

**IN THE MATTER OF AN OPPOSITION  
by Empire Comfort Systems, Inc. to  
application No. 1,166,534 for the trade-  
mark BROIL KING Design filed by  
Onward Multi-Corp. Inc.**

[1] On January 31, 2003, Onward Multi-Corp. Inc. (the Applicant) filed an application to register the trade-mark BROIL KING Design (the Mark), as illustrated hereafter, on the basis of use in Canada since at least as early as October 1980.

## **Broil King**

[2] In response to an Examiner's report, a revised application was filed on July 23, 2004 to amend the statement of wares to read "gas barbecues and replacement parts for barbecues". The right to the exclusive use of the word BROIL has been disclaimed apart from the Mark.

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 13, 2004.

[4] On December 13, 2004, Empire Comfort Systems, Inc. (the Opponent) filed a statement of opposition. Generally, the grounds of opposition, which are set out at paragraphs 3(a) through 3(d) of the statement of opposition, are based upon non-compliance with the requirements of s. 30 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act), non-registrability pursuant to s. 12(1)(b) of the Act, non-entitlement pursuant to s. 16 of the Act, and non-distinctiveness. I reproduce paragraph 2 of the statement of opposition, which is a preamble to the grounds of opposition:

2. The Opponent is the owner of the trade-mark subject of the following application:

- (i) Application No. 1,112,366 covering a trade-mark consisting of a design including the words **BROILMASTER** for use in association with "gas barbecues grills". Such trade-mark

application was filed on August 10, 2001 based on use in Canada since as early as 1996.

[5] I wish to mention that the aforementioned application filed by the Opponent was opposed by the Applicant. A decision has recently been issued with respect to the opposition, refusing application No. 1,112,366 for the trade-mark BROILMASTER on the basis of a likelihood of confusion with the Applicant's trade-mark BROIL KING of registration No. TMA257,283. However, the refusal of application No. 1,112,366 has no consequence in the present proceeding. Further, my remarks and findings in the present decision are expressed solely on the basis of the evidence filed in the present proceeding and within the context of the case before me.

[6] The Applicant filed and served a counter statement on February 11, 2005.

[7] The Opponent's evidence pursuant to Rule 41 of the *Trade-marks Regulations* (the Regulations) consists of affidavits of John A. Hart sworn on June 29, 2005, with Exhibits A through D (the Hart affidavit), and of Deborah A. Eatherley sworn on June 21, 2005, with Exhibits 1 through 59 (the Eatherley affidavit). The Applicant had obtained an order for the cross-examinations of both affiants, but only proceeded to cross-examine Mr. Hart. The cross-examination transcript was filed on June 2, 2006. The cross-examination was conducted on the affidavit filed in the present proceeding and on another affidavit of Mr. Hart filed in the opposition to application No. 1,112,366. While the two affidavits were not filed in the same context, the cross-examination transcript reflects that they were identical.

[8] The Applicant's evidence pursuant to Rule 42 of the Regulations consists of the affidavit of Theodore A. Witzel sworn on September 2, 2006, with Exhibits A through E (the Witzel affidavit). Mr. Witzel was cross-examined by the Opponent. The cross-examination transcript and replies to undertakings were filed on November 6, 2007. The cross-examination of Mr. Witzel was conducted along with his cross-examination on a separate affidavit filed in the opposition to application No. 1,112,366. I recognize that it is a common practice for parties to conduct cross-examination on affidavits sworn by the

same witness in related opposition proceeding. However, in addition to the fact that Mr. Witzel's affidavits were not filed in the same context, the cross-examination transcript suggests that they were not identical. In fact, the cross-examination transcript reflects 178 questions with only Q168 through Q178 directed to the affidavit filed in the opposition to application No. 1,112,366. Clearly, the cross-examination focused on the affidavit filed in the present proceeding with Q168 through Q178 pertaining to an affidavit that is not part of the record in the present proceeding.

[9] Both parties filed written arguments. It appears to me that certain of the parties' submissions relate to evidence that has not been made of record in the present proceeding, but rather in the opposition proceeding to application No. 1,112,366. In any event, I shall consider the parties' arguments insofar as they are relevant to the evidence of record in the present proceeding.

[10] Finally, both parties were represented at an oral hearing where the agent for the Opponent advised that the latter would no longer be relying upon the ground of opposition based upon s. 38(2)(c) of the Act. Hence, the non-entitlement ground of opposition set out at paragraph 3(c) of the statement of opposition was withdrawn at the oral hearing and need not be considered.

### **PRELIMINARY ISSUES**

[11] There are two issues arising from steps taken by each party within days before the oral hearing, namely a request from the Opponent for leave to file further evidence pursuant to Rule 44 of the Regulations, and the filing of a proposed revised application by the Applicant. Clearly, these are the results of the Applicant's evidence being to the effect that the Mark would have been first used in Canada by Jacuzzi Inc., its predecessor in title. Although discussed at the commencement of the oral hearing, both requests remain outstanding and must be dealt with in my decision.

#### **Opponent's request for leave to file further evidence**

[12] On October 15, 2009, five days before the hearing, the Opponent requested leave to file certified copies of the original application and of the amended application of July 23, 2004. The Opponent indicated that while the certified copies had been ordered, they had yet to be received for filing with the Registrar. The Opponent submitted that the proposed evidence was important since it discloses that the Applicant had failed to name its predecessor in title, which “may well be fatal to the application” pursuant to s. 30(b) of the Act. The Applicant objected to the Opponent’s request for leave.

[13] When a party seeks leave to file further evidence within days prior to an oral hearing, it is likely that the Registrar will not have been in a position to deal with the request prior to the oral hearing, especially if the original of the proposed evidence does not accompany the request. In any event, as I indicated at the oral hearing, I find it unnecessary to consider the Opponent’s request as it seems to be superfluous. Indeed, I consider it both relevant and necessary to review the content of the application of record when deciding the merit of the opposition and in doing so I can exercise my discretion to check the Registrar’s record. This leads me to consider the acceptability of the amended application filed by the Applicant on the eve of the oral hearing.

