



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

**Citation: 2011 TMOB 160**  
**Date of Decision: 2011-09-08**

**IN THE MATTER OF AN OPPOSITION  
by Sparitual, LLC to application  
No. 1,349,723 for the trade-mark THE  
SPA RITUAL & Design in the name of A  
Spa Ritual Corp.**

[1] On May 31, 2007, A Spa Ritual Corp. (the Applicant) filed an application to register the trade-mark THE SPA RITUAL & Design, as shown hereafter (the Mark):



[2] The application, as amended on June 17, 2009 and accepted by the Registrar on July 21, 2009, is based on proposed use of the Mark in association with the following services (the Services):

operation of a spa and wellness centre; beauty and health care services, namely massage therapy, facials, aromatherapy, manicures, pedicures, body treatments, reflexology, yoga and pilates, laser skin resurfacing, chemical skin peels, micro-dermabrasion, skin photo rejuvenation, the application of topical and injectable muscle relaxants and wrinkle removers and injectable cosmetic fillers, hair dressing, the application of make-up and cosmetics, nail shaping and conditioning, the application and removal of nail polishes, skin treatments, skin toning, the application of masques and conditioners to the skin, the treatment of corns and calluses, and exfoliation treatments; education services namely, fitness and wellness programs and seminars.

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of December 12, 2007.

[4] On February 19, 2008, Sparitual, LLC (the Opponent) filed a statement of opposition. On October 13, 2009, the Opponent obtained leave to file an amended statement of opposition filed on July 17, 2009. As part of its grounds of opposition, the Opponent alleges ownership of application No. 1,356,895 for the registration of the trade-mark SPARITUAL filed on the basis of use in Canada since January 2005 in association with nail care preparations; body care preparations, namely, hand lotions, body lotion, foot cream, skin scrub and body scents, as well as previous use and making known in Canada of its trade-mark and trade-name SPARITUAL. Generally speaking, the Opponent pleads that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(3)(a) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act), that the Mark is not distinctive, and that the application does not conform to the requirements of s. 30(i) of the Act.

[5] The Applicant filed a counter statement on June 6, 2008 essentially denying each ground of opposition.

[6] Both parties filed evidence, written arguments and were represented at an oral hearing.

### Onus

[7] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the 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 Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.); *Christian Dior S.A. v. Dion Neckwear Ltd.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)].

### Review of the Evidence

[8] In the following review of the parties' evidence, I have disregarded arguments and opinions as well as information or material that I consider not relevant to the issues at hand.

### Opponent's Evidence

[9] Pursuant to r. 41 of the *Trade-marks Regulations*, SOR/96-195 (the Regulations), the Opponent filed the affidavits of Jeff Zev Pink, sworn February 10, 2009 (the first Pink affidavit), and Kellee Martin, sworn February 13, 2009. On July 28, 2009, the Opponent was granted leave to file a second affidavit of Mr. Pink, sworn July 16, 2009 (the second Pink affidavit), as further evidence pursuant to r. 44(1) of the Regulations. The Applicant did not cross-examine either affiant.

### Affidavits of Jeff Zev Pink

[10] Mr. Pink is the President of the Opponent. As the second Pink affidavit only serves to reiterate that Distribution France L'écuyer Inc. (*sic*) is a Canadian distributor of the Opponent, I am reviewing hereafter the evidence introduced by the first Pink affidavit.

[11] According to Mr. Pink's statements, the Opponent, a division of Orly International Inc., was founded in 2004 under the laws of the State of California [pars. 2 and 4]. The products associated with the Opponent's trade-mark SPARITUAL are sold in 66 countries worldwide with average total annual sales of \$5 million, 65% of which are sales in Canada, the United States and Mexico [par. 5].

[12] Mr. Pink files a copy of the filing receipt issued by the Canadian Intellectual Property Office (CIPO) for the Opponent's application No. 1,356,895 for the trade-mark SPARITUAL filed on July 24, 2007 [par. 8, Exhibit "4"].

