

IN THE MATTER OF AN OPPOSITION by The Chamberlain Group, Inc. to application No. 1,224,296 for the trade-mark LYNXMASTER and application No. 1,224,318 for the trade-mark LYNXMASTER & Design filed by Lynx Industries Inc.

[1] On July 21, 2004, Lynx Industries Inc. (the Applicant) filed two trade-mark applications, one for LYNXMASTER (the Word Mark) and one for LYNXMASTER & Design (the Design Mark), the latter of which is shown below:



[2] Each application is based upon proposed use of the subject trade-mark in association with garage door openers.

[3] Both applications were advertised for opposition purposes in the Trade-marks Journal of January 12, 2005. On June 13, 2005, The Chamberlain Group, Inc. (the Opponent) filed a statement of opposition against each application.

[4] The Applicant filed and served a counter statement with respect to each application.

[5] In support of its opposition, the Opponent filed:

- a certified copy of Canadian trade-mark registration No. 370,675
- a certified copy of Canadian trade-mark registration No. 330,535
- an affidavit of James H. Nelems
- an affidavit of Mark B. Tone
- an affidavit of Sarah S. Anderson
- an affidavit of Joseph T. Nabor.

[6] In support of its application, the Applicant filed:

- an affidavit of Lynne Brigant
- an affidavit of George Mantis
- an affidavit of James McCarthy
- an affidavit of Blair Hughes
- an affidavit of Mark Schram.

[7] As reply evidence, the Opponent filed:

- an affidavit of Kelly Brady
- a further affidavit of James H. Nelems.

[8] The Applicant conducted cross-examinations of Ms. Anderson and Mr. Nelems on their affidavits. Transcripts of the cross-examinations and answers to undertakings have been filed.

[9] Each party filed a written argument and participated in an oral hearing.

Preliminary Issue - Admissibility of Evidence

[10] When the Applicant filed its evidence, it objected to the filing of 1) the transcript of the deposition of Mark Schram (Exhibit A to the Nabor affidavit) and 2) the first Nelems affidavit. Mr. Schram is the Applicant's Vice President and General Manager. Mr. Nabor is a partner with the law firm that is counsel of record for the Opponent in the parties' opposition in the United States; he conducted the deposition of Mr. Schram. Mr. Nelems is a market researcher who conducted a consumer survey on behalf of the Opponent in the United States.

[11] The stated objection to both of these pieces of evidence was that they were materials from opposition proceedings in the United States between the Opponent and the Applicant. In its written argument, the Applicant elaborated on its objection to the filing of the Schram transcript by saying that it is inadmissible hearsay evidence, that a prior statement is only receivable if the person who made the statement is unavailable, and that the statements in the transcript relate to a completely different proceeding.

[12] At the oral hearing, the Opponent submitted that the Schram transcript was admissible under the hearsay exception of necessity, in that it was not possible for the Opponent to get Mr. Schram to file an affidavit on behalf of the Opponent, given that he is the Applicant's Vice President. However, I find the argument made by the Applicant at the oral hearing to be more persuasive, namely that there was no necessity that invoked the exception to the hearsay rule because the Opponent was entitled to cross-examine Mr. Schram on the affidavit that he ultimately filed in support of the present application. The Opponent responded by arguing that it would not have been able to obtain the information set out in the U.S. transcript through a cross-examination of Mr. Schram because the Applicant would have argued that such information was beyond the scope of the cross-examination. Of course, we will never know if the Applicant would have refused to answer any questions put to Mr. Schram on cross-examination. In my view, a better approach would have been for the Opponent to have cross-examined Mr. Schram and see if answers to its questions were forthcoming. If they were not, then the Opponent could have either asked the Registrar to accord reduced weight to Mr. Schram's evidence, on the basis that he refused to answer relevant questions, or it could have then filed the transcript to refute any contrary evidence. To the extent that parts of the transcript are not relevant to the present proceedings, then it would of course have been reasonable for the Applicant to refuse to answer questions on such topics.

