



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

**Citation: 2013 TMOB 151**  
**Date of Decision: 2013-09-12**

**IN THE MATTER OF AN OPPOSITION  
by Walker Industries Holdings Limited to  
application No. 1,469,376 for the trade-  
mark W & hammer design in the name of  
Walker Industries Inc.**

Introduction

[1] This opposition relates to an application filed by Walker Industries Inc. (the Applicant) on February 11, 2010 to register the trade-mark identified as ‘W & hammer design’ (the Mark) as illustrated hereinafter:



in association with: commercial building construction and renovation, residential home construction and renovation (the Services). The Applicant has disclaimed the right to the exclusive use of the words ‘Industries Inc.’ apart from the Mark as a whole.

[2] The application is based on use since at least as early as September 10, 2005. It was advertised on July 21, 2010. Walker Industries Holdings Limited (the Opponent) filed a statement of opposition on March 18, 2011.

[3] The grounds of opposition raised by the Opponent are based on sections 30(b), 30(i), 12(1)(d), 16(1)(a), (b) and (c), and section 2 (distinctiveness) of the *Trade-marks Act* RSC 1985, c T-13, (the Act). The specific grounds of opposition are detailed in Schedule A annexed to this decision.

[4] The first issue is to determine if the Opponent has furnished sufficient evidence to support its grounds of opposition. If so, then I must decide if the application satisfies the requirements of section 30(i), if the Mark has been used since the claimed date of first use; and if the Mark is confusing with the Opponent's trade-marks.

[5] For the reasons detailed hereinafter, I conclude that the Opponent has failed to meet its evidential burden with respect to the ground of opposition based on sections 30(i), 30(b), 16(1)(b) and 2 of the Act. I also conclude that the Mark is not confusing with the Opponent's trade-mark WALKER INDUSTRIES & Design1 as defined hereinafter.

#### Legal Onus and Burden of Proof

[6] The legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. This means that if a determinate conclusion cannot be reached in favour of the Applicant once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Joseph E Seagram & Sons Ltd et al v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA) and *Wrangler Apparel Corp v The Timberland Company* (2005), 41 CPR (4th) 223 (FC)].

#### Preliminary Remark

[7] In coming to my decision I have considered all of the evidence and submissions made by the parties; however, only the portions of the evidence and submissions which are directly

relevant to my findings will be discussed in the body of my decision. I have also disregarded any opinion statements made by the deponents on, amongst other issues, the likelihood of confusion between the marks for example.

#### Ground of Opposition based on Section 30(i)

[8] Section 30(i) of the Act only requires the Applicant to declare that it is satisfied that it is entitled to use the Mark in Canada in association with the wares and services described in the application. Such a statement is included in this application. An opponent may rely on section 30(i) in specific cases such as where fraud by the applicant is alleged [see *Sapodilla Co Ld v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB)]. There is no allegation of that nature in the statement of opposition or any evidence in the record to that effect.

[9] Consequently the ground of opposition based on section 30(i) of the Act is dismissed.

#### Ground of Opposition Based on Section 30(b) of the Act

[10] The Opponent did not make any submissions on this ground in its written argument or at the hearing. The Opponent had an initial burden to file some evidence to support that ground of opposition. Alternatively, the Opponent may rely on the Applicant's evidence to meet its light evidential burden [see *York Barbell Holdings Ltd v ICON Health & Fitness, Inc* (2001), 13 CPR (4th) 156 (TMOB)].

[11] Ultimately, I find that there is no evidence that could be used to support this ground of opposition and accordingly it is dismissed.

#### Ground of Opposition based on Section 16(1)(b) of the Act

[12] To support this ground of opposition, the Opponent is relying on its registered trademarks WALKER INDUSTRIES & Design, certificate of registration 233,622 and WALKER INDUSTRIES & Design, certificate of registration 233,623 alleging that applications for their registration were previously filed by the Opponent. However section 16(4) of the Act stipulates that those applications must have been pending at the date of advertisement of the present

application (July 21, 2010). This was not the case as they had matured to registration on June 8, 1979. Consequently this ground of opposition is also dismissed.

Ground of Opposition based on Section 12(1)(d) of the Act

[13] The relevant date for this ground of opposition is the date of the Registrar's decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 at 424 (FCA)].

