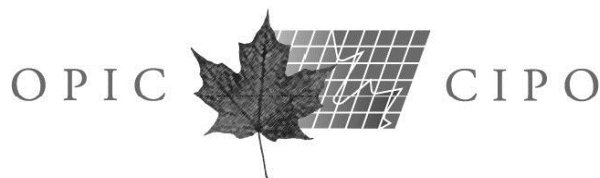


## TRADUCTION/TRANSLATION



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

**Citation: 2011 TMOB 241**  
**Date of Decision: 2011-12-05**

**IN THE MATTER OF AN OPPOSITION by  
Station Touristique Massif du Sud (1993) Inc. to  
application No. 1,212,361 for the trade-mark LE  
MASSIF in the name of Le Massif Inc.**

### Proceedings

[1] On March 31, 2004, Le Massif Inc. (the Applicant) filed application No. 1,212,361 for registration of the trade-mark LE MASSIF (the Mark) in association with the following:

Advertising and promotional materials, namely brochures, signs, pins, postcards, posters and photos, prerecorded promotional videocassettes, press kits, invitations, pens, stickers, key holders, glasses, cups, golf items namely balls, ball markers, golf club covers, raincoats, visor hats, umbrellas, tees, greens repair tools, bottles, pens, pencils and gift wrap containing golf items, medals, playing cards, watches, corkscrews, disposable cameras, umbrella. Clothing and athletic uniforms for men, women and children namely T-shirts, sweaters, anoraks, peak caps, rain suits, shirts, polar fleece garments, scarves, mitts and gloves, headbands, toques, hats with or without brims, vests, jackets, underclothing, belts, hose (“Wares”); and  
Operation of an all-season tourism facility offering services related to downhill skiing, snowboarding, telemarking, hiking and other outdoor sports and recreational activities, namely operation of runs for downhill skiing, snowboarding and telemarking, operation of ski lessons, ski patrols, mountain guide services, operation of ticket agency, artificial snow making, maintenance of runs and equipment, lifts, shuttle services, and organization and staging of sports competitions; operation of restaurants, bars, reception halls, equipment storage facilities, child care services, shops for the sale and rental of sports equipment, equipment repair, clothing and equipment for skiing, snowboarding and telemarking. (“Services”)

[2] The application, as amended at the time, was published for opposition purposes in the *Trade-marks Journal* of September 1, 2004. It was made on the basis of use by the Applicant since 1982. It made no reference to use of the Mark by a predecessor in title.

[3] Station Touristique Massif du Sud (1993) Inc. (the “Opponent”) filed a statement of opposition on January 28, 2005, which the Registrar forwarded to the Applicant on February 24, 2005. The Applicant filed a counter statement on March 21, 2005, denying all of the grounds of opposition described below.

[4] The Opponent’s evidence filed under Rule 41 of the *Trade-marks Regulations* [SOR/2007-91, s. 1] (Regulations) consists of the affidavits of René Godbout and Valérie Belle-Isle. Under Rule 42 of the Regulations, the Applicant filed the affidavits of Marc Deschamps and Jean-Luc Brassard. The Opponent filed the affidavits of Alain Contant, Gabriel Loubier, Roger Nadeau, Henri Dorion and Gaston Ouellet as reply evidence. I must also determine, as a result of an objection by the Applicant, whether any or all of these affidavits constitute reply evidence under Rule 43 of the Regulations.

[5] Only the Opponent filed written arguments. However, both parties were represented at an oral hearing.

[6] I will forego describing the events that have occurred in this file in favour of focusing on the pleadings currently in the record and on the evidence filed by the parties. However, it is worth noting that the Registrar heard this file once before and that his decision was appealed by the Applicant. Madam Justice Bédard, of the Federal Court, allowed the appeal, finding that the Registrar had exceeded his jurisdiction in allowing the opposition, raised for non-compliance with s. 30(b) of the *Trade-marks Act*, R.S.C., 1985, c. T-13 (Act), on the basis of a ground not argued by the Opponent, that is, the lack of reference in the published application for registration to use of the Mark by one or more predecessors in title. She referred the file back to the Registrar for rehearing, but by another member of the Trade-marks Opposition Board.