#### **Amended application**

[14] The Applicant seeks to amend the application to identify Jacuzzi Inc. as a predecessor in title having used the Mark. At the oral hearing, the Opponent objected to the proposed amendment. After the oral hearing, written submissions were requested from both parties as to whether the proposed amendment was contrary to the provisions of Rules 31 and 32 of the Regulations. I confirm that submissions were received from both the Applicant and the Opponent.

[15] Summarizing the parties’ submissions to the extent that they relate to Rules 31 and 32 of the Regulations, I note that the Applicant contends that the proposed amendment is not prohibited by these rules and that there is no legal authority to refuse the amendment. In contrast, the Opponent contends that the proposed amendment is contrary to the legislative intent of Rules 32(b), (c) and (d) “prohibiting changes to the

use claim after the date of advertisement”. In particular, the Opponent contends that the proposed amendment is contrary to Rule 32(b) pursuant to which no application for the registration of a trade-mark may be amended after it has been advertised in the *Trade-marks Journal* “to change...the date of first use or making known in Canada of the trade-mark”. To explain the Opponent’s reasoning, suffice it to reproduce the following excerpt of its written submissions:

Put another way, the Applicant originally claimed use by itself as of October 1980. Now amending the application to claim that a predecessor in title has used the mark since October 1980, by implication, shifts the date of first use by the Applicant to a later date. This is also not permitted pursuant to Rule 32(b) of the *Regulations*.

[16] Pursuant to Rule 30 of the Regulations, an application for the registration of a trade-mark may be amended either before or after the application is advertised pursuant to s. 37(1) of the Act, except as provided by Rules 31 and 32 of the Regulations. Rule 31 concerns amendments that are never permissible whereas Rule 32 concerns amendments that are not permissible after an application has been advertised.

[17] I disagree with the Opponent’s contention that the proposed amendment is prohibited by Rule 32(b). Certainly, the proposed amendment changes the claim to cover the period of use by the predecessor in title. However, the proposed amendment does not change the date of first use claimed in the application. I would add that if the Applicant’s predecessor in title had been named in the application prior to advertisement of the Mark, there would have been no reference to the predecessor in title in the advertisement. Further, there is nothing in the Act or related Regulations prohibiting amendments to an application during opposition proceedings, or even after allowance up to registration, providing that the amendment is not otherwise prohibited by sub-paragraphs (a) to (e) of Rule 31 or sub-paragraphs (a) to (e) of Rule 32. If Parliament had intended to prohibit an amendment to an application which is the subject of an opposition, surely it would have prohibited all amendments to an application after advertisement or while an application is the subject of an opposition; Parliament did not do so.

[18] In my view, the amendment to the application to claim use by the Applicant's predecessor in title, Jacuzzi Inc., does not fall into any of the prohibitions specifically set out in Rule 31 or Rule 32. Hence, I agree with the Applicant that the proposed amendment is not prohibited by Rules 31 and 32 of the Regulations and I see no other provisions of the Act or Regulations that would otherwise prevent such an amendment.

[19] In view of the above, on behalf of the Registrar, I accept the revised application filed by the Applicant on October 19, 2009.

### **MATERIAL DATES**

[20] The material dates that apply to the grounds of opposition are as follows:

- s. 38(2)(a)/s. 30 – the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.)];
- s. 38(2)(b)/s. 12(1)(b) – the filing date of the application [see *Fiesta Barbeques Limited v. General Housewares Corp.* (2003), 28 C.P.R. (4th) 60 (F.C.); *Shell Canada Limited v. P.T. Sari Incofood Corporation* (2005), 41 C.P.R. (4th) 250 (F.C.)];
- s. 38(2)(d)/non-distinctiveness – the filing date of the statement of opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.)].

### **ONUS**

[21] The Applicant bears the legal onus of establishing, on 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 Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.)].

[22] I shall review the evidence of record before analysing the grounds of opposition. I will refer to parts of the cross-examinations of Messrs. Hart and Witzel insofar as they are relevant to the evidence and the parties' arguments in the present proceeding.

## **OPPONENT'S EVIDENCE**

### **The Hart Affidavit and Cross-Examination**

[23] Mr. Hart has been the Chairman of the Opponent since 2004; prior to that, he was the Opponent's President from 1989 to 2004 and Vice President from 1985 to 1989.

[24] Mr. Hart explains that the Opponent's headquarters are located in Belleville, Illinois. The Opponent first started manufacturing barbecues in 1999, "with a large, high-end stainless steel grill". These barbecues retail for around \$6,000 [Q23-Q27]. The Opponent sells barbecues and accessories to Diversco Supply, Inc. (Diversco), its distributor in Canada, who in turn sells them to different retailers [paragraph 3].

[25] Mr. Hart states that the Opponent acquired the trade-mark BROILMASTER from Martin Industries, Inc. (Martin Industries) on November 30, 2001 [paragraph 4]. In cross-examination, Mr. Hart explains that the Opponent had purchased "the inventory, the brand name, the tooling and other assets all related to the Broilmaster division of Martin Industries, Inc." [Q31]. Mr. Hart states that Martin Industries' business records, including those relating to the sales of BROILMASTER barbecues prior to 2001, are not available to the Opponent [paragraph 5]; both Martin Industries and its predecessor, Lock Stove, are bankrupt [Q40].

[26] Following the acquisition of 2001, the Opponent began selling barbecues bearing the trade-mark BROILMASTER in Canada in 2003 [paragraph 6, Q50]. At paragraph 6 of his affidavit, Mr. Hart states that Canadian retail sale figures for BROILMASTER barbecues for 2003 and 2004 were "significant", but he goes on to state: "I do not wish to disclose exact sale figures as I am concerned that this information could be of assistance to Empire's [Opponent's] competitors."

[27] The following are appended as exhibits to the Hart affidavit:

- copies of sample invoices relating to the sale of BROILMASTER barbecues in 2003 and 2004 [paragraph 7, Exhibit A]. I note that the Opponent issued the invoices to Diversco. There is no reference to the trade-mark BROILMASTER on the invoices. However, I consider it reasonable to accept the invoices as corroborating the sales of barbecues associated with the trade-mark BROILMASTER in Canada by the Opponent, particularly since the Applicant did not cross-examine Mr. Hart on the invoices;
- sample brochures which contain photographs of barbecues bearing the trade-mark BROILMASTER representative of those sold in Canada in 2003, 2004 and 2005. The brochures are available to customers at retail locations [paragraphs 8-9, Exhibit B]. I note that the trade-mark BROILMASTER is clearly marked on the barbecues shown in the brochures;
- copy of a newspaper ad published in the *Leamington Post* in June 2003 [paragraph 11, Exhibit C];
- excerpts of the Opponent's website "www.broilmaster.com" [paragraph 12, Exhibit D]. I note that the excerpts, which were apparently printed out on May 30, 2005, provide a list of the BROILMASTER dealers (located in the provinces of Prince Edward Island and Ontario) and pictures of different barbecue models.