[13] According to Mr. Pink's statements, a wide variety of SPARITUAL nail and body care products, including but not limited to hand lotions, body lotions, foot creams, hand, body and foot scrubs, body scents, nail files, nail lacquers, bath salts, massages creams, has been offered in Canada since 2005 [par. 10]. The Opponent sells its SPARITUAL products directly to Canadian distributors, who in turn sell the products to their customers, "which include spa and salons as well as other key professional and retail outlets" [par. 11]. Mr. Pink identifies the names and locations of the five Canadian distributors of the Opponent as follows: West Coast Beauty Supply in British Columbia; Alternative Beauty Supply in Ontario; Distribution France L'écuyer

in Quebec; International Beauty in Alberta; and Maritime Beauty Supply in Nova Scotia [par. 12]. He files a report showing Canadian sales figures for each of the distributors for the years 2005 to 2008 [par. 13, Exhibit “5”].

[14] According to the yearly breakdown provided at paragraph 15 of the affidavit, the Opponent’s total sales of SPARITUAL products in Canada amounted approximately to US \$843,325 from 2005 to 2008. Mr. Pink files copies of invoices for SPARITUAL products sold by the Opponent for the years 2005 to 2008 [par. 16, Exhibit “6”]. I note that SPARITUAL® is prominently displayed at the top left corner of the invoices addressed to the Opponent’s distributors. Mr. Pink also files a report “showing details” of SPARITUAL products sold in Canada by the Opponent for the years 2005 to 2008 [par. 17, Exhibit “7”].

[15] Mr. Pink deposes that the Opponent’s expenditures for the promotion and advertising of the SPARITUAL product line in Canada were between \$25,000 and \$40,000 annually for the years 2005 to 2008 [par. 18]. He files “examples of print advertising” by the Opponent in catalogues of its Canadian distributors [par. 19, Exhibit “8”]. Mr. Pink states that the SPARITUAL products were featured in magazines distributed in Canada in September, October and December 2008; he files photocopies of the *W*, *Instyle* and *Lucky* magazine covers “with the feature advertisements [...] inlayed on the cover” [par. 20, Exhibit “9”]. Mr. Pink also files “a sample of promotional materials” provided to the Opponent’s distributors and their customers [par. 21, Exhibit “10”]. I note that the advertisements and promotional materials filed by Mr. Pink show among others the trade-mark SPARITUAL on packaging, products or products displays.

[16] Mr. Pink became aware of the application for the Mark in December 2007 when the Opponent was informed by its U.S. counsel that it had been cited by CIPO against the Opponent’s application No. 1,356,895 [pars. 22-23, Exhibit “11”].

[17] According to Mr. Pink’s statements, in May 2008 the International Spa Association (ISA) sent an email to an employee of the Opponent mistaking the membership of the Applicant for the membership of the Opponent [par. 24, Exhibits “12” and “13”]. On July 9, 2008, the Opponent received an email from ISA advising the Opponent, as a matter of courtesy, that “a new member joined the association with the company name The Spa Ritual” [par. 25, Exhibit “14”].

Following this email from ISA, the Opponent's U.S. counsel sent a letter to the Applicant's counsel on July 24, 2008 [par. 26, Exhibit "15"].

#### Affidavit of Kellee Martin

[18] Ms. Martin, who identifies herself as a trade-mark agent assistant, is an employee of the trade-marks agent firm representing the Opponent.

[19] Ms. Martin introduces evidence relating to the circulation in Canada of the magazines *W* and *Instyle* as well as of the magazines *Exceptionail* and *Salon*. I note that specimens of advertising in these two latter magazines are found in "Exhibit "8" to the first Pink affidavit. Ms. Martin has obtained the circulation figures of these magazines by accessing the websites of the publishers and contacting them directly, when necessary [pars. 5-9, Exhibits "A" to "N"]. I agree with the Applicant that since the figures provided by Ms. Martin are based on data collected and obtained from a third party, they constitute inadmissible hearsay evidence. Further no reasons were given as to why a person having direct knowledge could not have provided the evidence [see *R. v. Khan* [1990] 2 S.C.R. 531].

[20] In addition, Ms. Martin files two Google Alerts of February 10 and February 12, 2009 as well as printouts of the articles reported therein that she received from Ms. Shel Pink, the founder of the Opponent [pars. 10-11, Exhibits "P" and "Q"]. Ms. Martin states that the article published in the *Calgary Herald* refers to the Applicant [Exhibit "Q"]. She goes on to state that Ms. Pink "registered 'Sparitual' with 'Google News Alerts' as a mean to be alerted to any publicity or media attention her company or products may receive and which she may not otherwise be aware" [par. 11]. The evidence introduced by Ms. Martin as regards to the registration of "Sparitual" with Google and the Google News Alerts received from Ms. Pink constitutes inadmissible hearsay evidence.

