



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

Citation: 2010 TMOB 41
Date of Decision: 2010-03-31

**IN THE MATTER OF AN OPPOSITION
by Mövenpick-Holding (now Mövenpick-
Holding AG) to application Nos. 1,189,260
and 1,189,262 for the trade-marks
MARCHÉ BONICHOIX WHITE &
DESIGN and MARCHÉ BONICHOIX &
DESIGN in the name of Sobeys Capital
Incorporated**

[1] On September 16, 2003, Sobeys Capital Incorporated (“the Applicant”) filed applications to register the trade-mark MARCHÉ BONICHOIX WHITE & DESIGN (1,189,260, referred to as “260”) and MARCHÉ BONICHOIX & DESIGN (1,189,262, referred to as “262”); collectively, “the Marks”) based on use of the applied-for Marks in Canada since March 31, 2003 and March 3, 2003, respectively. The respective Marks are displayed below:



Application No: 1,189,260



Application No: 1,189,262

[2] Each application covers the following services:

Operation of supermarkets selling all manner of food, household supplies and small wares, counselling and assisting others in all phases of the operation of general stores selling all manner of food, household supplies and small wares.

[3] The right to the exclusive use of the word “MARCHÉ” is disclaimed apart from each of the Marks as a whole. Both applications were advertised for opposition purposes on October 13, 2004.

[4] A statement of opposition for each application was filed on March 14, 2005 by Mövenpick-Holding (now Mövenpick-Holding AG “the Opponent”); amended statements of opposition were filed on June 10, 2005 and again on January 21, 2010 on the eve of the oral hearing. The applicant filed and served its counter statements on August 12, 2005. As the grounds of opposition are identical for each statement of opposition, they will be described together. The final statement of opposition contained the following grounds under the *Trade-marks Act* R.S.C. 1985, c. T-13 (the “Act”):

- Section 30(a): The applications do not describe in ordinary commercial terms the specific services in association with which the Marks are being used.
- Section 30(b): The applicant cannot be satisfied that its Marks have been used in Canada in association with its services since March 31, 2003, for the ‘260 application, or March 3, 2003, for the ‘262 application.

[5] Subsequent to the oral hearing, the Opponent filed official documents and an affidavit attesting to the change of name of the Opponent from Mövenpick-Holding to Mövenpick-Holding AG which change occurred on April 6, 2009.

[6] The Opponent’s evidence for both applications consists of the affidavit of Dawn Brennan and the statutory declaration of Robert Staub. The Applicant’s evidence for both applications consists of the affidavits of Marc Baril, H el ene-Marie Girard, Sebastien Brung, and Sylvain Simard. No reply evidence was filed by the Opponent. Only Mr. Staub was cross-examined by the applicant on October 18, 2006; transcripts are of record. Both parties filed written arguments.

[7] An oral hearing was held at which both parties were represented.

Onus and Material Dates

[8] The applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential

burden on the opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v. The Molson Companies Limited*, (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298 [*John Labatt Limited*]].

[9] The material date that applies to grounds of opposition under s. 30 is the filing date of the application, namely September 16, 2003 in this case [see *Delectable Publications Ltd. v. Famous Events Ltd.*, (1989) 24 C.P.R. (3d) 274 (T.M.O.B.); *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.H.O.) at 475].

Summary of the Opponent's Evidence

[10] The present proceeding relates to two related applications; identical evidence was provided, save for references to the application numbers and their dates. Much of the evidence dealt with grounds of opposition that were removed before the oral hearing; only the evidence relevant to the remaining grounds of opposition is summarized below.

Ms. Brennan's Affidavit

[11] In her affidavit, Ms. Brennan identifies herself as an administrative assistant for the agents for the Opponent and attaches a number of Exhibits arguably relevant to the current grounds of opposition in that they relate to the nature of the services the Applicant as well as its competitors provide.

[12] Exhibit B comprises printouts from www.sobeys.com. I note that these printouts provide information about the Applicant including its corporate structure, its national distribution, and geographic distribution of Marché Bonichoix stores in Québec. Some printouts describe Sobeys supermarkets' full-service and in-store conveniences for one-stop shopping, including pharmacies, banking, delicatessen services, floral arrangements, dry-cleaning, etc.

[13] Exhibits C to F are printouts from the websites of various supermarket competitors of the Applicant, including Loblaw Companies Limited, Métro Inc., Couche-Tard, and Thrifty Foods. These printouts include information on the development of their respective companies over time, and the availability of one-stop shopping and prepared "ready-to-eat" food at their stores.