[13] In support of its argument that the Nelems affidavit should be disregarded, the Applicant relies upon *National Hockey League v. Pepsi-Cola Canada Ltd.*, [1995] B.C.J. No. 310 (C.A.), which it cites for the proposition that survey evidence is only relevant if it canvasses the correct universe and cannot be extrapolated to make conclusions about what would occur in other geographical areas. Mr. Nelems' affidavit introduces the results of a survey that he conducted in the United States on behalf of the Opponent for use in an opposition against the Applicant's U.S. trade-mark application for LYNX MASTER. The argument therefore is that the results of a U.S. survey have no meaning with respect to Canada. Mr. Nelems' attestation that he has "no reason to believe that the results obtained in the [U.S.] study would result in significantly different conclusions were a similar survey conducted in cities in Canada" is not persuasive since his statement is based on his knowledge and experience in the marketing research area, not on any

specific knowledge of how Canadians and Americans differ in their reactions. In other words, it is my view that the concerns expressed in the *NHL* decision apply in the present case. I am therefore not according any significant weight to Mr. Nelems' evidence.

[14] Incidentally, in the U.S. opposition decision re LYNX MASTER, the Trademark Trial and Appeal Board accorded limited weight to Mr. Nelems' survey results, after discussing what it considered to be a number of shortcomings in the way that the survey was conducted. [See *The Chamberlain Group, Inc. v. Lynx Industries, Inc.* (the U.S. Opposition), Opposition No. 91160673 to application Serial No. 78281660, filed on July 31, 2003, decision mailed December 14, 2007, which was provided by the Opponent.]

[15] The Applicant took the position in its March 9, 2007 letter that if the Board admitted the Nelems affidavit and the transcript of the Schram affidavit, then it ought to also admit the affidavits of Mr. Mantis, Mr. McCarthy and Mr. Hughes. These three affidavits were introduced to counter the objected-to evidence.

[16] At the oral hearing, I confirmed my understanding that in the event that I did not consider the objected-to evidence of the Opponent, then I need not consider the Mantis, McCarthy and Hughes affidavits. As the Nelems affidavit and Schram transcript will not be accorded any significant weight, I need not consider the Mantis, McCarthy and Hughes affidavits.

Onus

[17] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (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].

Evidence

[18] The key issue in these proceedings is whether either of the Applicant's marks is confusing with any of the Opponent's pleaded marks, namely GARAGE MASTER, LIFT MASTER, LIFTMASTER, ACCESSMASTER. I will therefore summarize the evidence concerning the reputation of each mark.

Opponent's Marks

[19] According to Ms. Anderson, the Opponent's Vice-President of Marketing, the Opponent is an American company that operates globally. She attests that the Opponent is the world's largest manufacturer of residential garage door openers and commercial operators. However, it is the activities within Canada that are relevant in the present proceedings and I will restrict my summary accordingly.

[20] During cross-examination, Ms. Anderson advised that because the Opponent is a privately held company, anything financial is treated as proprietary information, "so we don't share any figures with anyone." [Question 345] The Opponent may chose to withhold such information, but to the extent that its evidence is consequently ambiguous, such ambiguity should be interpreted against its interests.

i) LIFTMASTER

[21] As consumers would not perceive LIFT MASTER and LIFTMASTER as being two different marks, I consider them interchangeable. In the following summary, I will lump the evidence concerning the two together, referring to them collectively as LIFTMASTER.

[22] Ms. Anderson says that the Opponent has sold LIFTMASTER products in Canada since at least 1990. LIFTMASTER products comprise door control products and remote control products, which might also be described as garage door openers and accessories. Ms. Anderson has provided the following approximate annual unit sales of LIFTMASTER goods in Canada for the years 2000 to 2005:

2000 – in excess of 90,000

2001 - in excess of 90,000
2002 – in excess of 110,000
2003 – in excess of 120,000
2004 – in excess of 140,000
2005 – in excess of 120,000

[23] Ms. Anderson has also provided packaging showing how the LIFTMASTER mark is associated with garage door openers (Exhibit 7) and a partial list of distributors or installers in Canada that sell the Opponent’s wares (Exhibit 8).

