



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

**Citation: 2011 TMOB 192**  
**Date of Decision: 2012-10-14**

**IN THE MATTER OF AN OPPOSITION  
by Avmor Ltd. to application  
No. 1,321,416 for the trade-mark  
ARMOR in the name of Lochinvar  
Corporation**

[1] On October 24, 2006, Lochinvar Corporation (the Applicant) filed an application to register the trade-mark ARMOR (the Mark) based on proposed use in Canada in association with “water heaters and hydronic heaters” (the Wares).

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of November 7, 2007.

[3] On April 7, 2008, Avmor Ltd. (the Opponent) filed a statement of opposition. On March 9, 2009, the Opponent requested leave to file an amended statement of opposition. Leave was granted on August 27, 2009 and it is this statement of opposition that is currently of record. The grounds of opposition can be summarized as follows:

- Pursuant to s. 38(2)(a) and 30(i) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act), the Applicant could not state that it was satisfied of its entitlement to use the Mark in association with the Wares in light of the facts set out in the remainder of the statement of opposition;
- Pursuant to s. 38(2)(c) and 16(3)(a) of the Act, the Applicant was not the person entitled to registration of the Mark because at the filing date of the application for the Mark, and at any relevant date, the Mark was confusing with the trade-mark AVMOR & Design, which had previously been used in Canada by the Opponent;

- Pursuant to s. 38(2)(c) and 16(3)(b) of the Act, the Applicant was not the person entitled to registration of the Mark because at the date of filing the application for the Mark, and at any relevant date, the Mark was confusing with the trade-mark AVMOR LTD. & Design for which an application for registration had been previously filed in Canada by the Opponent for the same type of wares;
- Pursuant to s. 38(2)(b) and 12(1)(d) of the Act, the Mark was not registrable because at the date of filing the application for the Mark, or any other relevant date, the Mark was confusing with the Opponent's registration for the trade-mark AVMOR LTD. & Design (UCA50090);
- Pursuant to s. 38(2)(d) and 2 of the Act, the Mark is not distinctive in that it does not distinguish and is neither adapted to distinguish nor capable of distinguishing the Wares from the wares of others including from the wares associated with the Opponent's registration for AVMOR LTD. & Design (UCA50090) and the Opponent's trade-mark AVMOR & Design.

[4] The Applicant served and filed a counter statement in which it essentially pled over and denied the Opponent's allegations and put the Opponent to the strict proof thereof. The Applicant filed an amended counter statement on September 11, 2009 for which leave was granted on November 3, 2009. It is this counter statement that is currently of record.

[5] In support of its opposition, the Opponent filed the statutory declaration of Max Rubin Mattie Chinks declared March 10, 2009, with Exhibits MC-1 through MC-3. Mr. Chinks has been the President of the Opponent for approximately ten years and has worked for the Opponent for approximately 40 years.

[6] In support of its application, the Applicant filed the affidavit of Janet McKenzie, sworn September 11, 2009 with Exhibit A. Ms. McKenzie is an assistant employed by the Applicant's agent. On or about September 11, 2009, Ms. McKenzie printed a selection of pages from the Applicant's website, *www.lochinvar.com*, on instruction from the Applicant's agent.

[7] Both parties filed written arguments. An oral hearing was held at which only the Applicant was represented.

#### Onus and Material Dates

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

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

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

- s. 38(2)(a)/30(i) - the date the application was filed [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 at 475 (T.M.O.B.) and *Tower Conference Management Co. v. Canadian Exhibition Management Inc.* (1990), 28 C.P.R. (3d) 428 at 432 (T.M.O.B.)].
- s. 38(2)(b)/12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)].
- s. 38(2)(c)/16(3)(a)/(b) - the date of filing the application [see s. 16(3) of the Act].
- s. 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.)].

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

[10] Where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. The Applicant has provided the necessary statement and this is not an exceptional case; the s. 30(i) ground is accordingly dismissed.

#### Non-registrability Ground of Opposition – s. 12(1)(d) of the Act

[11] An opponent's initial onus is met with respect to a s. 12(1)(d) ground of opposition if the registration relied upon is in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration relied upon by an opponent [see *Quaker Oats of Canada Ltd./La Compagnie Quaker Oats du Canada Ltée v. Menu Foods Ltd.* (1986), 11 C.P.R. (3d) 410 (T.M.O.B.)]. I have exercised that discretion and confirm that registration No. UCA50090 was expunged on October 25, 2010.

Accordingly, the Opponent has not met its initial burden, with the result that this ground of opposition is dismissed.

