

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

Citation: 2011 TMOB 140
Date of Decision: 2011-08-04

**IN THE MATTER OF AN OPPOSITION by
Fronsac TM S.A. to application No. 1,351,271
for the trade-mark 60 EARTH HOUR &
Design in the name of World Wide Fund For
Nature Australia**

[1] On June 12, 2007, World Wide Fund For Nature Australia (the Applicant) filed an application to register the trade-mark 60 EARTH HOUR & Design (shown below) (the Mark) based upon proposed use of the Mark in Canada in association with the following wares and services, as revised:



(1) Cardboard; goods made from paper or cardboard, namely paper bags, labels, envelopes, note pads, organizers, stationery paper, postcards, writing paper, note paper and note cards; printed matter and printed publications, namely books, booklets, newsletters, magazines, catalogues, fact sheets, training manuals, brochures, diaries, calendars, greeting cards,

posters and wrapping paper; photographs; coasters, placemats and tablemats; (2) clothing, namely, athletic clothing, baby clothing, children's clothing, beachwear, casual clothing, rainwear, ski-wear, outdoor winter clothing, sleepwear, sportswear, underwear, pants, shirts, t-shirts, swimwear, jackets, business suits and socks; clothing accessories, namely, belts, scarves and wristbands; footwear, namely, athletic footwear, beach footwear, casual footwear, children's footwear, formal footwear, evening footwear, exercise footwear, outdoor winter footwear, hiking footwear and rain footwear; headgear, namely, headbands, berets, earmuffs, hats and toques.

(1) Advertising services, namely, placing advertisements for others, preparing advertisements for others, advertising the wares and services of others, direct mail advertising, and selling the wares and services of others by mail; providing advertising space in periodicals, magazines, newsletters, books and booklets; promotional services, namely, promoting goods and services by arranging for sponsors to affiliate goods and services with events relating to and with organizations dedicated to conservation of nature and the environment; marketing services, namely, arranging for the distribution of the products of others and providing marketing strategies; business management and business administration services; retail services, namely, retail sale of clothing, sporting goods, toys, food, books, periodicals and other printed matter; (2) education, training and teaching services in the field of the conservation of nature and the environment; entertainment, sporting and cultural activities, namely, organizing events and activities to raise awareness of the conservation of nature and the environment and to raise funds for organizations working for the conservation of nature and the environment; organizing conferences, exhibitions, community events and seminars relating to the conservation of nature and the environment; publication services, namely, operating an internet website providing information relating to conservation of nature and the environment, providing on-line electronic publications, publication of books, booklets, magazines, texts, training manuals, brochures, fact sheets and newsletters; production of videos, DVDs, CDs and other media containing educational and/or training content; advisory, consultancy and information services in relation to each of the aforementioned services.

[2] The application is also based upon use of the Mark in Australia in association with the wares (2) and services (2) and registration of the Mark in that country in association with the same kind of wares (1) and (2) and services (1) and (2). It further claims priority of the corresponding trade-mark application filed on December 13, 2006 under No. 1151908 in that country.

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of July 2, 2008.

[4] On October 27, 2008, Fronsac TM S.A. (the Opponent) filed a statement of opposition against the application. The grounds of opposition are:

- (i) The application for the Mark does not comply with the requirements of s. 30 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) in that:
 - (a) “[T]he application does not contain a statement in ordinary commercial terms of the specific wares or services in association with which the [Mark] has been claimed to have been used and is proposed to be used”;
 - (b) “The Applicant has not used the [Mark] in association with all of the wares and services as claimed in the application or at all”;
 - (c) “The Applicant did not intend to use the [Mark] in Canada in association with all of the wares and services set forth in the application based upon proposed use”;
 - (d) “The Applicant could not have been satisfied that it was entitled to use the [Mark] in Canada in association with the wares and services described in the application in view of the prior use and registration of the [Opponent’s] trade-marks” SIXTY, MISS SIXTY, and MISS SIXTY & Design (hereinafter referred to collectively as the Opponent’s MISS SIXTY Marks) listed in the attached Schedule A to my decision;
- (ii) The Mark is not registrable in view of the provisions of s. 12(1)(d) of the Act in that it is confusing with the Opponent’s trade-marks set forth in Schedule A;
- (iii) The Applicant is not the person entitled to registration of the Mark in view of the provisions of s. 16(2)(a) and (3)(a) of the Act in that, at the date of filing of the application, it was confusing with the Opponent’s trade-marks set forth in Schedule A, which had been previously used in Canada or made known in Canada; and
- (iv) The Mark is not distinctive within the meaning of s. 2 of the Act by reason of the fact that the Mark does not actually distinguish the wares and services of the Applicant, nor is it adapted to distinguish them, from the wares sold by the Opponent in association with the trade-marks set forth in Schedule A.