[7] Since that time, the Applicant has amended its application for registration so that it is made on the basis of use since 1982 by the Applicant or by its predecessor in title, Société de développement du Massif de Petite-Rivière-Saint-François Inc.

[8] It should be noted that, in the meantime, the Opponent amended its statement of opposition and thereafter referred me to the amended statement of opposition, dated March 9, 2011.

[9] That is the context in which this decision is delivered.

#### Grounds of opposition

[10] The various grounds of opposition raised by the Opponent in its statement of opposition amended on March 9, 2011, may be summarized as follows:

1. The application for registration does not meet the requirements of s. 30(a) of the Act in that the application does not include a statement in ordinary commercial terms of the specific wares and services in association with which the Mark has been used;
2. The application for registration does not meet the requirements of s. 30(b) of the Act in that the Mark has not been used in Canada since 1982 by the Applicant or by its predecessors in title as identified in its application for registration;
3. The Mark is not registrable under s. 12(1)(b) of the Act because whether depicted, written or sounded, it is either clearly descriptive or deceptively misdescriptive in the English or French language of the character, quality or place of origin of the Wares or Services. The word “massif” is a word that designates, in the tourism industry in general, products and services related to mountain activities, such as downhill skiing, snowboarding, hiking and other outdoor sports and recreational activities;
4. The Mark is a mark whose adoption is prohibited by s. 10 of the Act, since the Mark has, by ordinary and *bona fide* commercial usage, become recognized in Canada as designating the kind or quality of the wares or services described in the application and, therefore, no person may adopt it as a trade-mark in association with the Wares or Services or other wares and services of the same general class or use it in a way likely to mislead; and
5. The Mark is not distinctive within the meaning of s. 2 of the Act in that it does not actually distinguish and is not adapted to distinguish the Applicant’s Wares and Services from those of others, particularly the Opponent’s wares and services, in that, primarily on the basis of the above statements and the fact that the Mark consists of an ordinary word common to the tourism industry, it is therefore not capable of distinguishing the Wares and Services.

### Preliminary remarks

[11] This file has been the subject of a number of challenged incidental demands, which has bogged down the file. However, it should be borne in mind that these are opposition proceedings in respect of the registration of a trade-mark. The parties filed judgments by the Superior Court of Québec and the Court of Appeal of Québec, but those judgments are of little use in this dispute. First, the parties they involve are not the same as the parties in these opposition proceedings, and, second, the subject of those judgments is not the registration of the Mark in association with the Wares and Services.

[12] In its evidence and its written and oral arguments, the Opponent relied heavily on the existence of the Commission de toponymie, or place names commission, which it presents as the authority on geographical names in Quebec. I reiterate that we are dealing with an opposition to the registration of a trade-mark used in association with the Wares and Services. It is interesting to note that Henri Dorion, a geographer, describes the nature of his mandate as follows:

[TRANSLATION] “. . . in the context of place-name management in Quebec, can both names at issue, that is, Le Massif and Station touristique du Massif du Sud, coexist if this coexistence meets the code of standards for geographic names established by the Commission de toponymie du Québec and if, as a result, their concurrent use runs counter to the two practical and essential functions of place names, which are the identification of places and orientation in relation to those places” [emphasis added]. Aside from the fact that this evidence should have been filed under Rule 41 of the Regulations, I do not see how his expertise or his answer to this question enlightens us regarding the grounds of opposition argued. For these reasons, I will not take Mr. Dorion’s affidavit into account.