[24] Ms. Anderson says that the Opponent advertises its LIFTMASTER products in various media. She says that some trade magazines containing ads for LIFTMASTER products circulate in Canada (paragraph 12, Exhibit 4). She also says that the Opponent displays its wares at trade shows but she does not provide any precise figures concerning the number of Canadians who may have encountered the LIFTMASTER mark in this way. She also states that in 2004 over \$1 million was spent on advertising LIFTMASTER wares in Canada. That expenditure, according to pages 76 and 77 of her cross-examination transcript, relates to print and television advertising and money provided to dealers to promote the LIFTMASTER residential garage door openers. National advertising is “primarily” television advertising, but we have not been provided with any examples of the Opponent’s television advertisements.

[25] Ms. Anderson informs us that the Opponent’s “market share in the garage door opener market composed mostly of LIFTMASTER branded products” is approximately 65% in Canada (Ms. Anderson confirmed at Question 422 of her cross-examination that the 65% includes brands other than LIFTMASTER). The statement relating to 65% is based in part on homeowner survey information obtained through an independent research company; although this survey information was broken down by brand, Ms. Anderson chose to not provide the broken-down figures [cross-examination, Questions 425-437]. The Opponent’s agent has submitted that the statement that a 65% market share composed *mostly* of LIFTMASTER branded products is equivalent to at least a 33% market share attributable *solely* to LIFTMASTER branded products.

[26] The Opponent has a LIFTMASTER website that had in excess of 20,000 visits that originated in Canada in 2006.

ii) ACCESSMASTER

[27] Very little information has been provided with respect to the Opponent's ACCESSMASTER mark. During cross-examination, Ms. Anderson stated that it is used in the residential segment but that it is not being promoted. [Questions 683-691]

iii) GARAGE MASTER

[28] Similarly, very little information has been provided with respect to the Opponent's GARAGE MASTER mark. We do know however from Ms. Anderson's cross-examination that such mark is not being promoted. [Questions 683-694]

Applicant's Marks

[29] According to Mr. Schram, the Applicant is a Canadian company that is a world leader in the manufacturing, distribution and marketing of garage doors and garage door components. Mr. Schram attests that the Applicant has been manufacturing and distributing residential and commercial electric garage door openers since 1977. The Applicant uses LYNX and its Cat Head Logo to distinguish its products from those of competitors and these have appeared on all garage door operators sold in Canada.

i) LYNXMASTER

[30] There is no evidence that the Applicant has commenced the use or promotion of its proposed mark. Although Ms. Brady, a trade-mark agent employed by the Opponent's agents, made telephone enquiries that solicited positive answers from third parties in response to the question of whether they sell LYNXMASTER garage door openers, such evidence is inadmissible hearsay.

ii) LYNXMASTER & Design

[31] Similarly, there is no evidence that the Applicant has commenced the use or promotion of its design mark.

Section 12(1)(d) Grounds of Opposition

[32] The Opponent has pleaded that the Applicant's marks are not registrable pursuant to s. 12(1)(d) of the Act in that they are confusing with the Opponent's family of MASTER trade-marks comprising the registered trade-marks GARAGE MASTER and LIFT MASTER.

[33] The material date with respect to this ground of opposition is the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (F.C.A.)]. The Opponent has met its evidential burden because its registrations Nos. TMA370,675 for LIFT MASTER and TMA330,535 for GARAGE MASTER are extant.

[34] Since the Opponent's case is strongest with respect to its LIFT MASTER mark, I will focus my discussion on the likelihood of confusion between LIFT MASTER and LYNXMASTER. If LYNXMASTER is not confusing with LIFT MASTER, then it will also not be confusing with GARAGE MASTER. Similarly, if LYNXMASTER is not confusing with LIFT MASTER or GARAGE MASTER then LYNXMASTER & Design will also not be confusing with LIFT MASTER or GARAGE MASTER.

[35] 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. 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. However, these enumerated factors need not be attributed equal weight.

Section 6(5) analysis

s. 6(5)(a):

[36] The Opponent's LIFT MASTER mark is not inherently strong since it suggests that the associated garage door openers have mastered the art of lifting garage doors. (The Opponent's registration disclaims the right to the exclusive use of the word "lift".)

[37] The Applicant's LYNXMASTER mark is inherently stronger than the Opponent's mark because LYNX, unlike LIFT, has no meaning in relation to garage door openers.