[14] The Opponent filed certified copies of the following registrations:

TMA233,622 for WALKER INDUSTRIES & Design1 as illustrated hereinafter in association with asphalt emulsions and production of aggregates for the construction industry and services of road construction:



and TMA233,623 for WALKER INDUSTRIES & Design2 as illustrated hereinafter in association with asphalt emulsions and production of aggregates for the construction industry and services of road construction:



In both of these registrations the Opponent has disclaimed the right to the exclusive use of WALKER INDUSTRIES apart from the trade-mark. Additionally, registration TMA233,623 is lined for colours blue and yellow. As most of the exhibits filed by the Opponent are black and white copies of documents or pictures, I will compare the Mark to registration TMA 233,622. If the Opponent is not successful under this ground of opposition by comparing those marks it

would not have achieved a better result if I were to compare the Mark to the Opponent's trade-mark covered by registration TMA233,623.

[15] I exercised my discretion to check the register and note that both registrations are extant. Therefore the Opponent has met its initial burden with respect to this ground of opposition [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)].

[16] The test for confusion is outlined in section 6(2) of the Act. Some of the surrounding circumstances to be taken into consideration when assessing the likelihood of confusion between two trade-marks are described in section 6(5) of the Act: the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or any ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [See *Clorox Co v Sears Canada Inc* (1992), 41 CPR (3d) 483 (FCTD) and *Gainers Inc v Marchildon* (1996), 66 CPR (3d) 308 (FCTD)].

[17] Mr. Justice Binnie of the Supreme Court of Canada commented on the assessment of these criteria [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al* (2006), 49 CPR (4th) 401 and *Mattel Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321]. Each factor may be assessed different weight but the most important factor is often the degree of resemblance between the marks [see *Masterpiece Inc v Alavida Lifestyles Inc et al* (2011), 96 CPR (4th) 361 (SCC)].

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

[18] The Mark and the Opponent's registered trade-marks possess some inherent distinctiveness as each one of them includes a unique design portion.

[19] The distinctiveness of a trade-mark can be enhanced through its use or promotion. The Opponent has provided evidence on its history and the use of its trade-mark WALKER INDUSTRIES & Design1 in Canada. I shall now summarize that portion of the evidence.

[20] Mr. Fisher is the Opponent's President and Chief Executive Officer and has been employed by the Opponent and its affiliated companies since 2001. He traces the Opponent's history through its predecessors' in title that goes back to the 1840's. All of these facts are informative but are of no help to establish use of the abovementioned Opponent's registered trade-marks.

[21] Mr. Fisher provides significant evidence regarding the Opponent's use of the trade name and/or trade-mark WALKER INDUSTRIES. However, any such use would not qualify as use of the above mentioned registered design trade-marks and thus this evidence is not relevant to this ground of opposition.[see *Registrar of Trade-marks v Compagnie Internationale pour l'informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523 (FCA)].

[22] Ms. Meyden has been the Marketing and Communications Coordinator of the Opponent and has been employed by the Opponent since February 17, 2004. Part of her job functions with the Opponent involves coordinating the marketing and promotion of the WALKER INDUSTRIES brand.

[23] At this point I wish to point out that in her affidavit Ms. Meyden uses the terms 'WALKER INDUSTRIES brand' and 'WALKER INDUSTRIES trade-mark'. Neither of these terms was defined in her affidavit. In order to determine if the deponent is referring to WALKER INDUSTRIES as a word mark, or WALKER INDUSTRIES & Design1 or WALKER INDUSTRIES & Design2, I will have to look into the specific documentation she is referring to when using one of these expressions and I will indicate in the following paragraphs to which of these trade-marks she is referring to. In the absence of any specific documentation then there exists an ambiguity as to which of the Opponent's trade-marks she is referring to, I will interpret such ambiguity against the Opponent. As such, I will assume that the deponent is referring to the word trade-mark WALKER INDUSTRIES.

[24] Ms. Meyden filed as exhibit A a chart and a corporate graphics manual showing how the WALKER INDUSTRIES trade-mark is to be (and is) used. The WALKER INDUSTRIES trade-mark always appears regardless of the name of any of the Opponent's operating subsidiaries listed in Mr. Fisher's affidavit. However in the chart, exhibit A to Ms. Meyden's affidavit, there is no illustration of the mark covered by registration TMA233,622. Rather the words 'Walker' and 'Industries' are written below and outside the ellipse and on two separate lines. Nevertheless I consider such representation not to be a significant departure from the registered trade-mark WALKER INDUSTRIES & Design1 [see *Promafil Canada Ltd v Munsingwear Inc* (1992), 44 CPR (3d) 59]. Consequently any evidence of use of that version will be considered as use of the registered trade-mark WALKER INDUSTRIES & Design1 and I shall therefore make no distinction between those two designs.