[13] The Applicant further objects to the filing of the affidavits of Alain Contant, Gabriel Loubier, Roger Nadeau and Gaston Ouellet, since it contends that their contents do not constitute reply evidence. The Opponent argues that this evidence is a reply to the contents of Jean-Luc Brassard’s affidavit and that, in any case, in common law, relevance is the evidentiary rule of admissibility in administrative proceedings.

[14] The Regulations set out, at Rules 35 and following, the procedure to follow in an opposition, and Rule 43 specifies clearly that reply evidence is strictly confined to matters in reply.

[15] I must add that, even if these affidavits had been filed under Rule 44, their contents would have been largely irrelevant given the grounds of opposition described above. In fact, whether or not the Opponent, or a ski centre operating under the name “Massif du Sud”, exists would have no bearing on my decision. The Opponent has not pleaded s. 16(1) of the Act. In addition, the existence of a ski centre, or, at most, of three other places in Canada whose name contains the word “massif”, does not constitute, per se, ordinary and *bona fide* commercial usage recognized in Canada as set out at s. 10 of the Act. I will also address this issue in greater detail below.

[16] I have carefully perused the contents of the affidavits. Only the excerpt from the affidavit of Mr. Contant, the president and chief executive officer of the Opponent, in which he files a brochure of the travel agency Voyages Gendron containing an article written by Mr. Brassard, is reply evidence within the meaning of s. 43. These affidavits should have been filed as part of the Opponent’s evidence in chief under Rule 41. I will therefore not take their contents into account, except for the passage identified above, which is relevant to the issues to be decided.

[17] Mr. Brassard’s status remains to be determined. The Applicant calls him an expert, but an expert in which field? To be sure, he is an Olympic medal-winner with expertise in freestyle skiing. Over the course of his career, he participated in numerous national and international competitions, which led him to visit many ski centres all over the world, as he affirms in his affidavit. As a result of this expertise, he was asked to act as a sports columnist for Radio-Canada (television division) for the 2006 Olympic Games in Turin to provide commentary on the freestyle competitions (moguls). Following his career as an athlete, he worked from 2002 to 2005 as a consultant for Voyages Bernard Gagnon (skiing and outdoor travel wholesaler). His role was to visit various ski and outdoor destinations in Europe, the United States and Canada to analyze their tourism potential with the aim of attracting skiers from Quebec and elsewhere in Canada. He was working for the Applicant when he signed his affidavit. He was in charge of

media promotion for the Le Massif ski resort. He represented this ski centre at various public events and made personal visits to accompany the resort's clientele.

[18] I do not see how his field of expertise, freestyle skiing, could be of use to us in this file. However, just like any other Canadian skier who has gone to ski centres in Canada and throughout the world, he has personal knowledge of these centres. I will view his personal knowledge of these ski centres just as I would the personal knowledge of any other skier who has had the opportunity to engage in his or her favourite sport all over the world.

[19] In light of those comments, I will now conduct my analysis of the grounds of opposition described above.

#### Burden of proof in matters of opposition to trade-mark registration

[20] In proceedings to oppose registration of a trade-mark, the opponent must present enough evidence relating to the grounds of opposition raised to show that there are facts which may support those grounds. If the opponent meets this requirement, the applicant must persuade the Registrar, on a balance of probabilities, that the grounds of opposition raised should not prevent registration of the mark [see *Joseph Seagram & Sons Ltd. v. Seagram Real Estate Ltd.* (1984), 3 C.P.R. (3d) 325 (T.M.O.B.) and *John Labatt Ltd. v. Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.)].

#### Section 30(a) ground of opposition

[21] The Opponent filed no evidence to support the allegations it made under its first ground of opposition. Since the Opponent was unable to discharge its initial burden of proof, this ground of opposition is dismissed.