[38] Only the Opponent has evidenced that its mark has acquired reputation through use or promotion. In this regard, it is noted that the number of units of LIFT MASTER goods sold in Canada has exceeded 670,000 units as of today's date.

s. 6(5)(b):

[39] The Opponent claims that its mark has been used in Canada since at least as early as 1990. The Applicant does not claim to have used its mark to date.

s. 6(5)(c):

[40] The wares covered by the LIFT MASTER registration are garage door openers, so the party's wares are identical.

s. 6(5)(d):

[41] Although the parties have provided various evidence and argument on the issue of whether there is a distinction between the parties' intended purchaser and/or channels of trade, given that the parties' wares are the same and there is no restriction on the associated channels of trade in either the Applicant's application or the Opponent's registration, for the purpose of this analysis one should consider the channels of trade to be at least overlapping, if not identical.

s. 6(5)(e):

[42] With respect to the degree of resemblance, the marks must be considered in their totality; it is not correct to lay the trade-marks side by side and compare and observe similarities or differences among the elements or components of the marks. Nevertheless, the first component of a mark is often considered more important for the purpose of distinction [*Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183 (F.C.T.D.) and *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.)]. Also, when a word is a common, descriptive word, it is entitled to a narrower range of protection than an invented or unique word.

[43] Overall, there are significant differences between the marks in appearance, sound and ideas suggested. Although each mark comprises a single syllable word that commences with the letter L followed by the word MASTER, the differences between the marks are more significant than their similarities. In particular, the great differences between the words LIFT and LYNX both in appearance and sound, but most importantly in ideas suggested, counteract any similarities between these marks. Although the marks share the common word MASTER, that common feature is not the dominant portion of the Applicant's mark. Moreover, the word MASTER is an ordinary dictionary word that imparts a laudatory suggestion. Although the Opponent made submissions to the effect that the descriptive nature of the word MASTER varies depending on whether it is employed as a noun or as an adjective, I consider such an argument to be overly semantic and not decisive of the degree of resemblance between the marks.

other surrounding circumstances:

(i) state of the marketplace

[44] The Opponent correctly submits that only the state of the Canadian marketplace is relevant in these proceedings. Third party marks in the U.S. are not relevant.

[45] Ms. Brigant, a law clerk employed by the Applicant's solicitors, conducted searches of the Canadian trade-marks database on February 9, 2007 directed to the word MASTER. State of the register evidence is only relevant insofar as one can make inferences from it about the state of the

marketplace, and inferences about the state of the marketplace can only be drawn where large numbers of relevant registrations are located. [*Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432; *Del Monte Corporation v. Welch Foods Inc.* (1992), 44 C.P.R. (3d) 205 (F.C.T.D.); *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (F.C.A.)]

[46] Ms. Brigant located 3,037 registrations with the word MASTER as part of the trade-mark. The popularity of this word presumably is due to its laudatory nature.

[47] Ms. Brigant then narrowed her search to MASTER marks that contain the word “garage” in the wares/services. This search located six third party marks, in the name of four parties. Such low numbers are insufficient to support any conclusion about the state of the marketplace.

[48] Mr. Schram stated at paragraph 13 of his affidavit that he is personally aware of many other companies that use or have used the term MASTER in connection with doors, door openers and door installation services. He has provided four examples with respect to Canada:

1. Canadian Doormaster Electric Ltd. of British Columbia, which markets garage doors (Exhibit “E”);
2. Sunshine Door of Alberta, which markets its doors as DOOR MASTERS (Exhibit “F”);
3. Spring Masters of Canada of Ontario, which sells doors and building materials (Exhibit “G”);
4. Pro-Master Garage Doors Service of Ontario, which sells other parties’ garage doors and openers, in particular LIFTMASTER openers (Exhibit “H”).

[49] The Opponent filed the Brady affidavit in response to the foregoing evidence of Mr. Schram. Ms. Brady’s evidence regarding the four companies as of August 9, 2007 is as follows:

1. The web page of Canadian Doormaster was still on the Internet; a telephone call to that company confirmed that they sell garage door openers, in particular LIFTMASTER and LYNXMASTER garage door openers (but not GARAGE

MASTER openers).