[14] Exhibits G to K are printouts from the *Canadian Intellectual Property Office – The Wares and Services Manual – User Guide*, obtained from <http://strategis.ic.gc.ca>, including sections of the guide (section 1.1 “General” (Exhibit G) and 1.3 “Services” (Exhibit H)), and acceptable and unacceptable service descriptions that begin with “G”, “R”, and “S” (Exhibits I-K, respectively). Although the manual does not list “supermarkets”, “general store” or “grocery store”, it must be concluded that the wares and services list is not exhaustive, since the guide section in Exhibit G sets out a three-part test for making a determination as to whether the wares/services described are sufficiently specific.

[15] Exhibits N-Q are copies of definitions for the words “grocery store”, “supermarket”, “convenience store”, and “restaurant” obtained from Wikipedia. Exhibit T is a printout of the search results for trade-mark registrations with “Costco” in the “Current Owner Name” field and “restaurant” in the “Wares and Services” field from the Canadian Trade-marks database. The Costco registrations include “restaurant services”, among other services such as “deli and take-out food services” and “retail and wholesale bakery services”.

Mr. Staub’s Statutory Declaration

[16] In his statutory declaration, Mr. Staub identifies himself as Swiss legal counsel to the Opponent, and provides evidence regarding the Opponent’s Canadian trade-mark registrations, history of operations in Canada and related sales figures. This evidence is of no relevance to the current grounds of opposition.

Summary of the Applicant’s Evidence

Mr. Baril’s Affidavit

[17] Mr. Baril identifies himself as Manager of the “Aménagement commercial” Department (“the Department”) of Sobeys Québec Inc. (“Sobeys Québec”), an indirect subsidiary of the Applicant. The Department works with the owners of MARCHÉ BONICHOIX stores from the conception and planning stages to the final stages, where the store is fully operational. Specifically, it creates store layouts, arranges overall floor plans, the display of signs and posters, placement of equipment, the spacing of aisles and counters, and the design and creation of

shelving displays. Mr. Baril explains the Department acts as a liaison between the owners of these stores, and the engineers and architects involved in store construction. In doing so, the Department is responsible for consistency among MARCHÉ BONICHOIX stores by ensuring standard features are present in each store. Mr. Baril has been employed with Sobeys Québec and its predecessors since 1984.

[18] Mr. Baril provides a history of the MARCHÉ BONICHOIX “banner”, a term of art referring to the name under which a group of stores operates and advertises its services. He states that the BONICHOIX banner was used for mid-sized grocery stores by a predecessor in title; BONICHOIX was changed to MARCHÉ BONICHOIX in April 1998, and a first trade-mark application for MARCHÉ BONICHOIX & Design was filed and registered in January 2000 (“the first Mark”). A new logo was created for MARCHÉ BONICHOIX in March 2003; two trade-mark applications were filed. These are the subject of the present proceedings and for ease of reference are referred to together as “the second Mark”. In this regard, I observe that that the differences between the two trade-marks (in background shading - as shown above) are merely “petty differences”, and as such I consider it self evident that use of one Mark is also use of the other [see *Canada (Registrar of Trade-marks) v. Cie International pour l’informatique CII Honeywell Bull* (1985), 4 C.P.R. (3d) 523 at 525 (F.C.A.); *Canada Ltée v. Munsingwear Inc.*, 44 C.P.R. (3d) at 59 (FCA)].

[19] Mr. Baril explains there were 91 stores at the time of his affidavit, all located in rural areas in Québec, except for three stores in New Brunswick; all MARCHÉ BONICHOIX stores are considered, for administrative purposes, to be in Québec and under Sobeys Québec. Sobeys Québec is licensed by the Applicant to use the first and second Marks and in turn sublicenses use to MARCHÉ BONICHOIX store owners. Store owners are subject to the control of Sobeys Québec; evidence in support of this includes the fact that the stores meet certain physical appearances, standard designs, and provide standard advertising/promotional materials displaying the Marks.