[28] In Canada, the Opponent advertises the barbecues associated with the trade-mark BROILMASTER through newspaper advertisement, distribution of brochures at retail locations, and on its website [paragraphs 10 and 12]. The Opponent has tracked 5,590 hits from Canada on its website since January 2002 [paragraph 13]. In relation to advertising expenditures, Mr. Hart states that the Opponent spent over US\$11,000 and US\$16,000 on advertising BROILMASTER barbecues for the years 2003 and 2004 respectively in Canada [paragraph 14]. Diversco has also spent nearly US\$27,000 in advertising BROILMASTER grills for the years 2003 and 2004 mainly through newspaper ads, through a co-op advertising program with the Opponent [paragraph 15, Q94]. Mr. Hart goes on to state that the Opponent spent approximately US\$125,000 each



year in advertising the BROILMASTER grills in the United States, mainly through newspapers [paragraph 16]. Mr. Hart states at paragraph 17 of his affidavit that he is personally aware that Canadians have been exposed to BROILMASTER advertising through spill-over advertising from the United States to Canada. However, in cross-examination, Mr. Hart recognizes that he does not have any actual knowledge of the basis for the statement at paragraph 17 of his affidavit [Q148-Q151]. Thus, I am not affording any weight to Mr. Hart's statement about spill-over advertising in Canada.

[29] In cross-examination, Mr. Hart indicates that he saw BROILMASTER grills in the factory and warehouse of B.D. Wait in 1983 [Q61-Q64]. In view of the Opponent's submissions, it is my understanding that Mr. Hart's reference to B.D. Wait is a reference to B.D. Wait Co. Limited as a predecessor in title of the Opponent with respect to the trade-mark BROILMASTER.

[30] Mr. Hart testifies that he is aware of another manufacturer of barbecues in North America, WC Bradley, selling barbecues under the brand CHAR-BROIL [Q140].

[31] In concluding, I wish to remark that during his cross-examination Mr. Hart opined on the dissimilarity between the trade-mark BROILMASTER and the registered trade-marks BROIL KING, BROIL QUEEN and BROIL-MATE of the Applicant. Most probably, the fact that Mr. Hart was also cross-examined in the context of the opposition to the Opponent's application No. 1,112,366 brought about his testimony.

### **The Eatherley Affidavit**

[32] Ms. Eatherley is a law clerk with the Opponent's trade-mark agent firm. She introduces into evidence information that she obtained from the Canadian Intellectual Property Office (CIPO), from various searches conducted on the Internet, from CIPO's Trade-marks Database, and from the database of the United States Patent and Trademark Office (USPTO).

[33] Ms. Eatherley provides copies of CIPO's file histories for the Applicant's registered trade-marks BROIL QUEEN, BROIL KING and BROIL-MATE [Exhibits 1 to 3]. She also provides copies of CIPO's file histories of the trade-mark registrations for WAIT BROIL-MATE, WAIT BROILMASTER and BROILMASTER [Exhibits 4 to 6]. I note that these three registrations, originally owned B.D. Wait Co. Limited, have either been cancelled pursuant to s. 4(1)(b) of the Act or expunged pursuant to s. 45 of the Act.

[34] Ms. Eatherley also files copies of pages (printed on May 31, 2005) of the website "www.broilking.com" of BroilKing Corporation, which is a manufacturer of household items [Exhibits 7 and 8]. The website provides BroilKing Corporation's Canadian representative contact information for products availability in Canada. The following notice appears on pages of the website: "We are not the Broil King gas grill/barbecue company. To contact them, click here." Ms. Eatherley also submits printouts of the website "www.allbrands.com" that document the results of a search she conducted on June 1, 2005 regarding the online purchase of a BroilKing convection oven from Canada [Exhibits 9 to 15]. I note that Ms. Eatherley was able to obtain the total price of the product including the shipping cost to a Canadian mailing address using a set of postal code. In fact, she states at paragraph 11: "It is clear to me that residents of Canada, and 230 other countries, are able to order and obtain BroilKing products from the ALLBRAND.COM web site."

[35] Furthermore, Ms. Eatherley includes printouts of prior versions of both websites "www.allbrands.com" [Exhibits 16 to 19] and "www.broilking.com" [Exhibits 20 to 25] as archived by the Way Back Machine at "www.archive.org". Regarding "www.allbrands.com", Ms. Eatherley conducted a search for BroilKing products and found the brand referenced as early as February 2003 under "Kitchen Appliances" [Exhibit 18]. She includes printouts explaining the website's international order and shipping policies [Exhibit 19]. Regarding "www.broilking.com", Ms. Eatherley provides a printout of the website in 1997 with the option to request information on international shipping by email [Exhibit 23]. She also provides a copy of the webpage "About

BroilKing” as it appeared in 2000, in which the company stated that its products were available in the United States as well as Canada [Exhibit 26].

[36] Appended to her affidavit are printouts of third parties applications/registrations that Ms. Eatherley obtained from CIPO’s Trade-marks Database on June 9, 2005. I remark that these are for one trade-mark that contains the word “broyl” [Exhibit 27], five trade-marks that contain the word “broil” [Exhibits 28 to 32] and for ten trade-marks that contain the word “king” [Exhibits 33 to 42].

[37] Ms. Eatherley files the results of her search of the USPTO’s database for trade-marks that contain “broil” and “mast”, as well as “broil” and “king” and printouts of the corresponding six registrations [Exhibits 43 to 49].

[38] In addition, Ms. Eatherley provides printouts of June 2, 2005 of the website “www.broilmaster.com” which include a list of dealers in Canada [Exhibit 50], and a prior version of the website, in particular that of December 1998 archived by the Way Back Machine at “www.archive.org” [Exhibits 51 to 53]. The printouts of the archived website [Exhibit 53] refer to the manufacture and marketing of BROILMASTER barbecues. There is an indication on the archived version that “Broilmaster is one of Martin Industries’ most recognized brand names”. The archived version also indicates that the company’s products were sold in Canada.