Section 30(b) ground of opposition

[22] It is acknowledged in the case law that the Opponent may refer to the Applicant's evidence to prove allegations relating to the ground of opposition raised under s. 30(b) of the Act. However, this evidence must raise serious doubts about the truthfulness of the date of first use of the Mark alleged by the Applicant in its application for registration [see *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986) 10 C.P.R. (3d) 84 (T.M.O.B.), *Williams Telecommunications Corp. v. William Tell Ltd.*, (1999) 4 C.P.R. (4th) 107 (T.M.O.B.) and *Labatt Brewing Company v. Molson Breweries, Partnership* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.)].

[23] The Opponent refers to certain passages in the cross-examination of Mr. Deschamps. Since 2003, he has been a director at Groupe Le Massif Inc., which is the sole shareholder of the Applicant. Before that, between 1982 and 2000, he was the chief executive officer of the Société de développement du Massif de Petite-Rivière-Saint-François Inc., the Applicant's predecessor in title.

[24] He contends that the Applicant has been operating the Le Massif ski centre, located in the village of Petite-Rivière-Saint-François, since 2002. He contends that the Applicant's predecessor in title operated the ski centre since at least as early as the early 1980s. In 1978, snowmobiles and a truck transported skiers to the top of the mountain. In 1991, the ski centre put in ski lifts. He contends that, since 1982, the Mark has been displayed on signs, invoices and advertisements for the ski centre, as well as on a number of products sold there.

[25] At paragraph 11 of his affidavit, he describes all of the services and products offered in association with the Mark. For the purposes of this ground of opposition, there is no need for me to describe in detail the contents of his affidavit, since the crux of the problem lies in his cross-examination.

[26] When questioned at pages 26 and following about the date of first use of the Mark in association with the Wares and Services, Mr. Deschamps admitted to the following dates of first use:

[TRANSLATION]

pre-recorded promotional videotapes: late 1980s

press kits: 1983-1984

pens, stickers, key holders, glasses: 1992-1993

golf items, medals, playing cards, watches, corkscrews: late 1980s

clothing and athletic uniforms for men, women and children: 2002

operation of an all-season tourism facility offering services related to snowboarding and operation of runs for snowboarding, shops for the sale and rental of clothing and equipment for snowboarding: 1987

artificial snow-making services: December 12, 1992

lift services: 1992 (page 9 of his cross-examination)

child-care services: mid-1990s

[27] At the hearing, the Applicant argued that s. 30(b) of the Act requires that a date of first use be provided for each general class of wares and services, not for every specific ware or service. Therefore, according to the Applicant, if the evidence shows use of the Mark in association with one of the specific wares listed in a general class of wares, that evidence would be sufficient to cause all of the specific wares listed under that general class of wares to be maintained in the application. No case law has been referenced in support of that argument.

[28] There is certainly *Saks & Co. v. Canada* (1989), 24 C.P.R. (3d) 49. However, that decision was made in the context of the summary administrative proceeding to expunge a registered trade-mark under s. 45 of the Act. In that case, the list of wares was very exhaustive and involved a number of distinct classes of wares. In addition, given the nature of the proceedings, the registered owner had not admitted to not using the mark at issue in association with some of the wares listed on the certificate of registration. There was merely no evidence of use of the mark within the meaning of s. 4 of the Act in association with certain products. In my opinion, that decision is not applicable to the situation here.



[29] In any event, the Opponent has taken care either to list all of the specific wares within a general class, on cross-examination, or to simply refer to the general class of wares, such as, for example, “Clothing and athletic uniforms for men, women and children”.

[30] In the circumstances, I am of the opinion that the Opponent has discharged its burden of proof to show that the Applicant did not use the Mark in association with the wares and services listed below as of the date of first use alleged in the amended application for registration currently in the record:

[TRANSLATION]

pre-recorded promotional videocassettes, press kits, pens, stickers, key holders, glasses, cups, golf items namely balls, ball markers, golf club covers, raincoats, visor hats, umbrellas, tees, green repair tools, bottles, pens, pencils and gift wrap containing golf items, medals, playing cards, watches, corkscrews, disposable cameras, umbrella. Clothing and athletic uniforms for men, women and children namely T-shirts, sweaters, anoraks, peak caps, rain suits, shirts, polar fleece garments, scarves, mittens and gloves, headbands, toques, hats with or without brims, vests, jackets, underclothing, belts, hose; and

operation of an all-season tourism facility offering services related to snowboarding, runs for snowboarding, artificial snow making, lifts, shops for the sale and rental of clothing and equipment for snowboarding, and child care services.