#### Non-entitlement Grounds of Opposition

##### *s. 16(3)(a) of the Act*

[12] Despite the burden of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's AVMOR & Design trade-mark, shown below, the Opponent has the initial onus of proving that the trade-mark alleged in support of its ground of opposition based on s. 16(3)(a) of the Act was used or made known prior to the filing date for the Applicant's application (October 24, 2006) and had not been abandoned at the date of advertisement of the application for the Mark (November 7, 2007) [s. 16(5) of the Act].



[13] I note that neither party made any submissions regarding whether or not the Opponent had successfully met its evidential burden.

[14] In his affidavit, Mr. Chinks states that the trade-mark AVMOR & Design had been used since at least the 1960s in association with "sanitation products and sanitation equipment" (the Opponent's Wares).

[15] In support of this statement, Mr. Chinks attaches to his affidavit brochures dated 1996, 2002 and 2003 which he states show how the trade-mark AVMOR & Design was used with the Opponent's Wares (Exhibit MC-2). The AVMOR & Design mark is prominently displayed on each of these brochures; however, I note that it is being used in a manner that would suggest that it is a service mark used by the Opponent in association with the sale of third party branded sanitation products. Furthermore, I note that brochures, such as those attached to Mr. Chinks' declaration, would constitute advertisements for the Opponent's business and would not qualify as use with wares in compliance with s. 4(1) of the Act.

[16] I do note, however, that the 2002 brochure features images of bottles of sanitation products which display the AVMOR & Design mark in small print on the labels. These images suggest that some of the Opponent's Wares were marked with the AVMOR & Design mark in 2002. Mr. Chinks makes the sworn statement that the AVMOR & Design mark "is still displayed" as it is seen in the brochures, suggesting that the AVMOR & Design mark had not been abandoned as of the date of advertisement of the application for the Mark.

[17] Mr. Chinks also attaches to his affidavit a sampling of invoices dated 2004, 2005 and 2006 which he states show the trade-mark AVMOR & Design in association with sales of the Opponent's Wares (Exhibit MC-3). I note that the AVMOR & Design mark is not found in the product descriptions listed in the invoices, however, it is displayed on the top left hand corner of each invoice. I note that I have not been provided with evidence that the invoices are delivered to purchasers with the Opponent's Wares at the time of transfer of possession. In order for invoices bearing a mark to function as evidence of use in compliance with s. 4(1) of the Act they must be shown to be associated with the wares at the time of transfer of property or possession [see *Riches, McKenzie & Herbert v. Pepper King Ltd.* (2000), 8 C.P.R. (4th) 471 (F.C.T.D.)]. As mentioned earlier regarding the brochures, I note that the appearance of the AVMOR & Design mark on the invoices suggests that the Opponent uses the mark as a service mark in association with its sales of third party branded sanitation products.

[18] Mr. Chinks also makes the bald statement that the trade-mark AVMOR & Design has been "constantly used" by the Opponent in association with Opponent's Wares.

[19] I note that the Opponent has not provided any sales figures for the Opponent's Wares in association with the AVMOR & Design mark.

[20] Despite the deficiencies in the Opponent's evidence, I am satisfied that the Opponent has met its initial evidential burden of establishing that the AVMOR & Design mark was used by the Opponent prior to the filing date of the application for the Mark and had not been abandoned as of the date of advertisement of the application for the Mark. I must now assess whether the Applicant has met its legal burden.

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

[22] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See, in general, *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.) and *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 96 C.P.R. (4th) 361 (S.C.C.).]

*Section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which they have become known*

[23] As submitted by the Applicant, the Mark is a dictionary word. I may refer myself to a dictionary to determine the meaning of words [see *Insurance Co. of Prince Edward Island v. Prince Edward Island Insurance Co.* (1999), 2 C.P.R. (4th) 103 (T.M.O.B.)]. I have looked into the *Canadian Oxford Dictionary* and found the following definition for the term “armor”:  
“protective clothing, made of fabric, metal plates, or chain mail, designed to deflect or absorb the impact of weapons, bullets, etc.” While the Mark is a common dictionary word, I note that it has no meaning in relation to the Wares, and as a result the Mark is inherently distinctive.

[24] The AVMOR & Design mark is made up of the coined word AVMOR in fanciful script.

[25] Based on the foregoing, I assess the inherent distinctiveness of the parties’ marks as about the same.

[26] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. I will now turn to the extent to which the trade-marks have become known in Canada.

[27] The Applicant has not filed any evidence of the use or promotion of its proposed-use Mark and as a result it appears that the Mark has not become known to any extent.

[28] The Opponent has provided some evidence that sales of sanitation products bearing the AVMOR & Design mark may have occurred, at least in 2002, as well as evidence of a selection of invoices from 2004 – 2006. However, I note that the Opponent has not provided any sales figures for the Opponent’s Wares or any circulation figures for the brochures attached to Mr. Chinks’ declaration. As a result, I am unable to conclude as to the extent to which the AVMOR & Design mark has become known, other than that it has become better known than the Mark.