[39] Ms. Eatherley provides printouts of June 1, 2005 of Diversco’s website at “www.diverscosupply.com” where the trade-mark BROILMASTER can be seen along with many other brands [Exhibit 54]; printouts of June 9, 2005 of the Char-Broil website at “www.charbroil.com” where a list of retailers including those located in Canada is provided along with a link to the official distributor GRILL LOVER’s at “www.grilllovers.com” [Exhibits 55 to 57]. Finally, she files printouts of June 13, 2005 of the GRILL LOVER’S website where customers from United States and Canada can order replacement parts for Char-Broil barbecues [Exhibits 58 and 59].

## **APPLICANT'S EVIDENCE**

### **The Witzel Affidavit and Cross-Examination**

[40] I understand Mr. Witzel's references to "the BROIL KING and Design mark" in his affidavit and to "Broil King with the flame design" in cross-examination as references to the Mark.

[41] Mr. Witzel has been President of the Applicant since 1995 [Q6]. He has been with the Applicant since 1975 [Q8].

[42] In cross-examination, Mr. Witzel testifies that the Applicant is in the business of manufacturing, importing and exporting barbecues and barbecues accessories [Q21-Q23, Q31-Q33]. The Applicant exports barbecues to the United States [Q35]. Information such as the list of dealers is available on the Applicant's website; it is not possible to purchase barbecues on the website [Q36-Q38].

[43] Mr. Witzel states that the Applicant owns the registrations for the trade-marks BROIL KING (TMA257,283), BROIL QUEEN (TMA257,282) and BROIL-MATE (TMA332,350) [paragraph 1]. He files printouts of the trade-mark registrations apparently obtained from the Trade-marks Database maintained over the Internet by CIPO [paragraph 12, Exhibits "B" through "D"].

[44] At paragraph 2 of his affidavit, Mr. Witzel states that the Applicant purchased the registration for the trade-mark BROIL KING from Jacuzzi Inc. on November 16, 1989 and that the trade-mark BROIL KING registered in association with gas barbecues "has been used continuously in Canada since the date referred to in the Declaration of Use filed on October 16, 1980". For all intents and purposes, I note that the printout of registration No. TMA257,283 for the trade-mark BROIL KING discloses that the trade-mark was registered on March 27, 1981 in the name of Jacuzzi Inc. further to the filing of a Declaration of Use on October 16, 1980. An assignment of November 16, 1989 from Jacuzzi Inc. to the Applicant was recorded by CIPO on January 25, 1991.

[45] At paragraph 2 of his affidavit, Mr. Witzel also deposes on the use of the Mark. Although lengthy, I find it useful to reproduce his allegations:

2. [...] The BROIL KING and Design mark has been used in Canada as claimed since at least as early as October 1980 and the BROIL KING and Design mark that is the subject matter of application serial no. 1,166,534 has been used in the Design form as the BROIL KING mark for registration No. TMA 257,283 since at least as early as October 1980. The BROIL KING mark was assigned to the applicant by Jacuzzi Inc. on the 16<sup>th</sup> day of November 1989, and I have personal knowledge of the fact that BROIL KING as used by Jacuzzi Inc. at that time and as used by the Applicant continuously since that time was the BROIL KING Design that is the subject matter of application serial no. 1,166,534. Jacuzzi was using the same Design of the BROIL KING mark for a number of years prior to assigning the mark to the applicant and Jacuzzi was using the Design of BROIL KING from at least as early as October 1980 (see Exhibit "A" attached hereto).

[46] Mr. Witzel does not indicate the origin or the nature of the one page document attached as Exhibit "A", nor does he indicate its period of use. I note that this document seems to be promotional material. In any event, based on a fair reading of Mr. Witzel's statement, I conclude that Exhibit "A" purports to show use of the Mark by Jacuzzi Inc., especially since the Mark is shown on the top of a gas barbecue below the word JACUZZI.

[47] In replies to undertakings, the Applicant indicates that the "transaction" for BROIL KING "was made pursuant to an agreement dated December 12, 1986". The Applicant provides a copy of "such agreement with Jacuzzi". I remark that the agreement filed as reply to undertakings is identical to a purchase agreement between Jacuzzi Canada and the Applicant appended as Exhibit 1 to the cross-examination transcript. I also remark that a transfer document of several Canadian trade-mark registrations from Jacuzzi Inc. to the Applicant, dated November 16, 1989, is appended as Exhibit 2 to the transcript.

[48] From Mr. Witzel's cross-examination, it appears the Applicant takes the position that the agreement with Jacuzzi included the Mark, which explains the date of first use

claimed in the application [Q72-Q83, Q95, Q99]. It also appears from the cross-examination that the Applicant decided to claim “at least as October 1980” as the date of first use of the Mark based on the Declaration of Use filed for the trade-mark BROIL KING of registration No. TMA257,283 [Q101-Q105, Q107].

[49] Mr. Witzel indicates that the Applicant has spent more than ten million dollars in advertising the trade-marks BROIL KING, BROIL-MATE and the Mark since it owns the trade-marks [paragraph 5, Q129].

[50] In terms of sales, Mr. Witzel indicates that the Applicant has sold over two million gas barbecues in Canada under the trade-marks BROIL KING and BROIL-MATE, including the Mark. He goes on to state that the sale of gas barbecues under BROIL KING, which includes the Mark, is greater than the sale of gas barbecues under BROIL-MATE. He explains that detailed sales information is not provided since the Opponent is a competitor and sales information is confidential [paragraph 5]. In cross-examination, Mr. Witzel maintains the Applicant’s position not to provide detailed sales information [Q133], but he testifies: “[...] all the Broil King barbecues that we ever sold are with the flame design. But there might be some obscure exceptions.” [Q134]. The Applicant’s barbecues may cost up to a thousand dollars [Q165].

[51] When ask about his knowledge of any competitors of the Applicant selling barbecues or barbecue accessories using the word “broil” as part of the brand name, Mr. Hart testifies being “aware of a little bit of Broilmaster” [Q41]. He further testifies being aware of Charbroil from the US that had very limited sales in Canada for a period of time, probably in 2001 [Q44-Q46].