[5] The Applicant filed and served a counter statement in which it denies the Opponent's allegations.

[6] In support of its opposition, the Opponent filed the affidavit of Carla Edwards, a secretary employed by the law firm representing the Opponent in the present opposition proceeding, sworn August 7, 2009. In support of its application, the Applicant filed the affidavit of Josh Laughren, the Communications Director with World Wide Life Fund Canada (WWF Canada), sworn December 7, 2009.

[7] Both parties filed written arguments. An oral hearing was not requested.

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[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 evidentiary 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 Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.); and *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)].

Analysis of the grounds of opposition

[9] Applying these principles to the present case, the s. 16 (non-entitlement) and non-distinctiveness grounds of opposition can be summarily dismissed on the basis that the Opponent has not met its initial evidentiary burden in respect thereof. More particularly:

- The s. 16(2)(a) and (3)(a) grounds fail because the Opponent has failed to show that as of the date of filing of the Applicant's application, in this case the priority filing date of December 13, 2006, its MISS SIXTY Marks had been previously used in Canada and had not been abandoned as of the date of advertisement of the Applicant's application [s. 16(5) of the Act]. The Opponent has not filed any evidence of use of its MISS SIXTY

Marks. The Opponent's evidence consists solely of a copy of the particulars of three of the four trade-mark registrations pleaded by the Opponent in its statement of opposition obtained from the Canadian Intellectual Property Office (CIPO) trade-mark database, namely TMA409,753, TMA519,093 and TMA691,460. The mere existence of these registrations can establish no more than *de minimis* use of the Opponent's trade-marks [see *Entre Computer Centers, Inc. v. Global Upholstery Co.* (1992), 40 C.P.R. (3d) 427 (T.M.O.B.)]. Such use does not meet the requirements of s. 16 of the Act [see *Roos, Inc. v. Edit-SRL* (2002), 23 C.P.R. (4th) (T.M.O.B.)]; and

- The non-distinctiveness ground of opposition fails because the Opponent has failed to show that as of the filing date of the statement of opposition its MISS SIXTY Marks had a substantial, significant or sufficient reputation in Canada so as to negate the distinctiveness of the applied-for mark [see *Bojangles' International LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.)]. Again, the Opponent has not filed any evidence demonstrating the extent to which its MISS SIXTY Marks have become known in Canada.

[10] Turning to the s. 30 grounds of opposition, the Opponent's pleading raises four grounds of opposition. These grounds respectively fall under subsections 30(a), 30(d), 30(e) and 30(i) of the Act. All of these grounds of opposition can also be summarily dismissed as follows:

- The s. 30(a) ground of opposition, as pleaded, does not raise a proper ground of opposition in that the Opponent has not pleaded any material fact in respect thereof;
- The s. 30(d) ground of opposition fails on the basis that the Opponent has not met its initial evidentiary burden in respect thereof. There is no evidence whatsoever that puts into issue the correctness of the use and registration abroad basis claimed in the Applicant's application;
- The s. 30(e) ground of opposition fails on the basis that the Opponent has not met its initial evidentiary burden in respect thereof. There is no evidence whatsoever that puts

into issue the correctness of the proposed use basis claimed in the Applicant's application; and

- The s. 30(i) ground of opposition, as pleaded, does not raise a proper ground of opposition. The mere fact that the Applicant may have been aware of the existence of the Opponent's MISS SIXTY Marks does not preclude it from making the statement in its application required by s. 30(i) of the Act

Even if the ground had been properly pleaded, where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional circumstances such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.)]. There is no such evidence in the present case.