2. The Sunshine Doors website no longer displayed a particular DOOR MASTERS logo after May 6, 2006 but in 2007 its website did display both A DOOR MASTERS SUNSHINE DOOR Logo and the statement, “The Sunshine Door is manufactured in Red Deer, Alberta by DOORMASTERS INC.” A telephone call to this company was answered as “Good Morning, Door Masters” and confirmed that they sell LIFTMASTER garage door openers, but not GARAGE MASTER or LYNXMASTER openers.
3. The web page of Spring Masters of Canada was still on the Internet but the telephone number listed was no longer in service. Using Bell directory assistance, Ms. Brady located a number for Spring Masters of Canada in Ontario but a telephone call to that number revealed that such company does not sell garage door openers and is in an unrelated field.
4. The web page of Pro-Master Garage Doors Service of Ontario was still on the Internet. A telephone call was answered as “Pro-Master, can I help you?” and confirmed that they sell garage door openers, in particular LIFTMASTER openers and parts for LYNXMASTER, but not GARAGE MASTER.

[50] From the foregoing, I can only conclude that the Opponent’s use of the formative MASTER is not unique in its general field. I cannot conclude that there has been sufficient use of MASTER by third parties to increase the ability of Canadians to distinguish between one MASTER mark/name and another. Nevertheless, given the laudatory nature of the word, the attention of Canadian consumers would likely be drawn to the other features of such marks.

[51] It is interesting to also note the evidence introduced as Exhibit 3 to the Anderson cross-examination, namely the November 2007 web pages of Creative Door Services Ltd. (located in B.C., Alberta and Saskatchewan). The products offered by Creative Door Services Ltd. include both the Opponent’s LiftMaster garage door openers and a third party’s idrive TorqueMaster garage door opener. [pages 31-33, Anderson cross-examination] In addition, pages from the Opponent’s own 2007 website, introduced as Exhibit 6 during the cross-examination, show that

one of the Opponent's authorized dealers for its LIFTMASTER products is Pro Master of Mississauga, Ontario.

(ii) family of marks

[52] The Opponent has pleaded that it has a family of MASTER marks. In order to claim the benefit of a family of marks, the Opponent must prove use of each mark in its alleged family. [*McDonald's Corp. v. Alberto-Culver Co.* (1995), 61 C.P.R. (3d) 382 (T.M.O.B.)] In addition, a relevant consideration when a family of marks is pleaded is whether the feature common to the Opponent's marks is found in trade-marks owned by others. [*Canadian Olympic Association v. Techniquip Limited* (1999), 3 C.P.R. (4th) 219 (F.C.A.)]

[53] The Opponent has not evidenced its alleged family as it has only shown use of one MASTER mark and it appears that others in its industry use MASTER.

(iii) U.S. Opposition

[54] I will not discuss the U.S. Opposition further because that case differs from the one at hand with respect to both the law and the evidence. Cases decided in foreign jurisdictions have no precedential binding authority on this Board. [*Origins Natural Resources v. Warnaco U.S.* (2000) 9 C.P.R. (4th) 540 (T.M.O.B.); see also *Vivat Holdings Ltd. v. Levi Strauss & Co.* (2005), 41 C.P.R. (4th) 8 (F.C.T.D.)]

(iv) Applicant's reputation with respect to LYNX

[55] The Applicant submits that a further surrounding circumstance is the fact that the key word of its corporate name is the first word in the applied-for marks and that the mark LYNX has been used by it in Canada since 1976 on garage door openers.

[56] While the evidence supports a conclusion that the Applicant does have a reputation in association with LYNX, it is LYNXMASTER, not LYNX, that is at issue here.

conclusion re s. 6(5)

[57] Having considered all of the surrounding circumstances, I find that there is not a reasonable likelihood of confusion between the parties' marks. The most crucial or dominant factor in determining the issue of confusion is the degree of resemblance between the trade-marks and the marked differences between the first, dominant portion of each mark makes confusion unlikely, regardless of the fact that only the Opponent's mark has acquired a reputation. [See *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2d) 145 (F.C.T.D.) at 149, affirmed 60 C.P.R. (2d) 70.] To find otherwise would, in my view, be tantamount to granting the Opponent an inappropriate monopoly to the laudatory word MASTER in its field.