[25] Ms. Meyden filed as exhibit B photographs showing samples of the Opponent's fleet of 300 vehicles as well as a vehicle and equipment graphics manual which specifies how the WALKER INDUSTRIES & Design1 trade-mark may be used on the fleet of vehicles. She states that the WALKER INDUSTRIES trade-mark also appears on various signage, whether on large stone structures, on the side of buildings, on small temporary signs used on ongoing projects and on recycling bins and she filed photographs of examples of such signage on which the trade-mark WALKER INDUSTRIES & Design1 appears. I wish to point out that I noticed on one of the pictures that the word portion 'WALKER INDUSTRIES' appears to the right of the design portion. Again I consider the use of that design to be use of the trade-mark WALKER INDUSTRIES & Design1 [see *Promafil, supra*].

[26] Ms. Meyden alleges that the Opponent attends conferences and trade shows throughout Canada, primarily in Ontario, but also in Quebec and British Columbia and she filed as exhibit F a list of examples of conferences and trade shows which the Opponent attended including the 2011 Landscape Ontario Congress held in Toronto. She alleges that WALKER INDUSTRIES trade-mark is displayed at such conferences and trade shows on its booths and occasionally on the clothing of its staff. Since no illustration has been provided I do not consider this portion of her evidence as illustrating use of the WALKER INDUSTRIES & Design1 trade-mark.

[27] Ms. Meyden affirms that the Opponent also operates a website. According to records the Opponent began gathering on April 14, 2010 from this date until July 21, 2011 it received approximately 47,800 discrete 'hits' or visits. She alleges that the top location of visitors was from Canada. The top keyword search which led to the website was 'walker industries'. She filed a current version of the website as exhibit G. The trade-mark WALKER INDUSTRIES & Design1 appears on some of the extracts filed.

[28] She states that the WALKER INDUSTRIES trade-mark appears on documents the Opponent used in its daily business including invoices, letterhead, business cards and the like. She filed a copy of an invoice dated November 30, 2007 for the provision of services relating to the installation of steel studs, drywall, taping and the installation of windows and doors at a place of business. I note that the invoice is issued by The Maitland Group which is identified as 'a division of Walker Community Development Corporation'. Both of these entities are licensees of the Opponent as mentioned by Mr. Fisher. The trade-mark WALKER INDUSTRIES & Design1 appears on the invoice.

[29] Ms. Meyden filed another invoice dated July 31, 2011 issued by another licensee of the Opponent on which appears the trade-mark WALKER INDUSTRIES & Design1. She also filed blank invoices from 4 other entities all identified as licensees of the Opponent in Mr. Fisher's affidavit and all bearing the Opponent's trade-mark WALKER INDUSTRIES & Design1.

[30] Ms. Meyden states that the Opponent promotes its business by providing promotional items bearing the trade-mark WALKER INDUSTRIES to customers and prospective customers such as baseball caps, golf balls and tees, t-shirts, umbrellas etc.. and she filed copies of photographs of such items as exhibit L to her affidavit. The trade-mark WALKER INDUSTRIES & Design1 appears on most of these items.

[31] Ms. Meyden affirms that promotion of the Opponent's business activities is also done through the distribution of newsletters and she filed samples of such newsletters from 2010 and 2011 all showing the trade-mark WALKER INDUSTRIES & Design1.

[32] Ms. Meyden also states that the trade-mark WALKER INDUSTRIES appears on health and safety materials such as contractor health and safety handbook, two posters and banners (a



picture of a banner taken in 2007 was filed). That particular banner does not bear the trade-mark WALKER INDUSTRIES & Design1, but it does appear on the health and safety materials filed.

[33] Ms. Meyden filed copies of various advertisements placed in publications on which appear the trade-mark WALKER INDUSTRIES & Design1. However none of the publications (*Ontario Lake Country Visitor's Guide 2010, Solid Waste, Waste Edge, Impact and Niagara*) in which these ads were placed are known to such an extent that I could take judicial notice of their circulation in Canada [see *Milliken & Co v Keystone Industries (1979) Ltd* (1986), 12 CPR (3d) 166 (TMOB)]. She alleges that the Opponent also placed directory listings to promote the trade-mark WALKER INDUSTRIES such as in trade publications (*Spotlight, the 2010 National Stone, Sand & Gravel Association Membership Directory and Buyer's Guide; the 2003-04 and 2009 Membership of the Canadian Land Reclamation Association based in Calgary, the 2009-2010 Ontario Road Builders Association Sourcebook and the Ontario Stone, Sand and Gravel Association Source Book*) none of which I am aware of. Also we have no information as to when, how, how many and to whom this material has been distributed. However some of them do bear at least a year of publication.