#### Applicant's Evidence

[21] Pursuant to r. 42 of the Regulations, the Applicant filed the affidavits of Caroline D'Amours, sworn June 5, 2009, and Sandra Hood, sworn June 15, 2009. The Opponent did not cross-examine either affiant.

### Affidavit of Caroline D'Amours

[22] Ms. D'Amours, who identifies herself as a trade-mark-research-analyst, is an employee of Thompson CompuMark (CompuMark), an intellectual property research firm.

[23] Ms. D'Amours files as Exhibit CD-1 to her affidavit the results of a CompuMark Trade-Mark Dilution (How Common) Search that she conducted in June 2009 to determine “whether the words SPA RITUAL were common words for ‘spa-related wares and services’ in Canada” [par. 3]. Ms. D'Amours consulted selected Canadian common law sources, Canadian official business names registers, the Canadian trade-marks register (via CompuMark's proprietary database) and domain names (via CompuMark's proprietary database) [pars. 4-6].

[24] Finally, Ms. D'Amours files as Exhibit CD-2 to her affidavit the results of “in-use investigations” conducted with respect to some company names and domain names chosen by the Applicant's trade-mark agent [par. 8].

### Affidavit of Sandra Hood

[25] Ms. Hood, a trade-mark agent with O'Brien TM Services Inc., introduces into evidence the results of online searches that she conducted on June 12, 2009 pursuant to instructions received from the trade-mark agent for the Applicant.

[26] More particularly, Ms. Hood identifies the addresses of eight websites that she searched “using the Google Canada search engine, for the word combination ‘spa ritual’” [par. 2]. After viewing the website pages, she printed “the relevant pages” as well as the home or main page [par. 3, Exhibit “A”].

[27] In addition, Ms. Hood searched the Internet Archive or WayBack Machine “to locate archived versions of the web pages [she] had already viewed and which pre-dated February 19, 2008 and displayed the word combination ‘spa ritual’” [par. 4]. She files pages from the archived versions of the website *www.whiteoakresort.com* dated from July 8 and October 30, 2007 [Exhibit “B”].

### Analysis of the Grounds of Opposition

[28] At the outset, I dismiss the ground of opposition based upon non-conformity to s. 30(i) of the Act since, as pleaded, it does not raise a proper ground of opposition. Section 30(i) of the Act only requires that an applicant declares itself satisfied that it is entitled to use the applied-for mark. Such statement is included in the application for the Mark. Further, the mere knowledge of an opponent's rights, at the filing date of the application, is not sufficient to succeed under a s. 30(i) ground of opposition. Section 30(i) of the Act can sometimes be the basis of a ground of opposition in specific cases, such as where fraud by the applicant is alleged and established or if specific statutory provisions prevent the registration of the mark applied for [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) and *Canada Post Corporation v. Registrar of Trade-marks* (1991), 40 C.P.R. (3d) 221 (F.C.T.D.)].

#### Non-entitlement pursuant to s. 16(3)(a) of the Act

[29] In support of the ground of opposition pleaded pursuant to s. 16(3)(a) of the Act, the Opponent alleges that the Applicant is not the person entitled to register the Mark, in that as of the filing date of the application, the Mark "was confusing with the [O]pponent's trade-mark SPARITUAL which had been the subject of prior use and making known in Canada as set forth" in the statement of opposition.

[30] A plain reading of the Opponent's pleading must lead to the conclusion that the non-entitlement ground of opposition is based solely upon prior use and making known of SPARITUAL as its trade-mark. In other words, the Opponent did not rely upon the prior use or making known of SPARITUAL as a trade-name in support of a non-entitlement ground of opposition.

[31] Despite the onus resting on the Applicant, the Opponent has the initial burden of proving that its alleged trade-mark was used or had been made known in Canada prior to the filing date of the application for the Mark and had not been abandoned at the date of advertisement of such application [s. 16(5) of the Act].

