successful and the remaining grounds need not be considered.**

**In view of the above, I refuse the applicant's application.**

**DATED AT HULL, QUEBEC, THIS 31st DAY OF May, 1994.**

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