[34] Mr. Fisher states that sales in Canada over the last several years have been in excess of \$100,000,000 annually. However he does not specify since when this level of sales has been achieved; in association with which of the Opponent's trade-marks; and in association with which services. He states that the Opponent spent \$300,000 in 2009 and \$400,000 in 2010 for the promotion of the WALKER INDUSTRIES brand in Canada. However there is no reference to WALKER INDUSTRIES & Design1 trade-mark.

[35] In all from this evidence and despite its flaws, I conclude that the Opponent's trade-mark WALKER INDUSTRIES & Design1 is known to some extent in Canada as of the material date.

[36] Mr. Bruce Walker is the Applicant's President. He states that the Applicant currently operates from headquarters based in Calgary, Alberta. He alleges that it provides a wide range of services such as professional interior and exterior home renovation. He alleges that the Applicant has been using the name 'Walker Industries Inc' since September 10, 2005 and he filed a copy of the Alberta Corporation Search. There is no evidence in his affidavit of use of the Mark in association with any of the Services.

[37] Consequently overall this first factor favours the Opponent.

*The length of time the trade-marks have been in use*

[38] From the evidence described above, this factor also favours the Opponent.

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

[39] Under this ground of opposition I must compare the Services as described in the application with the services covered by the Opponent's registration [See *Mr. Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 at 10-11 (FCA); *Henkel Kommanditgesellschaft v Super Dragon* (1986), 12 CPR (3d) 110 at 112 (FCA); *Miss Universe Inc v Dale Bohna* (1994), 58 CPR (3d) 381 at 390-392 (FCA)].

[40] Even though both parties are involved in the construction business, a strict comparison between the Services and the services covered by registration TMA233,622 reveals that there exists quite a difference between the services of road construction, the production of aggregates for the construction industry on the one hand and commercial building construction and renovation, residential construction and renovation on the other. The wares and services associated with the Opponent's registrations do not overlap with the Services.

[41] The Opponent argues that over the years its business has expanded to cover construction services such as residential home construction and commercial renovations in Ontario in association with the trade-mark and trade name WALKER INDUSTRIES. This argument cannot stand in the context of a section 12(1)(d) ground of opposition. WALKER INDUSTRIES is not the trade-mark covered by registration TMA233,622. Furthermore those additional services are not covered by that registration. It might well be a relevant factor when assessing the grounds of opposition based on section 16 (entitlement) or lack of distinctiveness of the Mark.

[42] The Applicant argues that the parties operate in different geographical locations. This is not a factor to consider as the registration of a trade-mark provides to its owner the exclusive right to use it throughout Canada [see section 19 of the Act]. In fact the test of confusion set out in section 6(2) of the Act does refer to the use of the marks in the same area.

[43] As for the channels of trade, the Applicant's Services are targeted to home owners and commercial building owners while the Opponent's wares and services described in registration TMA233622 are for industrial use.

[44] I conclude that this factor favours the Applicant.

*The degree of resemblance*

[45] The visual dominant features of the trade-mark WALKER INDUSTRIES & Design1 is the combination of a large W letter with an ellipse and an inner circle. The Mark's dominant features are the letter W with a hammer and nail design. Also the use of a hammer and a nail in the design portion of the Mark suggests the idea of construction work. This is different than what could be suggested by the abstract design portion of the Opponent's registered trade-mark.

[46] In all I conclude that this factor favours the Applicant.

*Additional surrounding circumstances*

[47] The Applicant argues that the parties' marks have co-existed since 2005 without any evidence of confusion. As mentioned above there has been no evidence of use of the Mark. Therefore this argument is without merit.

*Conclusion*

[48] From this analysis I conclude that the Applicant has discharged its onus to prove, on a balance of probabilities, that there is no likelihood of confusion between the Mark and the Opponent's trade-mark WALKER INDUSTRIES & Design1. In reaching this conclusion I considered the fact that the Services are quite different from the wares and services covered by the Opponent's registrations. There are also sufficient differences visually and in the ideas suggested by the parties' marks to distinguish between them. Finally I took into account the fact that the word portion of the Opponent's mark is a weak component of its registered trade-marks. This is confirmed by the disclaimer made by the Opponent to the exclusive use of those words apart from the Opponent's trade-marks as a whole.