[32] I am satisfied that the Opponent has discharged its evidentiary burden of showing the prior use and non-abandonment of its trade-mark SPARITUAL in Canada in association with nail and body care products. Thus, the Applicant has the burden to convince the Registrar, on a balance of probabilities, that there was no reasonable likelihood of confusion between the Mark and the trade-mark SPARITUAL as of May 31, 2007.

[33] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[34] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; b) the length of time the trade-marks have been in use; c) the nature of the wares, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [see *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.); *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée et al.* (2006), 49 C.P.R. (4th) 401 (S.C.C.); and *Masterpiece Inc. v. Alavida Lifestyles Inc.* 2011 SCC 27 for a thorough discussion of the general principles that govern the test for confusion].

[35] As a preliminary matter, in view of submissions made by the Applicant in its written argument, I wish to note that in assessing the surrounding circumstances of this case, I am not affording any significance to the fact that the Mark was indexed by CIPO under “vortices, rotary movement, tornadoes”.

*The inherent distinctiveness of the trade-marks and the extent to which they have become known*

[36] In its written argument, the Applicant submits that a consideration of the inherent distinctiveness favours its position. However, as rightly pointed out by the Opponent at the oral



hearing, the Applicant has seemingly conceded that “spa ritual” is descriptive of the Services, as shown by the following excerpt of its written argument:

57. [...] The word “RITUAL” is a noun meaning “a procedure regularly followed” (The Canadian Oxford Paperback Dictionary, 2000). The word combination “spa ritual” would therefore be interpreted by the general public as referring to a procedure which occurs in a spa environment. [...]

[37] While the aforementioned argument was made by the Applicant in support of its contention as to the weakness of the Opponent’s mark, it obviously also applies to the Mark, and even more so when considering the Services. That being said, in view of its design feature, the Mark possesses some measure of inherent distinctiveness.

[38] When considered in association with nail and body care products, I find it reasonable to conclude that the Opponent’s mark would be perceived as a combination of the words “spa” and “ritual”. Even though the Opponent’s mark cannot be said to describe its wares, it is suggestive of products used in a spa environment and hence the Opponent’s mark possesses a limited degree of inherent distinctiveness.

[39] The strength of a trade-mark may be increased by means of it becoming known through promotion or use. In the present case, only the Opponent has provided evidence of the extent to which its mark has become known in Canada. Having considered the Opponent’s evidence, including the annual Canadian sales and advertising expenses provided in the first Pink affidavit, I accept that the trade-mark SPARITUAL had become known to some extent in Canada at the material date.

[40] In view of the foregoing, the overall consideration of the inherent distinctiveness of the parties’ marks and the extent to which they have become known favours the Opponent.

*The length of time each trade-mark has been in use*

[41] As the application for the Mark was filed on the basis of proposed use, this factor clearly favours the Opponent whose evidence establishes use of its mark SPARITUAL in Canada since January 2005.

*The nature of the wares, services or business; and the nature of the trade*

[42] It is the statement of services in the application that must be taken into consideration when assessing the factors set forth at s. 6(5)(c) and (d) of the Act.

[43] In its written argument, the Applicant has summarized the Services as the operation of spas, wellness centres and the provision of services ordinarily found in such establishments and related educational services. Hence, in the absence of evidence to the contrary, for the purposes of assessing confusion, I find it reasonable to conclude that the services “beauty and health care services, namely massage therapy, facials, aromatherapy, manicures, pedicures, body treatments, reflexology, yoga and pilates, laser skin resurfacing, chemical skin peels, micro-dermabrasion, skin photo rejuvenation, the application of topical and injectable muscle relaxants and wrinkle removers and injectable cosmetic fillers, hair dressing, the application of make-up and cosmetics, nail shaping and conditioning, the application and removal of nail polishes, skin treatments, skin toning, the application of masques and conditioners to the skin, the treatment of corns and calluses, and exfoliation treatments; education services namely, fitness and wellness programs and seminar” identified in the application are related to the services “operation of a spa and wellness centre” also identified in the application.