[20] Mr. Baril states that MARCHÉ BONICHOIX stores have standard supermarket departments (meat, produce, bakery, frozen foods, dairy, magazines, etc.), that some have a photo boutique, and that the stores also sell household supplies (bulbs, film, batteries). Exhibit 2

comprises photographs of three MARCHÉ BONICHOIX stores, which bear exterior signs, featuring both the first and second Marks. Exhibits 2B and 2C show interior displays and mobiles bearing the second Mark, taken in 2004 and 2005, respectively. Mr. Baril provides that only one location (Kingsey Falls, Québec) has a sitting area, which is small (less than 200 square feet) with only a self-serve coffee station and no food or beverage counter service (Exhibit 2C). This was made at the request of the premise's landlord for the employees of a nearby plant.

[21] Gross sales are provided for specified periods by Mr. Baril for all services provided by MARCHÉ BONICHOIX stores, including sales: over \$140 million (1999), over \$135 million annually (2000-2002), and over \$120 million annually (2003-2006). Mr. Baril states that he was advised of these figures by Sylvain Simard (budget manager for Sobeys Québec); and I note that they are corroborated in Mr. Simard's affidavit.

[22] Mr. Baril provides evidence of promotion and advertising using the first and second Marks. Also, as advised (and corroborated by Mr. Simard), Mr. Baril provides the advertising expenditures from 1999 to 2006, each annual figure is around \$1 million, and relates to production and distribution of flyers, printed store materials, radio and newspaper ads, and other materials. Specific examples of promotional material provided by the affiant include:

- Exhibit 4: sample flyers advertising MARCHÉ BONICHOIX store services in association with the second Mark for store distribution, starting at March 3, 2003. Sample invoices of the purchase of such flyers from December 2003 onwards are provided as Exhibit 5C. I note that following each invoice is a copy of the flyer displaying the Mark [Exhibit 3 relates to analogous material using the first Mark];
- Exhibit 7: sample marketing guides used by Sobeys Québec in counselling and assisting MARCHÉ BONICHOIX storeowners in advertising and marketing their services in association with the second Marks starting at March 31, 2003. I note that each marketing guide is attached in colour and in black and white, such that the '262 and the '260 Marks are represented. Further, both these guides and the promotional material they depict display the applied for Mark [Exhibit 6 relates to analogous material using the first Mark];

- Exhibit 9: sample seasonal and promotional displays starting at March 31, 2003 advertising services in association with the second Mark. [Exhibit 8 relates to analogous material using the first Mark];
- Exhibit 10: sample newspaper ads displaying the second Mark used by MARCHÉ BONICHOIX stores, starting at March 28, 2003. Invoices for the purchase of newspaper space for the attached 2004 and 2005 newspaper ads are included;
- Exhibit 11: the audio file and transcript of a radio ad, as well as the invoice for air time bought by Sobeys Québec in New Brunswick and Québec in connection with the stores' campaign "Passion fondue" in November 2006;
- Exhibit 12: sample in-store displays promoting food and services of these stores in association with the second Mark, starting at March 3, 2003;
- Exhibit 13: sample invoice dated March 31, 2003 for the purchase of suspended mobiles that advertise services of MARCHÉ BONICHOIX stores in association with the second Mark. Exhibit 2 comprises photographs of such mobiles;
- Exhibit 15: sample images of shopping bags that bear the second Mark.

Ms. Girard's Affidavit

[23] In her affidavit, Ms. Girard identifies herself as inside legal counsel with Sobeys Québec. She also attests that Sobeys Québec is an indirect subsidiary of the Applicant. In her affidavit, Ms. Girard provided a significant amount of evidence addressing confusion issues that is of no relevance to the grounds of opposition under s.30(a) and (b) of the Act.

Mr. Brung's Affidavit

[24] Mr. Brung identifies himself as a Senior Research Analyst for Thomson CompuMark, an intellectual property research firm. In his job, he conducts trade-mark searches and interacts with clients. Mr. Brung performed a "Thomson CompuMark Trade-Mark Dilution (How Common) Search" on April 5, 2007 for all registered trade-marks and active applications in Canada incorporating "MARCHÉ" in association with "FOOD INDUSTRY INCLUDING IN PARTICULAR, RESTAURANTS, SUPERMARKETS, GROCERY STORES, FOOD STORES AND CONVENIENCE STORES." While I note that the search is of little relevance to the

amended grounds of opposition, I would observe that many of the statements of services for the registrations in Mr. Brung's report include services such as "exploitation of food markets", "operation of retail food stores", and "operation of a food store".

Mr. Simard's Affidavit

[25] In his affidavit, Mr. Simard identifies himself as a certified management accountant and Budget Manager for Sobeys Québec. Amongst his job responsibilities, he attests he is in charge of preparing regular reports on sales and other figures related to Sobeys Québec's operations.