*Section 6(5)(b) – the length of time each has been in use*

[29] The application for the Mark is based on proposed use and the Applicant has not provided any evidence of use of the Mark subsequent to the filing date.

[30] Mr. Chinks makes the sworn statement that the AVMOR & Design mark has been used in association with the Opponent’s Wares since at least the 1960s; however, he only provides documentary evidence to support a finding that the mark has been used in association with the Opponent’s Wares since approximately 2002.

*Sections 6(5)(c) and (d) – the nature of the wares, trade and business*

[31] It is the Applicant’s statement of wares as defined in its application versus the Opponent’s claimed wares that govern my determination of this factor [see *Esprit International v. Alcohol Countermeasure Systems Corp.* (1997), 84 C.P.R. (3d) 89 (T.M.O.B.)].

[32] The Wares are “water heaters and hydronic heaters” whereas the Opponent claims use of the AVMOR & Design mark with “sanitation products and sanitation equipment”.

[33] As submitted by the Applicant in both its written argument and at the oral hearing, based on a review of the evidence, the Opponent’s Wares can be further specified to include the following:

lotion hand soap; griddle, fryer and oven cleaner; glass and window cleaner; general purpose cleaner deodorizer; floor cleaner and deodorizer; heavy duty cleaner

degreaser; laundry detergent; dishwashing detergent; glass cleaner concentrate; dishwashing detergent concentrate; hand soap concentrate; cleaner descaler and brightener; carpet cleaner concentrate; carpet shampoo concentrate; carpet cleaner and pre-spray concentrate; spot and stain remover concentrate; thermacrylic floor finish concentrate; acrylic floor finish concentrate; acrylic sealer concentrate; spray buff and restorer; stripper super concentrate; stripper concentrate; water soluble degreaser concentrate; neutral cleaner concentrate; neutral floor cleaner concentrate; cleaner disinfectant; emulsifying degreaser; butyl based degreaser; general purpose cleaner; neutral disinfectant; bathroom cleaner; and fabric cleaner & deodorizer.

[34] The Applicant submits that there was no evidence of sales by the Opponent of any type of equipment in association with the AVMOR & Design mark, and more importantly nothing related to water heaters or hydronic heaters. In summary, the Applicant submits, and I agree, that the Opponent's sanitation products are different in nature from the Applicant's water heaters and hydronic heaters.

[35] In terms of the nature of the parties' trades, the Applicant has not provided any evidence of the channels of trade through which the Wares will be sold. The Opponent has not provided direct evidence of its channels of trade. At the oral hearing, however, the Applicant's agent submitted that a review of the invoices attached to Mr. Chinks' declaration suggests that the Opponent's customers are institutional users or suppliers that buy the Opponent's Wares in large container sizes.

[36] In its written argument, the Opponent submitted that the parties' wares could easily be found in the same channels of trade, such as hardware stores. By contrast, at the oral hearing, the Applicant submitted that based on its observation regarding the nature of the Opponent's customers, the Opponent's Wares would likely not be sold in hardware stores in close proximity to the Wares. I note that there is no evidence of record supporting a finding that the either party's wares are sold in hardware stores.

[37] In the absence of evidence of overlapping channels of trade, given the significant differences between the parties' wares, I conclude that they would likely not be sold through the same channels of trade.



*Section 6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them*

[38] In most instances, the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested is the dominant factor and other factors play a subservient role in the overall surrounding circumstances [see *Beverly Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2) 145, conf. 60 C.P.R. (2d) 70 (F.C.T.D.)]. I also refer to *Masterpiece*, *supra* at para. 49, where the Supreme Court of Canada states that s. 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[39] The Applicant submits that the parties' marks differ in sound and appearance largely due to the presence of the letter "R" in the Mark and the letter "V" in the AVMOR & Design mark. I agree.

[40] The Applicant submits that the parties' marks are significantly different in terms of the ideas suggested by them. The Mark, being a dictionary word, suggests a protective covering, whereas the AVMOR & Design mark, being a coined word, has no meaning. I agree that the parties' marks share no similarity in ideas suggested.

[41] Based on the foregoing, I find that the parties' marks share very little similarities in terms of sound, appearance and ideas suggested.

*Additional surrounding circumstance*

[42] In its written argument, the Opponent submits that the fact that the Registrar issued a notice pursuant to s. 37(3) of the Act serves as a relevant surrounding circumstance favourable to a finding of a likelihood of confusion. The Opponent submits that although the Applicant had filed arguments sufficient to convince the Examiner of the absence of a probability of confusion there was a degree of doubt remaining and it was for this reason that the s. 37(3) notice was issued. The Opponent submits that this doubt should be resolved in favour of the Opponent.