[11] The only ground of opposition the Registrar must decide on is the ground based on non-registrability of the Mark. As indicated above, the Opponent has pleaded that the Mark is not registrable having regard to the provisions of s. 12(1)(d) of the Act in that it is confusing with the Opponent's MISS SIXTY Marks as listed in Schedule A.

[12] As indicated above, the Opponent has provided through the Edwards affidavit, particulars of three of the four registrations pleaded by the Opponent obtained from CIPO trade-mark database. I have exercised the Registrar's discretion to confirm that all four registrations are in good standing as of today's date.

[13] As the Opponent's evidentiary burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's MISS SIXTY Marks.

[14] 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.

[15] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those listed at 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 the trade-marks have 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. This list is not exhaustive; all relevant factors are to be considered, and are not necessarily attributed equal weight [see *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.); and *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée* (2006), 49 C.P.R. (4th) 401 (S.C.C.) for a thorough discussion of the general principles that govern the test for confusion].

[16] That said, and as recently reminded by Mr. Justice Rothstein in *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27 at para 49:

[...] the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis [...]. As Professor Vaver points out, if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar [...]. As a result, it has been suggested that a consideration of resemblance is where most confusion analysis should start [...]

[17] As I consider the degree of resemblance between the parties' marks to be the determining factor in the present case, I will analyse this factor first.

[18] The law is clear that when assessing the degree of resemblance between two marks they are to be looked at in their entirety and not dissected [see *British Drug Houses Ltd. v. Battle Pharmaceuticals* (1944), 4 C.P.R. 48 at 56(Can. Ex. Ct.), affirmed (1946) 5 C.P.R. 71 (S.C.C.)].

[19] In the present case, I agree with the Applicant that the parties' marks are clearly dissimilar in nearly every respect, and can be readily distinguished from one another. Their only

point of similarity is the inclusion of the word “SIXTY” in the Opponent’s marks and the numeral “60” incorporated into the Mark. However, the numeral “60” is in a design form that incorporates images of parts of the terrestrial globe. When the Mark is considered as a whole, the numeral “60” evokes the interval of 60 minutes that makes an hour and the images of parts of the terrestrial globe evoke the Earth, hence “EARTH HOUR”.

[20] By comparison, the Opponent’s MISS SIXTY Marks, except for registration No. TMA409,753 for the word mark SIXTY, are made up of the words “MISS SIXTY”, which, in the context of the Opponent’s wares, convey the idea of fashion items inspired by the icons of the 1960s designed for young women. The Opponent’s word mark SIXTY does not convey any particular idea in the context of the Opponent’s wares, except maybe, a reference again to the 1960s fashions. This brings me to address the inherent distinctiveness of the parties’ marks and the extent to which they have become known.

[21] The parties’ marks are inherently distinctive, not describing any particular feature of their associated wares or services.

[22] The strength of a trade-mark may be increased by means of it becoming known through promotion or use. However, as indicated above, there is no evidence that the Opponent’s MISS SIXTY Marks have been used in Canada or that they have become known to any extent whatsoever in Canada. As indicated above, the mere existence of the Opponent’s registrations can establish no more than *de minimis* use of the MISS SIXTY Marks in Canada.

[23] Turning to the Applicant’s proposed Mark, the Applicant has provided through the Laughren affidavit, evidence purporting to establish use of the Mark. I will briefly go over Mr. Laughren’s affidavit in light of the submissions made by the Opponent in its written argument.

[24] Mr. Laughren identifies himself as the Communication Director with WWF Canada and states that WWF Canada is a member of a worldwide group of environmental organizations known as the WWF Global Network and that he has worked with WWF Canada since 1997 [paragraph 1 of his affidavit].

[25] Mr. Laughren states that in 1961, the umbrella organization, WWF – World Wide Fund for Nature (WWF International) was formed under the name World Wide Fund (WWF) and is comprised of affiliated member organizations with global operations supporting conservation projects and to raise public awareness of environmental issues. Mr. Laughren goes on to state that the Applicant and WWF Canada are both independent WWF member organizations. He continues stating that while each of the independent member organizations work collaboratively, they also operate autonomously [paragraphs 2 to 5 of his affidavit].