Ground of opposition based on lack of Distinctiveness of the Mark

[49] The Opponent has the initial evidential burden to prove that its trade-marks WALKER INDUSTRIES & Design1, WALKER INDUSTRIES, and/or trade-name WALKER INDUSTRIES had become sufficiently known in Canada on March 18, 2011 in association with residential home construction and renovation services and commercial renovation services to negate the distinctiveness of the Mark [*Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 at 58 (FCTD) and *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FCTD)]. If this initial burden is met then the Applicant has a legal onus to show, on a balance of probabilities, that the Mark was not confusing with the Opponent's trade-marks and/or trade-name at the relevant date such that it was adapted to distinguish or actually did distinguish throughout Canada the Services from the Opponent's services [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d) 272 (TMOB)].

[50] The generally accepted material date associated with this ground of opposition is the filing date of the statement of opposition (March 18, 2011) [see *Andres Wines Ltd. and E & J Gallo Winery* (1975), 25 CPR (2d) 126, (FCA) and *Metro-Goldwyn-Meyer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FCTD)].

[51] In addition to the evidence described under the previous ground of opposition I must take into consideration the evidence of use of the Opponent's trade-mark and/or trade name WALKER INDUSTRIES as well as the use of the Opponent's trade-mark WALKER INDUSTRIES & Design1, all in association with residential home construction and renovation services and commercial renovation services.

[52] Mr. Fisher, in paragraphs 6 and 7 of his affidavit describes the expansion of the Opponent's business through its different subsidiaries by innovating and expanding its road construction and resurfacing business. In the early 1980's the Opponent further diversified its activities to include the manufacturing and supply of other material such as industrial wax emulsions for the gypsum, wood and paper industry. He further states that in the 1970's and 1980's the Opponent also expanded into transport, containment and disposal of liquid and hazardous wastes and the operation of controlled landfill. Beginning in or about 2000 the

Opponent further expanded its activities into ‘green’ businesses such as composting, bio solids processing, waste and recyclables.

[53] None of these activities overlap with the Applicant’s Services and therefore is no need to do a detailed analysis of the criteria listed under section 6(5) of the Act, assuming the Opponent has discharged its initial burden. No matter what would be the evidence of use of the trade-marks WALKER INDUSTRIES or WALKER INDUSTRIES & Design1 in association with any of those additional services, the conclusion would be identical to the one reached under the registrability of the Mark assessed under the section 12(1)(d) ground of opposition: there is no likelihood of confusion.

[54] However there are some allegations of use of WALKER INDUSTRIES and WALKER INDUSTRIES & Design trade-marks in association with land development and construction industries. In paragraph 11 of his affidavit Mr. Fisher alleges that : ‘... the Opponent and its affiliates engaged in residential home construction and commercial renovation in association with the WALKER INDUSTRIES trade-mark and trade name.’. There is however no specific date as to when the Opponent or anyone of its licensees began offering those services in Canada.

[55] With those allegations I must also take into consideration the following portions of Ms. Meyden’s affidavit:

- Exhibit I, an invoice dated November 30, 2007 for a total amount of \$12,492.10 describing some building construction and/or renovation work;
- Exhibit J, an invoice dated July 31, 2011 for a total amount of \$1845 describing renovation work done in a cafeteria;
- Exhibit M, a newsletter on ‘carbon neutral building’ dated May 2011;
- Exhibit Q, a brochure issued by The Maintland Group describing its home building construction services;
- Exhibit R, various advertisements.

[56] I also took into consideration the allegation contained in Mr. Fisher's affidavit and already mentioned above that the Opponent's sales in Canada 'over the last several years have been in excess of \$100,000,000 annually.'

[57] Despite all this additional evidence, the Opponent has not discharged its initial burden. Mr. Fisher has not broken down the sales figures of the Opponent by service provided by the Opponent and/or to subsidiaries. Therefore it is impossible to quantify the sales of the Opponent with respect to residential and commercial building construction services in association with the trade-marks WALKER INDUSTRIES and/or WALKER INDUSTRIES & Design1.

[58] The invoice filed as exhibit I to Ms. Meyden's affidavit is insufficient to establish that the Opponent's trade-mark WALKER INDUSTRIES & Design1 was known to some extent in Canada at the relevant date. As for exhibit J to Ms. Meyden's affidavit, it was issued after the relevant date.