[43] The Applicant responded to the Opponent's submissions on this point at the oral hearing. I need not, however, discuss the Applicant's submissions as I note that a decision by an Examiner of the Canadian Intellectual Property Office does not have precedential value for the Board because both the onus and evidence before an Examiner differs from that before the Board [see *Thomas*

*J. Lipton Inc. v. Boyd Coffee Co.* (1991), 40 C.P.R. (3d) 272 (T.M.O.B.) at 277 and *Procter & Gamble Inc. v. Morlee Corp.* (1993), 48 C.P.R. (3d) 377 (T.M.O.B.) at 386]. I must come to a decision based solely on the evidence of record in this opposition proceeding.

[44] Based on the foregoing, I am not satisfied that this forms a relevant surrounding circumstance supporting the Opponent's position.

#### *Conclusion*

[45] Having considered all of the surrounding circumstances, in particular the differences between the parties' wares, I am satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the parties' marks.

[46] Having regard to the foregoing, I dismiss the ground of opposition based on s. 16(3)(a) of the Act.

#### *s. 16(3)(b) of the Act*

[47] The s. 16(1)(b) non-entitlement ground is pleaded based on "the trade-mark AVMOR LTD. & Design, for which an application for registration had been previously filed in Canada by the Opponent for the same type of wares".

[48] Despite the burden of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's AVMOR LTD. & Design mark, the Opponent has the initial onus of proving that the trade-mark application alleged in support of its ground of opposition based on s. 16(3)(b) of the Act was pending at the date of filing the Applicant's application, October 24, 2006, and remained pending at the date of advertisement of the application for the Mark, November 7, 2007 [s. 16(5) of the Act].

[49] According to *Novopharm Limited v. AstraZeneca AB* (2002), 21 C.P.R. (4th) 289 (F.C.A.), I must assess the sufficiency of the pleadings in association with the evidence. While the Opponent has not pleaded an application number in association with the claimed trade-mark,

I assume based on the evidence of record, that the Opponent was referring to its trade-mark AVMOR LTD. & Design subject of registration No. UCA50090. The Registrar has the discretion, in view of the public interest, to check the register for applications relied upon by an opponent [see *Royal Appliance Mfg. Co. v. Iona Appliances Inc.* (1990), 32 C.P.R. (3d) 525 (T.M.O.B.)]. I note that the registration for this mark issued on May 26, 1953 and therefore the claimed mark was no longer pending at the date of advertisement for the Mark.

[50] Based on the foregoing, this non-entitlement ground of opposition is dismissed as a result of the Opponent's failure to meet its evidential burden.

#### Non-distinctiveness Ground – s. 38(2)(d) of the Act

[51] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Wares from those of others throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)], there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness.

[52] In order to meet its initial burden with respect to this ground, the Opponent must establish that one or more of the AVMOR & Design and AVMOR LTD. & Design marks was known at least to some extent in Canada as of April 7, 2008 [see *Bojangles' International LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.) and *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.)].

[53] I note that, while the Opponent has provided some evidence of use of the AVMOR & Design mark, sufficient to meet its evidential burden under s. 16(3)(a), the Opponent has not provided any circulation figures for the brochures attached to Mr. Chinks' declaration or any sales figures for the Opponent's Wares. The Opponent has thus not provided sufficient evidence to support a finding that the AVMOR & Design mark had become sufficiently known in Canada to negate the distinctiveness of the Mark as of the date of filing the statement of opposition.

[54] With respect to the trade-mark AVMOR LTD. & Design., a certified copy of the registration was attached to Mr. Chinks' statutory declaration (Exhibit MC-1). However, as

noted above, this registration was expunged on October 25, 2010. In any event, I note that the mere existence of a registration can establish no more than *de minimis* use and cannot give rise to an inference of significant and continuous use of a trade-mark [see *Entre Computer Centers, Inc. v. Global Upholstery Co.* (1991), 40 C.P.R. (3d) 427 (T.M.O.B.)]. As a result, the Opponent has not provided sufficient evidence to support a finding that the AVMOR LTD. & Design mark had become known to any significant extent as of the date of filing the statement of opposition.

[55] Based on the foregoing, this ground of opposition is dismissed as a result of the Opponent's failure to meet its evidential burden. In any event, even if the Opponent had met its evidential burden, the non-distinctiveness ground of opposition would not succeed for reasons similar to those discussed under the s. 16 ground of opposition.

#### Disposition

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

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office