[26] Mr. Laughren states that in the ordinary course of his employment, he is in regular contact with colleagues at the Applicant and other WWF member organizations and he has corresponded with Andy Ridley to discuss and confirm the contents of his affidavit as it relates to Australia. Mr. Laughren explains that Andy Ridley worked as Communication Director for WWF Australia since 2002, and helped to develop the 2007 inaugural EARTH HOUR event (discussed below). He became Executive Director of the global EARTH HOUR campaign after the success of the 2007 event, but continues to be based with WWF Australia [paragraph 6 of his affidavit].

[27] Mr. Laughren then goes over the history of the Mark stating that in 2007, WWF Australia initiated the first EARTH HOUR event to educate people about climate change. In furtherance thereof, it encouraged Sydney residents to turn off their lights for an hour starting at 7:30pm on March 31, 2007. Mr. Laughren states that he is informed by Andy Ridley that at least as early as January 2007, WWF Australia had begun using the Mark in connection with the EARTH HOUR event [paragraphs 7 to 10 of his affidavit]. As stressed by the Opponent and acknowledged by the affiant himself, Mr. Laughren has no access to WWF Australia's business records and is relying on second-hand information in regard to WWF Australia's use of the Mark in Australia. As such, I agree with the Opponent that Mr. Laughren's statements pertaining to the alleged use of the Mark by the Applicant in Australia is inadmissible hearsay. Accordingly, I will not comment further the history of use of the Mark by the Applicant as far as it pertains to Australia.

[28] That said, Mr. Laughren explains in his affidavit that in the wake of the successful 2007 EARTH HOUR event, WWF decided to launch the event globally the following year. On March

29, 2008, an EARTH HOUR event was held in 371 locations in over 35 countries, including Canada. Mr. Laughren states that according to news reports, over 50 million people participated in this event [paragraph 11 of his affidavit].

[29] More particularly, Mr. Laughren attaches to his affidavit as Exhibit 6 various WWF Canada press releases and related documents used in Canada in association with the 2008 EARTH HOUR event, which prominently feature the Mark. Mr. Laughren states that WWF Canada distributed these materials across Canada and depicted many on its website. He also includes a copy of a photograph of a 2008 EARTH HOUR event at WWF Canada held at Nathan Phillips Square in Toronto featuring two large banners displaying the Mark. He further attaches as Exhibit 7 a copy of a press release dated April 16, 2008 reporting the results of an Angus Reid poll commissioned by WWF Canada, according to which almost half of Canada's adult population participated in "WWF's Earth Hour event on March 29, 2008, creating an unprecedented call to action on climate change. [...] Nationally, more than 150 cities and municipalities turned off the lights – the most in any country. Across the country 49 per cent of Canadians say they participated in Earth Hour, and in the Greater Toronto Area (GTA) participation rose to 85 per cent" [paragraphs 12 and 13 of his affidavit].

[30] Mr. Laughren states that on March 28, 2009, the EARTH HOUR event was held in more than 4,000 locations in 88 countries around the world. He states that this time, WWF estimated that hundreds of millions of people participated in the event. Again, WWF Canada was a major participant. Mr. Laughren states that in collaboration with the city of Toronto, WWF Canada hosted a free EARTH HOUR concert at Nathan Phillips Square. WWF Canada prominently displayed posters featuring the Mark during the concert and in pre-concert advertising [paragraph 14 of his affidavit].

[31] Mr. Laughren states that according to an Environics poll, 52 per cent of adult Canadian respondents participated in the 2009 EARTH HOUR event and 85 per cent of respondents across the country were aware of the EARTH HOUR event. He attaches as Exhibit 8 a true copy of this poll. He also attaches as Exhibit 9 a collection of WWF Canada press releases and related documents used in association with the 2009 EARTH HOUR event, which were distributed

across Canada and made available on the WWF Canada website and which prominently feature the Mark [paragraphs 16 and 17 of his affidavit].