[31] Therefore, the burden is on the Applicant, who must demonstrate, on a balance of probabilities, that it or its predecessor in title has used the Mark since 1982 in association with these wares and services. Nothing in the Applicant’s evidence supports a finding in its favour. To the contrary, Mr. Deschamps’ admissions are categorical on this subject.

[32] Therefore, the second ground of opposition is allowed in part, for these wares and services only.

#### Section 10 ground of opposition

[33] By way of introduction, I quote the following passage from the Registrar’s decision in *Canteen of Canada Ltd. v. Montréal Mobile Canteen Wholesale Supplies Ltd.* (1978) 46 C.P.R. (2d) 128 (T.M.O.B.):

From the foregoing it may be concluded that opponent is using his trade name and may have effected a measure of trade mark use of the expression “Canteen of

Canada” in association with services and a limited user in association with wares. Nevertheless the use that has been demonstrated is not in my opinion sufficient to establish that either the trade name of the opponent or the expression “Canteen of Canada” has become recognized in this country to the extent necessary to meet the requirements of s. 10. For the purpose of establishing that any mark has become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, the party claiming entitlement to such recognition would be obliged to support his claim with a volume of evidence far greater and far more persuasive in nature than that represented by the Carter affidavit which makes no reference to any sales by the opponent in this country earlier than the year 1974, the year in which applicant claims to have first used his trade mark. It is true that the sales figure \$29,000,000 referred to by Carter represents a sizable sales volume, but the evidence does not establish that it was in any way instrumental in gaining for the opponent the measure of recognition necessary to qualify under the provisions of s. 10. I have therefore concluded that benefit of the provisions of s. 12(1)(e) and s. 10 is not available to the opponent in this case.

[34] The Opponent’s evidence must show, not only quantitatively but also qualitatively, that the Mark has, by ordinary and *bona fide* commercial usage, become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of the Wares or Services. The Opponent’s evidence in chief consists of the affidavits of Ms. Belle-Isle and Mr. Godbout.

[35] When she signed her affidavit, Ms. Belle-Isle was an articling student at the agent firm representing the Opponent. On October 10, 2005, she performed searches and filed excerpts from reference works such as French dictionaries and certain English dictionaries. Most of these works define the word “massif” as a grouping of heights, of mountains. The Applicant is not challenging that definition whatsoever.

[36] Mr. Godbout has been the chief executive officer of the Opponent for nearly 10 years. He explains that the Opponent operates a recreational tourism business located in the Massif du Sud regional park, under the name “Le Massif du Sud”. These services include services for downhill skiing, cross-country skiing, and snowmobile and snowshoeing lodges. Although Mr. Godbout asserts that these services have been offered in association with the name “Le Massif du Sud” since 1966, there is no documentary evidence before me supporting that allegation.

[37] I note that the term “use” is defined at s. 4 of the Act. This is a legal term. It is not enough to simply assert that a trade-mark is used in Canada in association with wares and services. The party must provide evidence of this use by showing that these services exist by filing an advertisement, invoices or other documentation of that nature. The Applicant has filed nothing in the record to that effect.

[38] In any event, the Opponent has not raised the ground of opposition under s. 16(1) of the Act to allege previous use of its trade-mark. I accept from Mr. Godbout’s affidavit that there is one ski centre in Quebec which operates under the name “Le Massif du Sud”. However, I have no evidence establishing a date of first use of this trade-mark in Canada within the meaning of s. 4 of the Act.