[52] In cross-examination Mr. Witzel refers to an agreement with Hudson Standard [Q157]. I have reviewed the documents filed in reply to an undertaking regarding the aforementioned agreement, namely a Settlement Agreement made on March 31, 1997 and a Trade-mark Licensing Agreement dated September 1, 1998 between the Opponent and Hudson Standard Corporation. It appears to relate to the use and registration of the

trade-mark BROIL KING by the Opponent for barbecues and related outdoor items and the use and registration of the trade-mark BROILKING by Hudson Standard Corporation for household items in the United States and “all foreign countries and territories”. I also note that paragraph 19 of the Settlement Agreement provides the following:

“The parties agree [...] to modify their web-sites to advise interested inquiries to identify the product line of the other party and to provide a referral to their proper web-site for household items as to Hudson Standard and for outdoor barbecues and related outdoor items as to Onward. [...]”.

[53] Except for the website page attached as Exhibit 7 to the Eatherley affidavit, there is no evidence directed to establish a relationship between Hudson Standard Corporation and BroilKing Corporation. A website page is not evidence of the truthfulness of the information. Still, considering the evidence in the present proceeding in its entirety, I find it reasonable to conclude that Hudson Standard Corporation is now BroilKing Corporation.

[54] Mr. Witzel opines on the likelihood of confusion between the Applicant’s trade-marks and the Opponent’s trade-mark BROILMASTER in his affidavit [paragraphs 6 to 11] and in cross-examination [Q135-Q136, Q139-152]. Mr. Witzel states that he was not aware of the use or advertisement of the Opponent’s trade-mark BROILMASTER “until well after” the opposition to application No. 1,112,366 was commenced [paragraph 13]. Mr. Witzel alleges that the Opponent is “wrongfully trading on the Applicant’s brand equity”, that the Opponent is infringing the Applicant’s registered trade-marks, and that the Opponent has no grounds for opposing the Mark [paragraph 14]. I am disregarding Mr. Witzel’s opinions. For one thing, the merit of the opposition is the issue to be decided by the Registrar from the evidence filed in the present proceeding. In addition, ownership of the registrations for the trade-mark BROIL KING, BROIL QUEEN and BROIL-MATE does not give the Applicant the automatic right to the registration of the Mark no matter how closely the trade-marks may be related [see *American Cyanamid Co. v. Stanley Pharmaceuticals Ltd.* (1996), 74 C.P.R. (3d) 571 (T.M.O.B.); *Ralston Purina Canada Inc. v. H.J. Heinz Co. of Canada* (2000), 6 C.P.R. (4th) 394 (T.M.O.B.)]. That

being said, the ownership, validity and enforceability of the Applicant's trade-mark registrations are not at issue in the present proceeding.

## **ANALYSIS OF THE GROUNDS OF OPPOSITION**

[55] I shall now consider the grounds of opposition, although not necessarily in their order of pleading.

### **Registrability**

[56] I reproduce the ground of opposition as pleaded:

The Opponent bases its opposition on the ground set out in Section 38(2)(b), namely, that the trade-mark claimed in the application is not registrable in view of Section 12(1)(b), and should have been refused by the Registrar by virtue of the provisions of Section 37(b), in view of the fact that the words "BROIL KING" are either clearly descriptive or deceptively misdescriptive of the character or quality of the wares. If the barbecues are the best for broiling, the trade-mark is clearly descriptive. If not, then the trade-mark is deceptively misdescriptive.

[57] The Opponent is seemingly alleging that the Mark contravenes the provision of s. 12(1)(b) of the Act because it describes that the wares are best for broiling. While I recognize the descriptive connotation attaching to the word "broil" when considering the wares, it is not apparent to me how the Mark in its entirety contravenes s. 12(1)(b) of the Act. In my view, the Opponent ought to have been more specific with respect to its pleading. Besides, the Opponent did not expand on this ground neither in its written argument nor at the oral hearing.

[58] In view of the above, I dismiss the ground of opposition that the Mark is not registrable pursuant to s. 12(1)(b) of the Act on the basis that it was insufficiently pleaded. Alternatively, I dismiss the ground of opposition on the basis that the Opponent did not satisfy its initial evidential burden with respect thereto.



### **Non-compliance with s. 30 of the Act**

[59] The ground of opposition based upon non-compliance with s. 30 of the Act is set out as follows:

The Opponent bases its opposition on the ground set out in Section 38(2)(a), namely, that the application does not comply with the requirements of Section 30 in that in view of the facts contained in paragraph 2, the Applicant could not have been satisfied that it was entitled to use or register its trade-mark. The Opponent further bases this ground of opposition on the fact that the Applicant did not use the trade-mark as alleged in the application or at all. In particular, the Applicant did not own the rights to the trade-mark at the date of first use alleged in the application.

[60] Although the Opponent does not refer to specific sub-sections, it can be concluded that the first part of the pleading relates to non-compliance with s. 30(i) of the Act whereas the second part relates to non-compliance with s. 30(b).

### ***Non-compliance with s. 30(i) of the Act***

[61] The Opponent did not allege that the Applicant had any knowledge of the Opponent's application No. 1,112,633 or adopted the Mark knowing it to be confusing with the Opponent's trade-mark BROILMASTER. In any event, the mere fact that the Applicant would have been aware of the Opponent's application or trade-mark would not have precluded the Applicant from truthfully making the statement required by s. 30(i) of the Act. Where an applicant has provided the statement required by s. 30(i), in my opinion the ground of opposition should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of an applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155].