[32] Mr. Laughren states that “[s]ince at least as early as January 2008, WWF Canada has used the [Mark] extensively in Canada in connection the EARTH HOUR products, events and materials. At all times, this has been under license, and subject to direction and quality control by the [Applicant]” [paragraph 18 of his affidavit]. Mr. Laughren then provides some further “non-exhaustive examples” of WWF Canada’s “extensive use of the EARTH HOUR logo [that is the Mark] in Canada” and states that in each case, these materials display the Mark [paragraph 19 of his affidavit]. These examples include the following:

- On-line use of the Mark on WWF Canada’s website at *www.wwf.ca*. Mr. Laughren states that in March 2008 alone, WWF Canada’s website received over 400,000 page views. Over 120,000 Canadians registered online as supporters of the 2008 EARTH HOUR event. He further states that over 70,000 Canadians did the same for the 2009 EARTH HOUR event and that 550,000 visited WWF Canada’s website [paragraphs 20 to 24 of his affidavit, Exhibits 10 and 11];
- A few thousand posters, postcards and buttons promoting the EARTH HOUR events [paragraphs 25 to 29 of his affidavit, Exhibits 12 to 15];
- 500 T-shirts, many of which were sold to Canadians via the WWF Canada online store [paragraphs 30 to 32 of his affidavit, Exhibits 16 to 18, which include *inter alia*, copies of photographs of these T-shirts being worn in Canada by singer Nelly Furtado, Virgin Group chairman Richard Branson, and Toronto Mayor David Miller];
- Various print ads by WWF Canada ran in the *Toronto Star* newspaper and on *Toronto Star* newspaper boxes prior to the 2008 EARTH HOUR event. Mr. Laughren further provides a chart summarizing WWF Canada’s advertising for the 2009 EARTH HOUR event (which includes print ads in the *Toronto Star*, *Vancouver Sun* and *Halifax Herald* newspapers, digital billboard ads at Yonge and Dundas, Toronto, etc.) and details of television advertising including for example commercials featuring Nelly Furtado and Richard Branson aired on Global TV between March 17 and 29, 2008. Mr. Laughren

states that with the exception of the radio advertisement, all of these advertisements featured the Mark [paragraphs 33 to 38 of his affidavit, Exhibits 19 to 21].

[33] The Opponent submits that Mr. Laughren's statement that "[a]t all times, [WWF Canada's use of the Mark] has been under license, and subject to direction and quality control by [the Applicant]" is nothing more than a bald assertion, unsupported by any factual evidence from which it could be ascertained as to whether there is proper licensing in place, pursuant to s. 50 of the Act. The Opponent submits that Mr. Laughren makes the following contradictory statements with respect to both direction and quality control in regard to WWF Canada's use of the Mark:

- Paragraph 24: "As WWF's Canadian Internal Lead for the EARTH HOUR brand, *I approved* each of the abovementioned online uses of the EARTH HOUR LOGO";
- Paragraph 29: : "As WWF's Canadian Internal Lead for the EARTH HOUR brand, *I approved* each of the abovementioned materials featuring the EARTH HOUR LOGO";
- Paragraph 32: "As WWF's Canadian Internal Lead for the EARTH HOUR brand, *I approved* the design of the 2008 and 2009 [T]-shirts";
- Paragraph 36: "As WWF's Canadian Internal Lead for the EARTH HOUR brand, *I approved* each of the abovementioned advertisements featuring the EARTH HOUR LOGO"; and
- Paragraph 39: "As WWF's Canadian Internal Lead for the EARTH HOUR brand, *I approved* these commercials [...] before they went to air in Canada". [Emphasis added]

[34] The Opponent points out that none of the exhibits to the Laughren affidavit include a copy of the license agreement between the Applicant and WWF Canada from which it may be determined whether proper licensing controls were in place. The Opponent submits that aside from the one statement asserting direction and quality control by the Applicant, the Laughren affidavit is also silent as to providing further details regarding the nature of the alleged direction and methods of quality control by the Applicant. The Opponent further submits that Exhibits 13 and 14 to the Laughren affidavit suggest use of the Mark that does not inure to the benefit of the Applicant. More particularly, in Exhibits 13 and 14, which consist respectively of copies of the

front and back of a postcard and the artwork that appeared on some of the posters distributed by WWF Canada, the Mark is marked with the TM symbol. Two other logos, namely the PANDA LOGO and the WWF LOGO are depicted on these materials and marked with the ® symbol. The following notice appears on the back of the postcard and at the bottom of the poster:

© Panda symbol WWF-World Wide Fund for Nature (also known as World Wildlife Fund). ® “WWF” is a WWF Registered Trademark.