[39] Mr. Godbout contends that, in the recreational tourism industry, the word “Massif” is commonly used to describe a place used for recreational tourism activities, such as those described above. However, if that were so, a multitude of documents would be on record showing recreational tourism centres operating under a name comprising the word “massif”. There are not.

[40] Mr. Godbout performed a search using the GOOGLE search engine. Even if I were to accept that the results of this search constitute evidence of use of the word “massif” as a component of any ski centre within the meaning of s. 4 of the Act, which I am far from doing, aside from the names of the Applicant and Opponent, Mr. Godbout found only two other places in Quebec. All of the other places are located outside Canada and, therefore, cannot be very useful in the context of a s. 10 ground of opposition. This section clearly provides “. . . in Canada”.

[41] Mr. Godbout performed a second search using the search engine Altavista.com. Subject to the same reserves on the admissibility of this evidence, there are only two more places in Canada which use the word “massif” in their names. In fact, there seems to be duplication in the results under “Massif des Chic-Chocs” and “Massif gaspésien”. For this reason, I accept only two more places not identified in his first search. This brings to six the total number of places in Canada having a name that comprises the word “massif”, including the ski facilities operated by

the parties to this case. Last, it is not clear from the excerpts produced whether the names are used as geographical designations or as trade-marks.

[42] These results provide no basis for me to conclude that the Opponent has discharged its initial burden under s. 10 of the Act. This ground of opposition is therefore dismissed.

#### Section 12(1)(b) ground of opposition

[43] The question that must be answered is the following: Is the Mark either clearly descriptive or deceptively misdescriptive in the English or French language of the character, quality or place of origin of the Wares or Services?

[44] It is worth recalling the guiding principles that help to determine whether a mark is clearly descriptive or deceptively misdescriptive within the meaning of s. 12(1)(b) of the Act. Thus, Mr. Justice Cattanach set out the prevailing approach in *G.W.G. Ltd. v. Registrar of Trade-marks* (1981), 55 C.P.R. (2d) 1 as follows:

It has been repeatedly stated based on the authority of numerous decided cases:

(1) that whether a trade mark is clearly descriptive is one of first impression;

(2) that the word “clearly” in para. 12(1)(b) of the Act is not a tautological use but it signifies a degree and is not synonymous with “accurate” but means in the context of the paragraph “easy to understand, self-evident or plain”, and

(3) that it is not a proper approach to the determination of whether a trade mark is descriptive to carefully and critically analyse the words to ascertain if they have alternate implications or alternate implications when used in association with certain wares and to ascertain what those words in the context in which they are used would represent to the public at large who will see those words and will form an opinion as to what those words will connote: see *John Labatt Ltd. v. Carling Breweries Ltd.* (1974), 18 C.P.R. (2d) 15 at p. 19.

[45] The prohibition set out in paragraph 12(1)(b) of the Act is designed to prevent one party from monopolizing one or more descriptive words so that competitors may no longer use them in the course of their commercial activities [see *General Motors v. Bellows*, [1949] S.C.R. 678 and *Emall.ca Inc. v. Cheap Tickets and Travel Inc.* (2007), 56 C.P.R. (4th) 81]. The assessment of the descriptive nature of the Mark must take into account the Wares and the Services in

association with which the Mark is used [see *Mitel Corporation v. Registrar of Trade-marks* (1984), 79 C.P.R. (2d) 202 at page 208 (F.C.T.D.)].

[46] The issue to be decided is whether the Mark is either clearly descriptive or deceptively misdescriptive of the place of origin of the Wares and Services. The evidence shows that the ski resort operated by the Applicant is located in the village of Petite-Rivière-Saint-François (paragraph 4 of Mr. Deschamps' affidavit). Therefore, I do not see how the Mark would be either clearly descriptive or deceptively misdescriptive of the place of origin of the Wares and Services.

