

IN THE MATTER OF AN OPPOSITION
by DC Comics Inc. to application
No. 581,086 for the trade-mark
THE BAT & Design filed by
Canada's Wonderland Limited (and
subsequently assigned to
Canada's Wonderland Inc.)

On March 30, 1987, Canada's Wonderland Limited filed an application to register the trade-mark illustrated below based on proposed use in Canada for "amusement and theme park services in the nature of an amusement ride" and for the following wares:
apparel, namely: hats, shirts, sweatshirts
and T-shirts; and souvenirs, namely: buttons
and coffee mugs.

The application was advertised for opposition purposes on September 30, 1987 and was subsequently assigned to Canada's Wonderland Inc., the current applicant of record.

The opponent, DC Comics Inc., filed a statement of opposition on December 30, 1987, a copy of which was forwarded to the applicant on January 18, 1988. The grounds of opposition include 'inter alia' that the applied for trade-mark is not distinctive of the applicant's wares and services in view of the opponent's use of its trade-mark BATMAN and various design marks illustrated below for "entertainment services, games, toys, comic books and souvenir items."

Reg. No. 305,796 Reg. No. 323,484 Appl'n. No. 481,448

The applicant filed and served a counter statement. As its evidence the opponent filed the affidavits of the following individuals:

Paul Levitz	Ann Bartell
Nancy Miller	Jim Dahlin
Ken Gibson	Laurel Hanson
Barb Britton	Jeffrey Prendergast
Lynn Martens	Ronald Hamson
Ross Little	Robert Terryberry
Marlene Lawrence	Leslie Watson
Gordon Goobie	Wendy Armstrong-LeBlanc

The applicant filed the affidavits of Judy Gord and Julie Davies. Both parties filed written arguments but no oral hearing was conducted.

As for the ground of non-distinctiveness, the onus or legal burden is on the applicant to show that its trade-mark is adapted to distinguish or actually distinguishes its wares and services from those of others throughout Canada. There is, however, an evidential burden on the opponent to provide evidence in support of the allegations of fact underlying this ground. The material time for considering the circumstances respecting the ground of non-distinctiveness is as of the filing of the opposition.

The applicant has operated an amusement park north of Toronto since 1981 under the name Canada's Wonderland. In 1987, the applicant introduced a new roller coaster ride called The Bat and adopted the design mark which is the subject of the present application. The applicant advertised its new ride and

the design mark throughout 1987 and over two million people attended the park during the 1987 season. At the amusement park, the applicant sold a number of souvenir items featuring the applied for trade-mark including T-shirts and hats.

The opponent has produced and sold a comic book entitled "Batman" for many years and the cover page of the comic book has invariably featured the design trade-mark shown above as registration No. 305,796 (that design mark appears to have recently been replaced by a more stylized version). The comic book itself features a character named Batman as shown in registration No. 323,484 and the character wears a suit featuring the design component of the mark in application No. 481,448. The opponent's evidence establishes that the opponent's Canadian sales of its comic book have more recently been of the order of \$30,000 per year and that such sales have been made throughout Canada. A television show entitled "Batman" was broadcast throughout much of Canada in the 1960's and, more recently, the opponent has sold videos featuring its trade-marks.

The applicant's mark and the opponent's various marks are all inherently distinctive. Given the number of visitors to the applicant's park in 1987, it is reasonable to assume that the applicant's mark had become known at least to some extent in southern Ontario. Based on the evidence of record, I am able to conclude that the opponent's marks had become known to some extent throughout Canada in association with comic books. The opponent's marks have been used for a considerably longer period of time than the applicant's mark.

There is a fairly high degree of resemblance in all respects between the applicant's mark and the opponent's mark registered under No. 305,796 and the opponent's mark applied for under No. 481,448. There is also some degree of resemblance between the opponent's mark BATMAN and the applicant's mark which is dominated by the word BAT and what appears, at least to some extent, to be an anthropomorphic representation of a bat.

The applicant's wares and services are different from the wares

associated with the opponent's marks and presumably the trades of the parties would also be different. However, paragraph 17 of the Davies affidavit reads as follows:

17. I have read the affidavit of Nancy Miller filed in these proceedings with respect to the brochure of Canada's Wonderland which features various cartoon characters. Canada's Wonderland has, since the Park opened, had present at the Park and featured in its advertising various cartoon characters developed by Hanna-Barbara Productions including the Flintstones, Yogi Bear and the Jetsons. Over the past few years, Canada's Wonderland has also used the characters known as the Smurfs at the Park in a similar manner. Canada's Wonderland has also used, for special occasions and with the permission of their owners, the costumes of other cartoon characters at the Park. Canada's Wonderland has never used the comic book character of Batman at the Park. Canada's Wonderland has also never used the above-noted cartoon characters in any specific association with the ride The Bat. Rather those characters are associated with the promotion of the Park generally.

Thus, it is apparent that the applicant commonly employs cartoon characters at its amusement park and that children attending the park would expect to see depictions and representations of such characters. Presumably that expectation might also include comic book characters.

The applicant has submitted that survey evidence compiled by it respecting its roller coaster ride The Bat shows that no one surveyed associated the ride with the opponent's character Batman (see paragraphs 10-12 of the Davies affidavit). However, the applicant has failed to properly evidence the surveys conducted by it. Ms. Davies does not qualify herself as an expert in conducting and analyzing surveys nor does she adequately explain the methodology used. In particular, she doesn't provide a list of the questions asked, she doesn't explain how respondents were chosen, where and when they were questioned and whether or not the sample included children. Even if I could overlook the deficiencies in the applicant's survey, I could not give it any weight since the one survey question referred to by Ms. Davies is irrelevant to the issue at hand. The applicant had heavily advertised its ride The Bat in association with a particular celebrity spokesperson and the survey question was apparently designed solely to assess the success of that promotion. Thus, the survey evidence does not support the applicant's

contention that no one would associate its trade-mark with the opponent's marks.

The applicant also relied on the Gord affidavit to show the common use of representations of bats as components of registered trade-marks. However, the Gord affidavit fails to properly evidence state of the register evidence, Ms. Gord indicating that the search was conducted by someone other than herself. She did, however, append photocopies of 13 registrations to her affidavit but nine of them are for various design marks for alcoholic beverages all owned by Bacardi & Company Limited. The remaining four are otherwise irrelevant to the issue at hand. Thus, the state of the register evidence is of no consequence in the present case.

As noted by the opponent, one must keep in mind that the relevant population of consumers in this case includes children as well as adults and, in fact, is probably dominated by children. Thus, I must keep in mind that the average consumer in the present case is more likely to be less discriminating and more impressionable. Keeping that in mind and keeping in mind the resemblance between the marks at issue and the applicant's predilection for employing cartoon characters at its amusement park, I consider that the opponent has met its evidential burden of showing that the applicant's mark is not distinctive. Although I am not entirely convinced that the applicant's mark is not distinctive, the onus is on the applicant. Since the matter is left in a state of doubt, I must therefore resolve that doubt against the applicant. The ground of non-distinctiveness is therefore successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 28th DAY OF FEBRUARY 1991.

David J. Martin,
Member,
Trade Marks Opposition Board.