[58] Accordingly, the s. 12(1)(d) grounds are dismissed.

Section 16 grounds of opposition

[59] The Opponent has pleaded that the Applicant is not the person entitled to registration pursuant to s. 16(3) of the Act in that as of the filing date of the applications, the Applicant's marks were confusing with the Opponent's trade-marks GARAGE MASTER, LIFT MASTER and LIFTMASTER, which were previously used in Canada in association with, *inter alia*, garage door openers and structural parts therefor, as well as with the Opponent's trade-mark ACCESSMASTER, which was previously used in Canada in association with perimeter access security devices, and the Opponent's family of MASTER trade-marks. In order to meet its initial burden with respect to s. 16(3)(a), the Opponent must evidence that it has used its marks in Canada prior to July 21, 2004. The Opponent has done so only with respect to LIFTMASTER garage door openers.

[60] There are some differences between the evidence as of today's date and as of the filing date of the applications. As of the filing date of July 21, 2004, there is no evidence of the use of MASTER by third parties and the evidence of the Opponent's reputation is reduced somewhat. However, these differences do not result in a different conclusion regarding the likelihood of confusion from that reached above pursuant to s. 12(1)(d), since my earlier conclusion was

determined primarily based on the differences between the parties' marks. As a result, in the circumstances of this case, nothing turns on the date at which the issue of confusion is determined.

[61] Accordingly, for reasons similar to those set out under the s. 12(1)(d) grounds of opposition, the s. 16 grounds are also dismissed.

Distinctiveness grounds of opposition

[62] The Opponent has pleaded that each of the Applicant's marks is not distinctive because it is confusing with the Opponent's marks. The date to assess confusion under this ground is the date of filing of the opposition [*Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)]. However, an assessment of the likelihood of confusion as of such date does not differ significantly from my assessment of the likelihood of confusion as of today's date pursuant to s. 12(1)(d).

[63] The distinctiveness grounds of opposition are accordingly dismissed for reasons similar to those discussed with respect to the s. 12(1)(d) grounds.

Section 30(i) grounds of opposition

[64] 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. [*Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R. (2d) 152 (T.M.O.B.)] There is no evidence of bad faith in the present case. In this regard, I find that neither the Applicant's knowledge of the Opponent's marks nor any patent litigation between the parties supports a conclusion of bad faith.

[65] The s. 30(i) grounds of opposition are dismissed.

Section 30(e) grounds of opposition

[66] The Opponent has pleaded that the applications do not comply with s. 30(e) of the Act in that, at the date of filing of the applications, the Applicant did not intend to use the applied-for

trade-marks. The Opponent relies on the counter statements to meet its initial burden with respect to this ground. The Applicant's counter statements, in addition to denying the grounds of opposition, set out various arguments. Typically, such inappropriately placed argument is simply ignored. However, here the Opponent wishes to rely on the following statement from paragraph (g) of the counter statements: "The Applicant states that since the Lynx cat head logo appears in connection with all of the Applicant's goods in some way, the distinct commercial impression of its trade-mark will be further enhanced in the marketplace."

[67] I do not read the foregoing quote as some sort of admission that the Applicant does not intend to use the applied-for marks. Moreover, I reject the Opponent's argument that even if these statements are not clearly inconsistent with the Applicant's intent to use the marks, such a test should not be applied since there is no ability for the Opponent to cross-examine on the contents of a counter statement. Clearly the Opponent could have cross-examined the Applicant's Vice President Schram if it seriously wanted to pursue this ground of opposition. Furthermore, as pointed out by the Applicant's agent at the oral hearing, Mr. Schram made a clear attestation in his affidavit concerning the Applicant's intent to use both of the applied-for marks.

[68] I am therefore dismissing the s. 30(e) grounds of opposition on the basis that the Opponent has not met its initial burden in respect thereof.

Disposition

[69] Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject both oppositions pursuant to s. 38(8) of the Act.

DATED AT TORONTO, ONTARIO, THIS 19th DAY OF OCTOBER 2009.

Jill W. Bradbury
Member
Trade-marks Opposition Board