

IN THE MATTER OF AN OPPOSITION BY  
Siebruck Hosiery Ltd. to application No. 657,136  
for the trade-mark MICROSHEER filed by Just  
Hosiery Incorporated

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On May 10, 1990, the applicant, Just Hosiery Incorporated, filed an application to register the trade-mark MICROSHEER for the wares

pantyhose, socks, tights and leotards for ladies and children

on the basis of proposed use in Canada. The application was executed on behalf of the applicant company by its President namely, Stephen Harbour.

The subject application was advertised for opposition purposes in the Trade-marks Journal issue dated March 20, 1991 and was opposed by Siebruck Hosiery Ltd. (hereinafter "Siebruck") on April 19, 1991. A copy of the statement of opposition was forwarded to the applicant on May 10, 1991.

The first ground of opposition is that, pursuant to Section 30(i) of the Trade-marks Act, the applicant could not have been satisfied that it was entitled to use the applied for mark in Canada. The opponent alleges that the applicant, through Stephen Harbour, had knowledge of the opponent's adoption of the mark MICROSHEER for use in association with pantyhose in early 1990.

The second ground of opposition is that, pursuant to Section 16(3)(a), the applicant is not entitled to register the applied for mark. The opponent alleges that at the date of filing of the subject application, the applied for mark MICROSHEER was confusing with the opponent's mark MICROSHEER previously used in Canada by the opponent in association with women's pantyhose.

The third ground of opposition is that, pursuant to Section 12(1)(b), the trade-mark MICROSHEER is not registrable because it is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. The final ground of opposition is that the

applied for mark is not distinctive of the applicant's wares within the meaning of Section 2 of the Act.

The applicant filed and served a counter statement denying the opponent's allegations. The counter statement also alleges [see paragraph 1(b)] that the applicant "through one of its principal officers, Paul Harbour [Stephen Harbour's son] . . . developed the trade-mark [MICROSHEER] and its marketing program and made representations to intended customers, including Woolco, for the sale of pantyhose . . . as early as December 1989" As will be noted later, the applicant company was not incorporated until March 30, 1990.

The opponent's evidence consists of the affidavit of Josh Lazar, Vice-President Sales & Marketing of the opponent company. The applicant's evidence consists of the affidavits of Stephen F. Harbour, President of the applicant company and Paul A. Harbour, Vice President-Marketing of the applicant company. None of the affiants were cross-examined on their affidavits and neither party submitted a written argument. Each party requested an oral hearing however neither party attended.

Mr. Lazar's evidence may be summarized as follows. The opponent Siebruck has been manufacturing, selling and distributing pantyhose, hosiery and tights in Canada since 1963. One of Siebruck's major customers is the F. W. Woolworth Co. Ltd. chain of retail outlets. During the year 1990, Stephen Harbour was employed by Siebruck as Executive Vice-President, Marketing and Sales and responsible for servicing the Woolworth account. At that time Mr. Lazar was CEO of Siebruck. According to Mr. Lazar, it was he who adopted the term MICROSHEER and directed Stephen Harbour to market pantyhose to Woolworth double branded under the new mark MICROSHEER and under Siebruck's existing registered mark SILKYALLS. Paragraphs 10-13 of Mr. Lazar's affidavit, reproduced below, discuss ensuing events:

The marks MICROSHEER and SILKYALLS are clearly displayed on packaging for Siebruck's pantyhose and the opponent Siebruck is identified as the source of the wares on the back of the package: see Exhibits C and D attached to Mr. Lazar's affidavit. Sales under the mark MICROSHEER (I assume in conjunction with the mark SILKYALLS) totalled in excess of \$300,000 for the two year period 1990, 1991. Exhibit G to Mr. Lazar's affidavit is a copy of the certificate of incorporation of the applicant company showing that it was incorporated on March 30, 1990, that is, about six weeks prior to filing the subject application.

Stephen Harbour's and Paul Harbour's evidence contradict Mr. Lazar's testimony in several respects. According to Stephen Harbour, he was indeed employed by Siebruck from May 1985 to February 1991 but that it was his son Paul Harbour who ". . . developed the MICROSHEER concept in the fall of 1989 and he [Paul Harbour] was planning on using it." Stephen Harbour alleges that he left Siebruck when Siebruck withheld commission payments from him in an attempt to pressure him to have his son Paul Harbour "release the MICROSHEER trade-mark to Siebruck . . ." Stephen Harbour's evidence is that the mark MICROSHEER is the property of the applicant company although it is not clear from his testimony, or from Paul Harbour's testimony, how the applicant company came to own the mark.

Paul Harbour's evidence is that he was employed as a sales representative by Siebruck from April 1987 until September 1989. According to Paul Harbour, he "conceived the trade mark MICROSHEER" for pantyhose some time about October 1989 and also developed packaging displaying the mark (for pantyhose). Specimens of such packaging are attached as Exhibits C and D to his affidavit. I note that the source of the wares does not appear on any of the exhibit material. Paul Harbour alleges that Mr. Lazar was aware of the applicant's intention to market its wares under the mark MICROSHEER as least as early as July 1990 when the applicant's packaging was inadvertently shipped to Siebruck.

In the absence of cross-examination, there is little to assist me in determining the legitimacy of parties' conflicting allegations. However, I prefer Mr. Lazar's testimony to that of Stephen and Paul Harbour because it is more detailed and more comprehensive, leaves fewer questions unanswered, and because the exhibits attached to Mr. Lazar's affidavit corroborate his testimony to a greater extent than do the exhibits attached to Mr. Harbour's affidavit.

In view of the above, I find that opponent succeeds on the first ground of opposition which alleges that, at the date that the subject application was filed, the applicant could not have been satisfied that it was entitled to use the applied for mark MICROSHEER in association with the wares specified in the application. It is therefore not necessary for me to consider the remaining grounds of opposition. I would add that on the evidence before me, the opponent would also likely have succeeded on the last ground of opposition alleging non-

distinctiveness of the applied for mark (at the material date April 19, 1991).

The applicant's application is refused.

DATED AT HULL, QUEBEC, THIS 16<sup>th</sup> DAY OF JANUARY, 1996.

Myer Herzig,  
Member,  
Trade-marks Opposition Board