[62] The Opponent submits that the agreement between the Applicant and Hudson Standard (now BroilKing Corporation) shows that the Applicant could not have been satisfied as to "its entitlement to register" the Mark because the Applicant was merely a licensee of Hudson Standard in Canada and the United States. The Opponent supports its

contention by reproducing in its written argument the following excerpt of paragraph 1 of the Trademark License Agreement dated September 1, 1998:

Subject to the terms and conditions of this Agreement and in reliance upon the representations and warranties of and in consideration of the licensing rights and covenants, agreements and promises of the corporations, Hudson Standard Corporation agrees to irrevocably license Onward Multi Corp., Inc. to use the trademark in every State of these United States and all foreign countries and territories... [emphasis added]

[63] I would remark that the first ground of opposition does not include any allegations of fact reflecting the Opponent's contention. Notwithstanding this remark, I consider that the remaining part of paragraph 1 as well as paragraph 2 of the Trademark License Agreement dated September 1, 1998, reproduced hereafter, are relevant to the issue raised by the Opponent:

...without payment it being understood that full consideration for this licensing is the execution of a prior Settlement Agreement dated March 31, 1997 which document alone shall control the use of the Trademark in the future for barbecues and related outdoor items exclusive of Hudson continuing rights in the mark for its present and future household items not including outdoor barbecues or related outdoor items.

2. Hudson Standard Corporation consents to the application and registration by Onward of the mark "Broil-King" in relation to outdoor barbecues and/or related outdoor products in the United States of America or any other country. Similarly, Onward consents to the application and registration by Broil-King in any country in relation to household items of Hudson's manufacture other than outdoor barbecue and/or related outdoor products. [My underlining].

[64] In my opinion, a plain reading of paragraph 2 contradicts the Opponent's contention with respect to the Applicant's "entitlement to register" the Mark. At the oral hearing, I did ask comments from the Opponent's agent, but she had none.

[65] In view of the above, I dismiss the ground of opposition based upon non-compliance with s. 30(i) of the Act on the basis that it was insufficiently pleaded.

Alternatively, I dismiss the ground of opposition on the basis that this is clearly not a case where there is any evidence of bad faith on the part of the Applicant.

***Non-compliance with s. 30(b) of the Act***

[66] To the extent that the relevant facts are more readily available to the Applicant, the evidentiary burden on the Opponent with respect to the ground of opposition based upon s. 30(b) of the Act is lower [see *Tune Masters v. Mr. P's Mastertune Ignition Services Ltd.* (1986), 10 C.P.R. (3d) 84 (T.M.O.B.)]. Also, the Opponent may rely upon the Applicant's evidence to meet its initial onus, but the Opponent must show that the Applicant's evidence is clearly inconsistent with the Applicant's claim [see *York Barbell Holdings Ltd. v. ICON Health & Fitness, Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)]. In addition, s. 30(b) of the Act requires that there be continuous use of the trade-mark applied for in the normal course of trade since the date claimed [see *Labatt Brewing Co. v. Benson & Hedges (Canada) Ltd.* (1996), 67 C.P.R. (3d) 258 (F.C.T.D.)],

[67] Given the written submissions of the Opponent on the amended application, I conclude that the Opponent acknowledges that its pleading does not include an allegation that the Applicant's predecessor did not use the Mark at the date alleged in the application. In any event, I conclude that such allegation cannot be read into the pleading and thus cannot be considered [see *Imperial Developments Ltd. v. Imperial Oil Ltd.* (1984), C.P.R. (2d) 12 (F.C.T.D.)].

[68] Moreover, in view of the application now of record, the allegation that the Applicant did not own the Mark at the alleged date of first use is a moot point. Likewise, the allegation that the Applicant did not use the Mark as alleged in the application is a moot point, but only to the extent that it can be understood as an allegation that the Applicant did not use the Mark since the alleged date. Indeed, I conclude that the allegation that the Applicant did not use the Mark "at all" can be read as a pleading covering the period of use by the Applicant. Thus, the issue is whether the Opponent has met its initial onus to show that during the period covering the use of the Mark by the

Applicant, the Mark has not been continuously used in association with “gas barbecues and replacement parts for barbecues”.

[69] In cross-examination, Mr. Witzel was referred to Exhibit 2 to the Eatherley affidavit (CIPO’s file history for registration No. TMA257,283) and was asked questions on the specimen showing a barbecue bearing the trade-mark shown below:



[70] I reproduce the part of the cross-examination concerning the aforementioned specimen [pp. 38-39 of the transcript] and the part of the cross-examination directed to the use of the Mark in association with “replacement parts for barbecues” [pp. 41-42 of the transcript]:

109. MS. THOMAS [Opponent’s counsel] Q. (...) And that’s a Broil King with the maple leaf, is it not? Does that look like a flame design to you?

A. Often when the first use is, Jacuzzi never used Broil King in that form.

110. Q. But the file at the Trade-marks Office says a specimen. That that’s (*sic*) what they were using in 1980.

A. Yeah. When the actual trade-mark came out, they used it with – like I’ve never seen it used that way. I’ve seen it used with the flame design.

111. Q. Are you saying then that their trade-mark application is invalid because they’re claiming use of a mark that wasn’t actually being used?

A. No, no...

MR. SCHNURR [Applicant’s Counsel] No, we’re not saying that.

A....

MR. SCHNURR: ...used it. He’s saying that to his knowledge, Jacuzzi was using it with the flames over the I’s. But obviously we’re not saying that Jacuzzi lied and don’t think they did. They probably did use it this way, for a period of time

112. Q. Okay, so then I’d pretty much like to know how do you know that Broil King with the flame design was being used in 1980 or October, 1980, the date you’ve claimed in your

application, and do you have any proof of that? So that was two questions.

A. Yeah. No we don't have any proof. But it is our – we've always used it this way and you know it's our, our belief that that's how it was always used.

MR. SCHNURR: Are you saying by Jacuzzi or by you or?

A. By Jacuzzi.

113. MS. THOMAS: Q. It was your belief but not your personal knowledge?

A. I cannot recall that.

(...)

119. MS. THOMAS: Q: (...) So I'm wondering how do you now claim in your Broil King, the flame design application, that you've had use since 1980 with respect to replacement parts? Where did that come from?

A. With respect to replacement parts?

120. Q. For the barbecues? When none of these marks seem to refer to that? Except for your new one which claims the date of first use...

A. Well I don't really understand the relevance because we've been selling replacement parts for barbecues since we acquired Jacuzzi so.

Q. And you acquired Jacuzzi, the Jacuzzi trade-marks again in what year?

A. I have answer (*sic*) the question.

MR. SCHNURR: '86 or '87 he said.

MS. THOMAS: Q. So '86 or '87 is correct, yes?