Discussion - The Brennan Affidavit

[26] The admissibility of the Brennan affidavit was discussed at length in the Applicant's written submissions, and at the oral hearing. The relevant portions of the affidavit relate to whether or not the Applicant's statement of services is accurate, sufficiently specific and in ordinary commercial terms.

[27] The Applicant raised two main concerns with the Brennan affidavit. First, the Applicant argues that it is deficient in that it lacks any explanatory statements. Second, the independence of her evidence is questioned, as Ms. Brennan is an employee for counsel of the Opponent. I note that the Applicant also argued against the inclusion of material from "Wikipedia" in its written arguments. However, as stated by Member Folz in *Canadian Council for Professional Engineers v. Alberta Institute of Power Engineers* (2008), 71 C.P.R. (4th) 37, at paragraph 35, although Wikipedia "carries a certain degree of risk of unreliability, it is not so much that it is completely inadmissible as long as the other side can reply to the evidence".

[28] Regarding the first issue, Ms. Brennan attaches various Exhibits, the most relevant to the amended grounds of opposition being excerpts of competitors' websites, as noted previously. Ms. Brennan provides no explanation as to how she came into possession of this material.

[29] Regarding the second issue, independence of the evidence, generally speaking, an affidavit of an employee of an agent's firm is admissible only to the extent that the evidence relates to non-controversial and non-central matters (*Cross Canada Auto Body Supply (Windsor) Limited et al. v. Hyundai Auto Canada* [2005] F.C.J. No. 1543, 43 C.P.R. (4th) 21 (F.C.T.D.);

affirmed [2006] FCA 133 [*Cross Canada Auto Body*]; followed in *Kocsis Transport Ltd. v. “K” Line America, Inc.* [2008] T.M.O.B. 37 at para. 6 [*Kocsis*]). At issue in *Cross Canada Auto Body, supra*, was opinion evidence provided by an employee of counsel. This is not the case here, as Ms. Brennan simply attaches, albeit without explanation, copies of website pages.

[30] However, the Brennan affidavit forms the entirety of the Opponent’s evidence on the remaining grounds of opposition. In fact, counsel for the Opponent conceded the significance of this evidence at the oral hearing. Thus although Ms. Brennan does not provide opinion evidence, which was the issue in *Cross Canada Auto Body*, her evidence clearly relates to the central and controversial matters in this proceeding. However, although I appreciate the Applicant’s arguments in this regard, and consider the Brennan affidavit to be somewhat problematic, since the Applicant did have the opportunity to address these matters in its evidence (*see Canadian Council for Professional Engineers v. Alberta Institute of Power Engineers, supra*), I am willing to afford it some weight in these proceedings.

[31] In any event, the admissibility of the Brennan affidavit is not determinative in this case, for the reasons that follow.

[32] Analysis of the Grounds of Opposition

[33] In regards to s. 30 of the Act, the initial evidential burden on the Opponent is “the burden of adducing sufficient evidence to persuade the trier of fact that the alleged facts are true” (*John Labatt Limited, supra* at 298). This burden is less onerous where the application is based on proposed use, rather than prior use of a Mark in Canada (*McDonald's Corporation and McDonald's Restaurants of Canada Ltd. v. M.A. Comacho-Saldana International Trading Ltd. carrying on business as Macs International* (1984), 1 C.P.R. (3d) 101 (T.M.H.O.) at 104).

Section 30(a) of the Act

[34] The Opponent has submitted that the statement of services in the application is not sufficiently specific, nor is it in ordinary commercial terms. Specifically, the Opponent has taken issue with the phrases “operation of supermarkets selling all manner of food, household supplies and small wares”, “counselling and assisting”, and “the operation of general stores”. I note

however, that there are no independent services listed as “the operation of general stores” rather this phrase is included in the description of the services of counselling and assisting - “*counselling and assisting others in all phases of the operation of general stores selling all manner of food, household supplies and small wares*” (emphasis added).

[35] It is the Opponent’s argument that the first phrase, especially “all manner of food”, is uncharacteristically broad and unspecific, and points to the fact that the Baril affidavit often goes further to specify types of food of food offered in the Applicant’s stores. The Opponent also points to registrations of Costco (Brennan affidavit - Exhibit T), which include specification of products (e.g. “dairy products”, “baked goods”, etc.). It is my understanding from this argument that the Opponent would expect the application to recite a laundry list of each food the applicant offers in order for the Applicant to meet its requirements under s. 30.