[47] The Opponent also argued that the Mark is descriptive of the character of the Services. It goes without saying that, from the description of the Wares, the Mark cannot be deemed to be either clearly descriptive or deceptively misdescriptive of the character of the Wares. As for the operation of sliding sports centres (downhill skiing, telemarking, snowboarding, etc.), is it open to me to conclude that the Mark is clearly descriptive or deceptively misdescriptive of the character of these services? I do not believe so. In fact, the word "massif" means a grouping of mountains, of heights. I do not see how this word would be clearly descriptive of the character of the services related to sliding sports.

[48] It is clear that, from their character, these activities are done in the mountains. However, is the Mark per se clearly descriptive of the character of these services? In my view, the fact that these services are offered in a mountainous region does not mean that the Mark may be deemed to be clearly descriptive or deceptively misdescriptive of the character of the Services within the meaning of the Act. The first impression created by the Mark is one of the deciding factors. However, I do not see how the word "massif" would give Canadian consumers a first impression pertaining to the character of the Wares and Services.

[49] The Opponent argues that if the Applicant obtains the registration of the Mark, it would be granted a monopoly on the word "massif". Thus, ski station operators would no longer be able to use this word. To be more specific, I would add [TRANSLATION] ". . . as a trademark in association with the Wares and Services". Moreover, this is the very essence of section 19 of the Act. However, would the registration of the Mark prevent the Opponent from continuing to use the name "Massif du Sud" in association with its commercial activities, or is this name confusing

with the Mark in the manner and circumstances described in s. 6 of the Act? These are questions I need not answer in the context of these proceedings.

[50] For these reasons, I dismiss the third ground of opposition.

#### Distinctiveness of the Mark

[51] The Opponent contends that the Mark is not distinctive because it comprises an ordinary word common to the tourist industry. However, I have already decided that the evidence in the record does not allow me to reach that conclusion. Furthermore, I have no evidence of use of these names as trade-marks in association with wares or services of the same character as those described in this application for registration. Last, even if I were to accept as evidence the results of the Internet searches, I have no evidence of use of those names before the filing date of the statement of opposition (January 28, 2005), that is, the relevant date under this ground of opposition [see *Andres Wines Ltd. and E&J Gallo Winery* (1975), 25 C.P.R. (2d) 126 (F.C.A.) at page 130, *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at page 424 (F.C.A), and *Metro-Goldwyn-Meyer Inc v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)]

[52] On the other hand, if the wording of the ground opposition suggests that the Mark is not distinctive because it is clearly descriptive or deceptively misdescriptive of the character, quality or place of origin of the Wares and Services, I have also decided this issue in the Applicant's favour for the ground of opposition raised under s. 12(1)(b) of the Act.

[53] Consequently, I also dismiss this last ground of opposition.

#### Decision

[54] Pursuant to the authority delegated to me under s. 63(3) of the Act, and in accordance with the principles set out in *Produits Ménagers Coronet Inc. v. Coronet Werke Heinrich SCH*, 10 C.P.R. (3d) 482 (F.C.T.D.), which allow me to deliver a split decision, I dismiss the opposition only in respect of the following wares and services:

[TRANSLATION]

Wares: Advertising and promotional materials, namely brochures, signs, pins, postcards, posters, photos and invitations;

Operation of an all-season tourism facility offering services related to downhill skiing, telemarking, hiking and other outdoor sports and recreational activities, namely operation of runs for downhill skiing and telemarking, operation of ski lessons, ski patrols, mountain guide services, operation of ticket agency, maintenance of runs and equipment, shuttle services, and organization and staging of sports competitions; operation of restaurants, bars, reception halls, equipment storage facilities, shops for the sale and rental of sports equipment, equipment repair, clothing and equipment for skiing and telemarking;

pursuant to s. 38(8) of the Act.

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Jean Carrière  
Member, Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified true translation  
Sarah Burns, Translator