A. That's correct.

[71] I am not affording any significance to the specimen showing Broil King with the maple leaf. Indeed, since the specimen was filed in CIPO's file for the word trade-mark BROIL KING, I consider it would be improper to afford any weight to it in the present proceeding. In any event, the specimen would relate to the use by the Applicant's predecessor in title, whereas I am considering the use of the Mark by the Applicant.

[72] Since mere assertions of use found in the Witzel affidavit and cross-examination do not evidence use of the Mark within the meaning of s. 4(1) of the Act, I recognize that it would have been a simple and prudent matter for the Applicant to file specimens showing the Mark as used in association with "gas barbecues and replacement parts for

barbecues” pursuant to s. 4(1) of the Act. However, the absence of evidence showing use of the Mark pursuant to s. 4(1) of the Act is not, by itself, sufficient to conclude that the Opponent has discharged its evidentiary burden. That being said, the Witzel affidavit introduces evidence with respect to gas barbecues, but not with respect to replacement parts for barbecues. For instance, Mr. Witzel attests to the sales of gas barbecues under the Mark, but not to the sales of replacement parts for barbecues. I am mindful of Mr. Witzel’s testimony that the Applicant has been selling replacement parts for barbecues since it “acquired Jacuzzi”. Yet, the Applicant has acquired a few trade-marks from Jacuzzi. Hence, it could be that the replacement parts being sold are not associated with the Mark, but rather with other trade-marks formerly owned by Jacuzzi.

[73] In the end, when considering the Witzel affidavit on its entirety, I find that the absence of any allegations directed to the use of the Mark in association with “replacement parts for barbecues” combined with the absence of specimens showing use of the Mark raise at least some doubt as to whether the Applicant had used the Mark in association with “replacement parts for barbecues” at the material date.

[74] In view of the above, I find that the Applicant’s own evidence satisfies the Opponent’s light evidential burden, but only in respect of the wares “replacement parts for barbecues”. The Opponent having discharged its initial onus, I am not satisfied that the Applicant has discharged its burden to prove that the ground of opposition should not prevent registration of the Mark in association with “replacement parts for barbecues”.

[75] Having regard to the foregoing, I maintain the ground of opposition based upon non-compliance with s. 30(b) of the Act for the wares “replacement parts for barbecues” and I dismiss the ground of opposition for the wares “gas barbecues”.

### **Distinctiveness**

[76] The ground of opposition is pleaded as follows:

The Opponent bases its opposition on the ground set out in Section 38(2)(d), namely, that the trade-mark claimed in the application is not distinctive in

view of the facts alleged in this Statement of Opposition and also since it is not adapted to distinguish the wares in association with which it is alleged to be used by the Applicant from the wares of others including the wares and services of the Opponent and the Applicant's trade-mark is not adapted so as to distinguish them. The trade-mark BROIL KING is also used by Broil King Corporation and is used extensively on the Internet at **www.broilking.com** and accordingly, it cannot serve to distinguish the Applicant's barbecues from those of others.

[77] Clearly, the pleading includes an allegation that the Mark is not distinctive in view of the use of the BroilKing Corporation's trade-mark BROILKING. The question becomes whether any other allegations of facts can be read into the pleading that the Mark is not distinctive "in view of the facts alleged in this Statement of Opposition" and also since it is not adapted to distinguish the Applicant's wares "from the wares of others including the wares and services of the Opponent".

[78] Deciding on the sufficiency of the pleading by considering both the evidence and the statement of opposition in its entirety, especially paragraph 2 [see *Novopharm Ltd. v. Astrazeneca et al* (2002), 21 C.P.R. (4<sup>th</sup>) 289 (F.C.A.)], I find it can be understood that the ground of opposition includes an allegation that the Mark is not distinctive in view of the use of the Opponent's trade-mark BROILMASTER. However, I find it cannot be understood that the ground of opposition includes an allegation that the Mark is not distinctive in view of the use of a third party's trade-mark, other than the use of the mark BROILKING by BroilKing Corporation. I also find that it cannot be understood that the pleading includes an allegation that the Mark is not distinctive because it is not registrable.

[79] To summarize, I conclude that the first part of the pleading relates to non-distinctiveness in view of the use of the Opponent's trade-mark BROILMASTER whereas the second part of the pleading relates to non-distinctiveness in view the use of BroilKing Corporation's trade-mark BROILKING.

[80] There is an initial burden on the Opponent to show that the Opponent's trade-mark or BroilKing Corporation's trade-mark had become known sufficiently as of

December 13, 2004 to negate the distinctiveness of the Mark [see *Motel 6, Inc. v. No. 6 Motel Ltd.*, 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.T.D.)].

*Use of the Opponent's trade-mark BROILMASTER*

[81] In its written argument, the Opponent submits that the Opponent and its predecessor in title, Martin Industries, have used the trade-mark BROILMASTER in Canada since at least as early as January 1996. The Opponent further submits that there is evidence on the record to show that the trade-mark BROILMASTER was used by predecessors in title in Canada as early as 1973. I disagree on both counts.

[82] Considering the Opponent's submissions with respect to the evidence of use by predecessors in title since 1973, I note the following

- the file history for the trade-mark BROILMASTER of expunged registration No. TMA268,753 [Exhibit 6 to the Eaterley affidavit] is not evidence of use of the trade-mark since 1973;
- Although I do not doubt Mr. Hart's testimony that he came across BROILMASTER grills in B.D. Wait's factory and warehouse in 1983, his testimony does not qualify as reliable evidence of use of the trade-mark BROILMASTER by a predecessor in title of the Opponent;
- the evidence filed by B.D. Wait in the opposition decision *B.D. Wait Co. Ltd. v. Sunbeam Corporation* (1985), 5 C.P.R. (3d) 543 (T.M.O.B.) involving the trade-mark GRILLMASTER and BROILMASTER is not of record in the present proceeding;
- even if I accept Exhibit 53 to the Eatherley affidavit as evidence that the website "www.broilmaster.com" was in existence in December 1998, I do not accept it as evidence of the truthfulness of the information. There is no reliable evidence of use of the trade-mark BROILMASTER in Canada by Martin Industries nor was the Opponent able to provide any information regarding sales and advertisement of the wares associated with the trade-mark in Canada by its predecessor in title.



