

IN THE MATTER OF AN OPPOSITION by Canstar Sports Group Inc. to application No. 651,814 for the trade-mark Skate Design filed by Sport Maska Inc.

On February 23, 1990, the applicant, Sport Maska Inc., filed an application to register the trade-mark Skate Design, a representation of which appears below, based upon proposed use of the trade-mark in Canada in association with "patins". The applicant asserted in its application that the representation of the skate does not form part of its trade-mark.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of February 27, 1991 and the opponent, Canstar Sports Group Inc., filed a statement of opposition which was subsequently amended in response to an Office letter from the Opposition Board. As its first ground, the opponent alleged that the applicant could not have been satisfied that it was entitled to use the trade-mark Skate Design in Canada in association with skates because, as of the applicant's filing date [February 23, 1990], the applicant was aware of the opponent's use of its mark Skate Design in association with skates since at least as early as 1986. As its second ground, the opponent alleged that the applicant is not the person entitled to registration in that, as of the applicant's filing date, the applicant's trade-mark was confusing with its trade-mark Skate Design which had been used by the opponent in association with skates since at least as early as 1986. As its final ground, the opponent alleged that the applicant's trade-mark is not distinctive because it is

not adapted to distinguish nor does it distinguish in fact the applicant's Skate Design skates from the opponent's Skate Design skates.

The opponent failed to file evidence in a timely manner pursuant to Rule 43 [now Rule 41(1)] of the *Trade-marks Regulations* while the applicant submitted as its evidence the affidavit of Richard S. Levy. The opponent filed the affidavit of Terry Fontana as evidence in reply pursuant to Rule 43 of the *Trade-marks Regulations*. However, the Fontana affidavit is not strictly confined to matter in reply to the Levy affidavit and is therefore inadmissible as reply evidence in this proceeding. Further, the applicant alone submitted a written argument and an oral hearing was not conducted in respect of this opposition.

As its first ground, the opponent alleged that the present application does not comply with Section 30 of the *Trade-marks Act* as the applicant could not have been satisfied that it was entitled to use the trade-mark Skate Design in Canada in association with skates because, as of the applicant's filing date [February 23, 1990], the applicant was aware of the opponent's use of its mark Skate Design in association with skates since at least as early as 1986. The onus or legal burden is on the applicant to show compliance with the provisions of Section 30 of the Act [see *Joseph Seagram & Sons v. Seagram Real Estate*, 3 C.P.R.(3d) 325, at pp 329-330; and *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R.(3d) 293]. There is, however, an initial evidentiary burden on the opponent to establish the facts relied upon by it in support of the Section 30 ground. As no admissible evidence has been filed by the opponent in support of its allegation that the applicant could not have been satisfied that it was entitled to use the trade-mark Skate Design in Canada, it has failed to meet the evidentiary burden upon it in respect of this ground. I have therefore rejected the first ground of opposition.

The second ground of opposition is based on Section 16(3)(a) of the *Trade-marks Act*; and material date for considering this ground is the applicant's filing date [February 23, 1990]. There is an initial burden on the opponent in view of Sections 16(5) and 17(1) of the *Trade-marks Act* to establish its prior use of its trade-mark Skate Design in Canada, as well as to show that it had not

abandoned its trade-mark as of the date of advertisement of the applicant's application in the *Trade-marks Journal* [February 27, 1991]. As no admissible evidence has been filed by the opponent in support of its allegations that it had previously used its Skate Design trade-mark in Canada, it has failed to meet the burden upon it in respect of this ground which I have therefore dismissed.

The final ground relates to the alleged non-distinctiveness of the applicant's trade-mark. While the onus or legal burden is on the applicant to show that its trade-mark is distinctive, there is an initial evidentiary burden on the opponent to establish the facts relied upon by it in support of this ground. As no admissible evidence has been filed by the opponent in support of this ground, it has failed to meet the evidentiary burden upon it. Consequently, this ground also fails.

In view of the above, and having been delegated by the Registrar of Trade-marks pursuant to Section 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to the provisions of Section 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC this _____ day of _____ 1996.

G.W. Partington
Chairman
Trade-marks Opposition Board