[44] Since the Opponent’s mark is associated with nail and body care products, I disagree with the Opponent’s submissions that the nature of the parties’ wares and services and the nature of the parties’ trade are identical. In addition, there is no evidence of record to support the Opponent’s submission that “it is in fact common for spas to carry their own product line of beauty products”. Still, the Opponent’s evidence establishes that its Canadian distributors sell the SPARITUAL products to spas. In fact, the Services include the provision of services for nail and skin care. Also, at the oral hearing, the Applicant ultimately acknowledged that beauty products, such as nail care products, are used by spas.

[45] In the end, given the evidence of record, I conclude to an overlap between the Services and the Opponent’s wares and the nature of the parties’ trade.

*The degree of resemblance between the marks in appearance or sound or in the ideas suggested by them*

[46] As recently reiterated by the Supreme Court of Canada in *Masterpiece*, this factor “is often likely to have the greatest effect on the confusion analysis”. It is trite law that when assessing the degree of resemblance between two marks they are to be looked at in their entirety and not dissected [see *British Drug Houses Ltd. v. Battle Pharmaceuticals* (1944), 4 C.P.R. 48 at 56 (Can. Ex. Ct.), affirmed (1946), 5 C.P.R. 71 (S.C.C.)].

[47] In its written argument, the Applicant contends that the consideration of this factor favours its position. However, the Applicant did not develop its contention in its written argument. In oral argument, the Applicant pointed out the large size of the word “ritual” and the concentric circle found in the Mark, seemingly arguing that these features are sufficient to distinguish the Mark from the Opponent’s mark. Although I recognize that there are differences between the trade-marks at issue when viewed, I find that there is still a fair degree of resemblance between them when considered in their entirety. Further, since the article “the” is not distinctive, the marks are strikingly similar when sounded and suggest the same idea.

*Additional circumstances*

[48] The parties’ evidence and submissions advance the state of the Canadian marketplace and actual confusion as additional surrounding circumstances.

*State of the Canadian marketplace*

[49] The Applicant submits that its evidence shows common use of the word combination “spa ritual” by third parties for trade-names and trade-marks associated with spa services and so it supports a finding of no confusion between the trade-marks at issue in the present proceeding.

[50] Aside from the fact that both affiants conducted their searches in June of 2009, which is more than two years after the relevant date, I find that the evidence is far from establishing common use of the word combination “spa ritual” in Canada in association with the wares and services at issue.

[51] The search of the trade-marks register conducted by Ms. D'Amours with respect to the combination word "spa ritual" has yielded only the application for the Mark and the application for the Opponent's mark.

[52] Most of the entries disclosed by the searches of Canadian common law sources and official business names conducted by Ms. D'Amours are for company names involving the word "spa" in combination with words other than "ritual". This is arguably not surprising given the descriptive connotation attaching to the word "spa". That being said, in most instances, the searches give no indication of what the company names are used for.

[53] The results of the searches of Canadian common law sources and official business names do reveal a number of entries for names containing the words "spa" and "ritual" in combination. However, there are a few instances where a name appears more than once in the results. Further, as pointed out by the Opponent, the word "spa" and "ritual" are not immediately one after the other in all instances. In fact, it appears to me that the names SPA RITUALS, SPA-RITUAL-SALON, SPA RITUAL LIMITED PARTNERSHIP and SPARITUAL (under Distribution France Lécuyer Inc.) are the only entries with the words "spa" and "ritual" one after the other. As these four entries have been identified for "in-use-investigations", I shall turn to the results of these investigations.

[54] In addition to the hearsay issues attached to the results of the investigations, the reports for SPA RITUALS and SPA-RITUAL-SALON each concludes as follows: "We were unable to determine whether the company name [...] is in use." The investigation for SPA RITUAL LIMITED PARTNERSHIP was restricted to providing a report from the Alberta Corporate Registration System, which by itself does not constitute evidence of use of that name. Interestingly, the investigation report for SPARITUAL refers to a telephone conversation with a person from Distribution France Lécuyer Inc., which the Opponent has identified as one of its Canadian distributors. Although the investigation report does not constitute reliable evidence of use of the mark SPARITUAL, it does corroborate the evidence introduced by Mr. Pink as to the sales of SPARITUAL products by this Canadian distributor.

[55] Besides the four names discussed above, I have noted four names with the words "spa" and "ritual" - though not one after the other - with an indication that their business activities

would be “beauty salons”, “health spas” and the like. However, there is no indication that any of these four businesses were in activity at the relevant date or, for that matter, at any time whatsoever. Furthermore, the formation or registration of a company under a particular name by itself does not constitute use of that name as a trade-mark or a trade-name.