[83] Turning to the use of the Mark by the Opponent, I recognize that Mr. Hart provides evidence of use and advertisement in Canada starting in 2003. Still, the Opponent has elected not to detail the value or volume of its sales in 2003 and 2004. Surely, Mr. Hart's mere allegation that Canadian retail sale figures for BROILMASTER barbecues for 2003 and 2004 were "significant" does not permit me to draw a conclusion as to the extent to which the Opponent's trade-mark had been used or become known in Canada at the material date. Further, without evidence as to the number of Canadian retail locations selling the wares associated with the trade-mark BROILMASTER from 2003 up to the material date, it is difficult to conclude on the extent to which the brochures were distributed in Canada. Moreover, there is no information on the volume of brochures distributed at Canadian retail locations at anytime whatsoever.

[84] Insofar as advertisement is concerned, I have previously indicated not affording any weight to Mr. Hart's statement about spill-over advertising in Canada. Further, since Mr. Hart signed his affidavit on June 29, 2005, I am not prepared to conclude that the totality of the US\$27,000 spent by Diversco "since 2003" in advertising the BROILMASTER wares in Canada, mainly through newspapers, had been spent as of the material date. Apart from the fact that it is unclear whether the advertisement in the newspaper *Leamington Post* in June 2003 is a specimen of advertisement by the Opponent or by Diversco, there is no evidence showing the extent of circulation of the *Leamington Post* in Canada. I am not prepared to take judicial notice that the *Leamington Post* is a major daily newspaper having a substantial circulation in Canada.

[85] Finally, while Mr. Hart indicates that the Opponent has tracked 5,590 hits from Canadians on its website since January 2002, because his affidavit was sworn on June 29, 2005 I am not prepared to conclude that all of these 5,590 hits had taken place at the material date. In fact, I am not in a position to draw any conclusions as to the number of hits that had occurred at the material date.

[86] While the legal burden is on the Applicant to establish that the Mark is distinctive, there is an evidential burden upon the Opponent to establish the facts being relied upon by it in support of its ground of opposition. In order for the ground of opposition to succeed, the Opponent needs to have shown that its trade-mark BROILMASTER had become known sufficiently as of December 13, 2004 to negate the distinctiveness of the Mark. Although there is a high degree of resemblance between the ideas suggested by the Mark and trade-mark BROILMASTER, the Opponent has not provided evidence that would lead me to conclude that its trade-mark BROILMASTER had become sufficiently known in Canada, as of December 13, 2004, to negate the distinctiveness of the Mark.

*Use of the trade-mark BROIL KING by BroilKing Corporation*

[87] For the reasons set forth below, I am not satisfied that the Opponent has discharged its burden of showing that the trade-mark BROILKING of BroilKing Corporation had become sufficiently known in Canada in association with household items, as of December 13, 2004, to negate the distinctiveness of the Mark.

[88] First, the Settlement Agreement of March 31, 1997 and the Trade-mark Licensing Agreement of September 1, 1998, by themselves, cannot serve as evidence of use of the trade-mark BROILKING in Canada by a third party, be it Hudson Standard or BroilKing Corporation, in association with household items.

[89] Second, Mr. Witzel's testimony that Canadians can view BroilKing Corporation's website and the Applicant's website [Q175-Q178] was provided in cross-examination on his affidavit filed in the opposition to the Opponent's application No. 1,112,366. The said affidavit is not of record in the present proceeding. In any event, Mr. Witzel's testimony does not evidence the extent to which each party's website had been visited by Canadians at the material date.

[90] Third, I ascribe no weight to the evidence introduced by the Eatherley affidavit with respect to the website "www.broilking.com". Although I recognize that Ms. Eatherley did access the website, she did so on May 31, 2005, that is after the

material date. Even if I accept the Eatherley affidavit as evidence that the website was in existence in 1997 [Exhibits 22 to 24] or in 2000 [Exhibit 25], the Opponent has failed to establish that Canadians had visited the website at any time prior to the material date [see *Candrug Health Solutions Inc. v. Thorkelson* (2008), 64 C.P.R. (4th) (F.C.A.)]. Besides, website pages are not evidence of the truthfulness of the information. The mere fact that the 1997 printout of the website provides the option to request information on “international shipping”, is not evidence that household items associated with the trade-mark BROILKING of BroilKing Corporation were ordered from Canada in 1997. In fact, it is not even evidence that household items associated with the trade-mark could be ordered from Canada in 1997.

[91] Finally, I also ascribe no weight to the evidence intended to show the reference to BroilKing Corporation’s products on the website “www.allbrands.com”. For one thing, the Opponent has failed to establish that the website had been accessed by Canadians at the material date. Moreover, even if I accept the Eatherley affidavit as evidence that convection ovens bearing BroilKing Corporation’s mark could be ordered by Canadians on June 1, 2005 [Exhibits 10 to 15] the evidence is subsequent to the material date.

***Conclusion on the distinctiveness ground of opposition***

[92] In view of the above, I find that the Opponent has not discharged its initial burden to show that its trade-mark BROILMASTER or the trade-mark BROILKING of BroilKing Corporation had become known sufficiently as of December 13, 2004 to negate the distinctiveness of the Mark. I therefore dismiss the ground of opposition based upon non-distinctiveness.

[93] I wish to add that if I was incorrect in restricting the second part of the pleading to the trade-mark BROILKING of BroilKing Corporation, I would have found that the Opponent did not discharge its burden to show that any other third party’s trade-mark had become known sufficiently in Canada at the material date to negate the distinctiveness of the Mark. Likewise, if I was incorrect in concluding that an allegation that the trade-mark is not registrable could not be read into the ground of opposition, my previous conclusion

on the s. 12(1)(b) ground of opposition would have applied. Consequently I would have dismissed the ground of opposition that the Mark is not distinctive as contrary to s. 12(1)(b) of the Act.

### **DISPOSITION**

[94] Having regard to the foregoing, and with the authority delegated to me under s. 63(3) of the Act, I refuse the application with respect to the wares “replacement parts for barbecues” and I reject the opposition with respect to the wares “gas barbecues” [see *Produits Ménagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 C.P.R. (3d) 492 (F.C.T.D.) as authority for a split decision].

DATED AT MONTREAL, QUEBEC, THIS 19<sup>th</sup> DAY OF MARCH 2010.

Céline Tremblay  
Member  
Trade-marks Opposition Board