[36] Although some degree of specificity is required, it has been recognized that statements of services may be more difficult to specifically define in comparison to statements of wares (*Sentinel Aluminium Products Co. Ltd. v. Sentinel Pacific Equities Ltd.* (1983), 80 C.P.R. (2d) 201). Further, the *Trade-marks Examination Wares and Services Manual* (“the Manual”) states that in reading the entire statement of services, “context may serve to specify an otherwise unacceptable identification of services”. While the Manual is not binding, it provides guidance as to reasonable interpretation of statements of services. In this regard it is clear on a reading of this statement of services that the inclusion of “supermarket” necessarily informs the phrase “all manner of food, household supplies and small wares”.

[37] I do not accept the Opponent’s argument that due to recent trends in supermarket businesses to provide ready-to-eat foods there is a need for the Applicant’s statement of services to be more specific to differentiate it from “restaurant services”. In my view, the average consumer is familiar enough with modern supermarkets to understand the kinds of foods, supplies and small wares typically offered by them; it is not necessary to produce a list of specific foods, supplies, and wares to describe the supermarket business in ordinary commercial terms.

[38] In any event, I accept the Applicant’s evidence from Mr. Brung, demonstrating similar language used by competitors, and broad statements of services for the Marks of other grocery

stores and supermarkets. The Opponent made arguments at the oral hearing that only the facts of this case were important, not what other companies have done previously. However, I find evidence of what is commonly used in the trade to describe services important in assessing what constitutes “ordinary commercial terms”. As similar language and scope has been used by others in the same industry, I am prepared to conclude that the Applicant’s statement of services is in ordinary commercial terms. By way of analogy, I also point out that “retail sporting goods store services” (*Pro Image Sportswear Inc. v. Pro Image Inc.* (1992), 42 C.P.R. (3d) 566 [*Pro Image*]) and “operating a business specializing in the retail sale of classes of household and commercial wares” (*Stanhope Inc. v. Les Encheres Stanley Inc.* (1983), 82 C.P.R. (2d) 20, cited in *Pro Image, supra*) were both deemed sufficient as for the purposes of s. 30(a).

[39] The Opponent has argued that “counselling and assisting others in all phases of the operation of general stores...” is too broad, as it cannot be assessed what the alleged phases of operation are, and further that it is not an accurate description of the services actually provided by the Applicant.

[40] With respect to the accuracy of the description, the Opponent states that the description should reflect a franchisor/franchisee relationship since there is an inherent imbalance of power in the relationship, and minimal choice in the “advice” the storeowners receive. I find this argument, *de minimis* and irrelevant; the Opponent has not adduced any evidence to indicate that “counselling and assisting” necessarily implies that choice must be present. For example, while the Applicant ensures certain elements of store designs are applied to each store as they are being built (paragraph 5 of the Baril affidavit), the Opponent has not provided evidence that this is not “counselling and assisting”. In my view, since the storeowner must consult with the Applicant to ensure the proper guidelines are met; this can be considered “counselling and assisting” even if the storeowner’s options are few.

[41] With respect to whether or not “counselling and assisting others *in all phases of operation*” (emphasis added) is too broad, for reasons that are elaborated below with respect to the s.30(b) ground of opposition, I find that this statement of services is sufficiently specific. More particularly, Mr. Baril states that his department works with storeowners “from the beginning of the planning stages until the store is fully operational”. This includes new, relocated

and renovated stores. Further, the sample marketing guides provided as Exhibit 7 appear to be useful and relevant to all phases of operation of a store; accordingly I find that “all phases of operation” in the context of retail stores to be sufficiently specific.

[42] In view of the foregoing, even affording weight to the Brennan affidavit, I find that the Opponent has not adduced enough evidence to support its allegations and that the applicant has established that its statement of services meets the requirements of the Act. Accordingly, this first ground of opposition must fail.

Section 30(b) of the Act

[43] The initial burden on the opponent is light respecting the issue of non-conformance with s. 30(b) of the Act, as the facts regarding the Applicant’s first use are particularly within the knowledge of the applicant (*Tune Masters v. Mr. P’s Mastertune Ignition Services Ltd.* (1986), 10 C.P.R. (3d) 84 (T.M.H.O.) at 89). This burden may be met by reference not only to the opponent’s evidence, but also to the applicant’s evidence (*Labatt Brewing Co. v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) 216 (F.C.T.D.) at 230). Although the opponent may rely on an applicant’s evidence to meet its evidential burden in relation to his ground, the opponent must show that the applicant’s evidence is “clearly” inconsistent with the applicant’s claims as set forth in its application (*Ivey Lea Shirt Co. v. 1227624 Ontario Ltd.* (1999), 2 C.P.R. (4th) 562 (T.M.O.B.) at 565-566, affirmed 11 C.P.R. (4th) 489 (F.C.T.D.)).