[56] As for the domain name search, it reveals a fairly large number of entries containing the words “spa” and “ritual” side by side or separated from each other. However, the search gives no indication of what those domain names are used for. Even if it seems reasonable to conclude that some of those names relate to a spa business, there is no indication that any has been actively used in Canada. To the extent that “in-use-investigations” were conducted for the domain names SPARITUALSKINCARE.CA, SPARITUAL.CA, THESPARITUAL.CA and SPARITUALS.CA, I note that each investigation report states: “We were unable to determine whether the domain name [...] is in use.”

[57] Insofar as the Hood affidavit is concerned, suffice it to say that it introduces evidence subsequent to the material date. Exhibit “A” establishes at the utmost that the websites were in existence at the date they were accessed by the affiant, namely June 12, 2009 whereas Exhibit “B” establishes at the utmost that the website pages were in existence on July 8 and October 30, 2007 respectively.

[58] Having regard to the foregoing, the state of the Canadian marketplace is not a relevant surrounding circumstance in the present proceeding.

#### *Actual confusion*

[59] In its written argument, the Opponent submitted that the email of May 2008 from ISA, mistaking the membership of the Applicant for the membership of the Opponent, establishes actual confusion in the marketplace. In oral argument, the Applicant submitted that aside from showing an instance of confusion that occurred outside Canada and subsequently to the material date, the email shows an instance of confusion between the parties’ trade-names, not their trade-marks. I find it pointless to discuss the merit of the parties’ submissions as I find it unnecessary to consider that additional circumstance to find in favour of the Opponent.

*Conclusion on the likelihood of confusion*

[60] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having regard to the foregoing, I arrive at the conclusion that the Applicant has not discharged its burden of establishing, on a balance of probabilities, that the Mark was not confusing with the Opponent's trade-mark SPARITUAL at the filing date of the application.

[61] In view of the above, the ground of opposition based upon non-entitlement pursuant to s. 16(3)(a) of the Act is successful.

Non-distinctiveness

[62] The Opponent has pleaded that the Mark neither actually distinguishes nor is adapted to distinguish the Services. Deciding on the sufficiency of the pleading by considering both the evidence and the statement of opposition [see *Novopharm Ltd. v. Astrazeneca et al* (2002), 21 C.P.R. (4th) 289 (F.C.A.)], I find that it could at least be inferred that the Opponent was alleging that the Mark is not distinctive because it is confusing with the trade-mark SPARITUAL of the Opponent.

[63] In order to meet its initial burden with respect to this ground of opposition, the Opponent has to show that its trade-mark SPARITUAL had become known sufficiently as of the filing date of the statement of opposition to negate the distinctiveness of the Mark [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.); *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.); *Bojangles' International, LLC and Bojangles Restaurants, Inc. v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.)].

[64] I am satisfied that the Opponent has discharged its evidentiary burden under this ground of opposition. Thus, the Applicant has the burden to convince the Registrar, on a balance of probabilities, that there was no reasonable likelihood of confusion between the Mark and the trade-mark SPARITUAL as of February 19, 2008.

[65] The relevant date under this ground of opposition does not substantially affect my prior analysis of each of the s. 6(5) factors. In fact, when considering the extent to which its mark has

become known and the length of time it has been in use, the Opponent's case may even be stronger under this ground of opposition. Also, while the pages printed from the July 8 and October 30, 2007 versions of the website *www.whiteoakresort.com* are relevant, they remain of no assistance to the Applicant's case. Suffice it to say that these website pages introduced into evidence by Ms. Hood do not constitute reliable evidence of use of the word combination "spa ritual" as a trade-mark or trade-name by the owner of the website. I would add that I find it not without merit for the Opponent to argue that they show the use of "spa ritual" in a descriptive sense.

[66] In view of the above, I find that the Applicant has not discharged its onus to establish, on a balance of probabilities, that the Mark was not confusing with the Opponent's trade-mark SPARITUAL as of February 19, 2008. Accordingly, the ground of opposition based upon non-distinctiveness is successful.

#### Disposition

[67] Having regard to the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office