[35] I disagree with the Opponent’s submissions. The fact that none of the exhibits to the Laughren affidavit include a copy of the license agreement between the Applicant and WWF Canada is not fatal to the Applicant as s. 50 of the Act does not require a written license agreement. The same holds true of the fact that none of these exhibits give public notice either of the fact that the use of the Mark is a licensed use or of the identity of the owner (in fact, all exhibits are silent as to the ownership of the Mark), as s. 50 of the Act does not require that public notice of such license be given. What is required by s. 50 of the Act is that is that “the owner has, under the license, direct or indirect control of the character or quality of the wares and services”. In the present case, Mr. Laughren has clearly sworn, in paragraph 18 of his affidavit reproduced above, that such control by the Applicant over the licensed use of the Mark by WWF Canada exists. Mr. Laughren’s explicit statement regarding control is further supported by the statement that in the ordinary course of his employment, he is in regular contact with colleagues at the Applicant. On a fair reading of the affidavit as a whole, I do not consider Mr. Laughren’s statements that *he personally approved* the materials described above to contradict the statement made in paragraph 18 of his affidavit or to lead to the inference that the Applicant itself does not exercise control over the character or quality of same. I read these particular statements of Mr. Laughren’s to mean that *he* is the person responsible, *within WWF Canada*, for ensuring that the proper quality standards are followed.

[36] In view of the foregoing, I am prepared to find that the Applicant has commenced use of its proposed Mark in Canada since at least as early as March 2008 in association with some of the wares and services described in its application for the Mark, such as “T-shirts” and “organizing events and activities to raise awareness of the conservation of nature and the environment”. Although testimony based on data gathered by third parties such as Angus Reid

and Environics constitutes inadmissible hearsay evidence, I am also prepared, considering Mr. Laughren's affidavit as a whole, to accept that the EARTH HOUR event has received considerable attention in Canada and that the Mark has been used and become known at least to some extent in this country in association with such event. If I am wrong in so doing, I wish to add that the overall outcome of the present opposition is not dependant upon a finding of use and acquired distinctiveness of the Applicant's Mark, as per my findings below.

[37] I do not find it necessary to proceed with a detailed analysis of the remaining factors. As indicated above, the issue is whether a consumer, who has a general and not precise recollection of the Opponent's MISS SIXTY Marks, will, upon seeing the Mark, be likely to believe that their associated wares or services share a common source. While there is some overlap between the nature of the parties' wares in the form of clothing, I find such overlap insufficient to shift the balance of probabilities in favour of the Opponent in view of the strong differences existing between the parties' marks and the absence of evidence of acquired distinctiveness of the Opponent's MISS SIXTY Marks, particularly the Opponent's word mark SIXTY.


[38] As I find that the Applicant has satisfied its burden to show that there is not a reasonable likelihood of confusion between the marks in issue, the s. 12(1)(d) ground of opposition is dismissed.

Disposition

[39] In view of the foregoing and 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.

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Trade-mark	Regn. No. & Date	Wares
SIXTY	TMA409,753 1993-03-19	Clothing, namely, trousers, skirts, t-shirts, coats, overcoats, jackets, blouses, pullovers, jumpers, scarves, suits and dresses.
	TMA519,093 1999-11-03	Jeans, shirts, t-shirts; shoes.
MISS SIXTY	TMA691,460 2007-07-06	Perfumeries, essential oils, bath gel, shower gel, foam bath.
MISS SIXTY	TMA705,927 2008-01-29	Leather and imitations of leather; goods of leather and imitations of leather, namely, backpacks, travelling bags, wallets, key rings, shoulder-strap bags, animal skins.