[59] The promotional material filed as exhibit M to Ms. Meyden's affidavit was issued after the relevant date. Finally the Opponent has not provided any circulation figures of the publications that contained the advertisements filed as part of exhibit R to Ms. Meyden's affidavit.

[60] In all, the Opponent failed to prove that its trade-marks WALKER INDUSTRIES and WALKER INDUSTRIES & Design1 were known to some extent in Canada at the relevant date in association with residential and commercial building construction and renovation services. As for the Opponent's services covered by its certificates of registration, I already concluded in favour of the Applicant under the ground of opposition of registrability. The earlier material date under this ground of opposition would have no effect on my analysis of the nature of those services. Consequently this ground of opposition is also dismissed.

#### Ground of Opposition based on Section 16(1) of the Act

[61] The relevant date to consider this ground of opposition is the date of first use of the Mark alleged in the application (September 10, 2005). The Opponent not only has to establish prior use

of its trade-marks or trade name but it must also prove that it had not abandoned such use at the advertisement date of the present application [see sections 16(1) and (5) of the Act].

[62] There is no evidence of use of the Opponent's trade-marks WALKER INDUSTRIES and WALKER INDUSTRIES & Design<sup>1</sup> within the meaning of section 4(2) of the Act in association with residential home and commercial building construction and renovation services prior to the relevant date. The invoice filed as exhibit I to Ms. Meyden's affidavit is dated November 30, 2007. We have no evidence that the marketing material filed as exhibit Q and R to Ms. Meyden's affidavit was distributed prior to September 10, 2005. M. Fisher has not provided any details on the annual sales of the Opponent prior to 2005 related to those specific services.

[63] As for the Opponent's services covered by its certificates of registration or those described in paragraph 52 above, I already concluded in favour of the Applicant. The earlier relevant date under this ground of opposition would have no effect on the analysis of the nature of those services.

[64] Consequently I dismiss all grounds of opposition based on section 16(1) of the Act.

#### Disposition

[65] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(8) of the Act.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

## Schedule A

The relevant grounds of opposition can be summarized as follow:

1. The Application does not comply with the requirements of section 30(b) of the *Trade-marks Act* RSC 1985, c T-13, (the Act) in that the Applicant has not used the Mark in association with each of the Services since the date of first use claimed in the application or at all;
2. The Application does not comply with the requirements of section 30(i) of the Act in that the Applicant could not have been satisfied at the filing date of its application that it was entitled to use the Mark in view of the prior use of the Opponent's trade-marks WALKER INDUSTRIES & Design and WALKER INDUSTRIES (the Opponent's Trade-marks) in Canada in association with asphalt emulsions (Opponent's wares) and production of aggregates for the construction industry and services of road construction; and in association with construction services, house-building services, commercial renovation construction services, environmental project management, waste management services, renewable energy projects services, green building services, production of aggregates, road construction and paving services (the Opponent's services);
3. The Mark is not registrable in view of section 12(1)(d) since the Mark is confusing with the Opponent's reregistered trade-marks:
  - WALKER INDUSTRIES & Design, certificate of registration TMA233,622
  - WALKER INDUSTRIES & Design, certificate of registration TMA233,623;
4. The Applicant is not the person entitled to the registration of the Mark pursuant to section 16(1)(a) of the Act in that at the date of first use the Mark was confusing with the Opponent's Trade-marks previously used in Canada by the Opponent in association with the Opponent's wares and services;
5. The Applicant is not the person entitled to the registration of the Mark pursuant to section 16(1)(b) of the Act in that at the date of first use the Mark was confusing with the Opponent's Trade-marks in respect of which applications for registration had been previously filed in Canada by the Opponent, in association with the Opponent's wares and services;
6. The Applicant is not the person entitled to the registration of the Mark pursuant to section 16(1)(c) of the Act in that at the date of first use, the Mark was confusing the Opponent's trade-names Walker Industries Holdings Limited and Walker Industries which had been previously used in Canada by the Opponent, in association with the Opponent's wares and services;
7. Pursuant to section 38(2)(d) of the Act, the Mark is not distinctive within the meaning of section 2 in that it does not distinguish the Services of the Applicant from the wares and services of others, namely the Opponent's wares and services offered in association with the Opponent's Trade-marks nor is the Mark adapted so as to distinguish the Applicant's Services.