[44] Before analyzing this ground, I note that s. 4(2) of the Act provides that “[a] trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.”

[45] The Opponent has submitted merely that the Applicant has not provided any evidence of continuous and uninterrupted use of the Marks up to the filing date in association with the sale of “*all manner of food*”, and counselling and assisting in “*all phases of the operation of general stores...*” (emphasis added). As mentioned above, it seems the Opponent wants evidence of continuous use for each type of food sold by the Applicant and for each phase of operation of its stores since the date of claimed first use; in doing so, it relies on *Loblaws Inc. v. No Frills Auto and Truck Rental Ltd.* 2006 FC 537 at para. 39. I note that the relevant portion of this decision

only states that when an applicant claims use to an earlier date, that use must be “continuous and in the normal course of trade”. O’Keefe J. found the applicant’s evidence of use was lacking because it did not provide evidence of use for a significant period of time and because there was no evidence of continuous use of the mark after the original applicant had been struck from the corporate registry. The evidence was not lacking because the applicant failed to show use of the mark in association with each and every aspect of its statement of services.

[46] The Opponent has not adduced any evidence itself to suggest that the Applicant was indeed not using its Marks on the date claimed in the application, but relies on the sufficiency of the applicant’s evidence and suggests that the Applicant, by not evidencing use of the mark with each and every food or phase of operation of stores, has provided evidence that is clearly inconsistent with the claims of its application, I do not find this to be the case here.

[47] As discussed above, there are two separate services at issue; those in relation to “operation of supermarkets selling *all manner of food...*”, and “counselling and assisting in *all phases of operation* of general stores...”

[48] In my view, the Applicant’s evidence is consistent with the application’s claims. For example, Exhibit 4A of the Baril affidavit specifically advertises a variety of food in association with the Marks for the week of March 3, 2003; food typically available in a supermarket such as: fresh and frozen meat, condiments, produce, and canned food. Numerous other Exhibits show such advertisements and promotional displays using the Marks for several months each year from March 2003 until October 2006, just after the application’s filing date. Evidence of use for each and every food sold by the applicant since March 2003 would be unduly onerous, and unnecessary. Moreover, I find the expansive examples of use evidenced by the Applicant to be accurate and consistent with the breadth of food the applicant offers.

[49] The same reasoning can be applied to the category of counselling and assisting in “*all phases* of the operation of general stores...” The marketing guides are used by the Applicant to counsel and assist MARCHÉ BONICHOIX storeowners in their store operation by providing instructions and procedures for advertising. The Applicant provides at least two sample guides for each year dating from March 2003 until November 2006 (Exhibit 7 of the Baril affidavit). Further, paragraphs 4 to 6 of the Baril affidavit describe what would be the normal course of

trade by elaborating on the phases of operation the Applicant is involved in. He states that his department in the applicant company works with storeowners “from the beginning of the planning stages until the store is fully operational”. This includes new, relocated and renovated stores. I do not find this explanation by Mr. Baril to be inconsistent with the notion of “all phases of operation”. Further, it does not appear that the marketing guides provided by the applicant are limited to only one phase of store development and operation, as opposed to “all phases” as the application claims. In fact, on a fair reading of the Baril affidavit, these marketing guides could be used to counsel and assist storeowners at any stage of store development: whether it is setup of promotional displays in anticipation of a new store opening or at an existing store. In the absence of evidence by the Opponent to the contrary (and I note that the Opponent did not take advantage of its ability to cross-examine Mr. Baril), I find the Applicant’s evidence on this category of service consistent with continuous use of the Marks since March 3 and 31, 2003.

[50] Accordingly, I would dismiss the s. 30(b) ground of opposition on the basis that the opponent has not met its evidential burden.

Disposition

[51] In view of the foregoing, and pursuant to the authority delegated to me under s. 63(3) of the Act, the Oppositions to Application nos. 1,189,260 and 1,189,262 are rejected pursuant to s. 38(8) of the Act.

P. Heidi Sprung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office