

IN THE MATTER OF AN OPPOSITION by Interlink Reality Corporation
to application No. 1053896 for the trade-mark INTERLINK and Design
filed by InterLink Business Management Inc.

On April 5, 2000, the applicant, InterLink Business Management Inc., filed an application to register the trade-mark INTERLINK and Design (shown below) based on use of the mark since November 1995 by the applicant or its predecessor-in-title in association with the following services:

Providing environmental business development and marketing consultancy services to high-tech environmental manufacturers, environmental remediation businesses, hazardous and oily waste destruction businesses and air pollution control and waste water treatment businesses.

The applicant disclaimed the right to the exclusive use of the words BUSINESS and MANAGEMENT apart from its trade-mark. The application was advertised for opposition purposes on November 21, 2001.



The opponent, Interlink Reality Corporation, filed a statement of opposition on January 8, 2002. Although the opponent correctly referred to Section 38 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (“the Act”) in giving notice of the grounds it was relying upon in supporting its opposition, and also asserted that the basis for opposing falls under Section 6 of the Act, it did not specifically rely on any of the enumerated grounds listed in subsection 38(2) in its statement of opposition. Instead, it made 29 various allegations, some of which regarded the issue of confusion with the opponent’s two registered trade-marks (TMA 479,955 and TMA 524,925) but the majority of which were inadmissible statements of fact. Despite these deficiencies, the Registrar considered that the statement of opposition raised at least one substantial issue for decision and therefore forwarded the statement of opposition to the applicant on March 5, 2002, in compliance with subsection 38(5) of the Act.

Although the statement of opposition may have raised a substantial issue for decision, it should be noted that unless a ground of opposition is set out in sufficient detail to enable the applicant to reply thereto, it cannot be considered (*Imperial Developments Ltd. v. Imperial Oil Ltd.*, 79 C.P.R. (2d) 12 and *Carling Breweries Ltd. v. Molson Companies Ltd.*, 1 C.P.R. (3d) 191). In the present case, the applicant served and filed a counter statement on April 4, 2002. While it did specifically object to paragraphs 9 and 10 of the statement of opposition (for being “illegally pleaded, vague and ambiguous”), it otherwise responded to the statement of opposition by denying all allegations regarding non-entitlement, non-registrability in view of the opponent’s registered trade-marks TMA 479,955 and TMA 524,925, and non-distinctiveness. In view that these three grounds are the grounds of opposition that the applicant has assumed it had to meet, these are the grounds that I will consider as the grounds pleaded.

The applicant has also asserted full compliance with all of the requirements set forth in Section 30 of the Act in its counter statement. However, in view that the opponent did not in fact plead a Section 30 ground, this ground will not be considered.

By way of letter to the Opposition Board dated May 6, 2002, the opponent asked whether there was anything else it had to file or do with respect to the subject application. By way of Office Letter dated May 30, 2002, the opponent was advised that it was in default of filing and service its evidence and that if it did not remedy the default, the subject opposition would be deemed withdrawn pursuant to subsection 38(7.1) of the Act. In reply, the opponent submitted materials entitled “evidence” on June 7, 2002. The opponent was advised by way of Office Letter dated June 19, 2002, that its response did not address the issue raised by the Board concerning the opponent’s default to file and serve its evidence in a timely manner. The opponent was also told that the “evidence” submitted by it would in any event be inadmissible as it was not in affidavit or statutory declaration form as required by the *Trade-marks Regulations*.

In reply, attached to a covering letter dated June 25, 2002, the opponent filed the statutory declaration of Benjamin G. Larsson, declaring the following:

1. I am the President of Interlink Realty Corporation.
2. Attached hereto are true copies of two documents, the first entitled "Evidence" and the second entitled "Statement of Opposition", both of which have been signed by me.
3. All the statements made by me in the documents referred to in paragraph 2 herein are true and correct.

The opponent's letter of June 25, 2002, still did not address the issue raised by the Board concerning the opponent's default to file and serve its evidence in a timely manner. By inadvertence, the Board did not follow up on this deficiency and the proceeding continued.

Although the fact that the opponent was not represented does not excuse it from not having made a retroactive extension of time request to file its evidence pursuant to subsection 47(2) of the Act, in view that: 1) the applicant has not objected to the opponent's non-compliance with the Board Member's request; 2) the opponent has substantively complied with subsection 38(7.1) by filing and serving evidence in the proper form; and 3) the office erroneously allowed the proceeding to continue without addressing the opponent's non-compliance, I am prepared in this case to disregard the opponent's failure to request and be granted a subsection 47(2) extension of time to file its evidence. I would like to add that, even if I am wrong in considering the opponent's evidence, the overall outcome in the present case would be the same.

The applicant filed the affidavit of Sonia Shoukry. Both parties filed a written argument. An oral hearing was not conducted.

Preliminary Issues

In its written argument, the applicant submits that the opponent's evidence must be scrutinized as it is comprised of simply argument or statements attached as exhibits to a statutory declaration. In view that Mr. Larsson has declared that all the statements made in the documents attached to his statutory declaration are "true and correct", I am prepared to accept them as if they had been declared statements contained in the body of the statutory declaration. Any arguments or conclusions of law in the opponent's evidence, however, shall be disregarded.

I also note that the exhibits identified as Exhibits A, B and C which were attached to the document entitled "evidence" were unnotarized. Had an objection to these exhibits been made earlier, the opponent could have rectified this deficiency. However, given that we are now at the hearing stage, I do not consider that it would be fair to disallow the Larsson exhibits into evidence at this stage (see the opposition decision in *Thomas J. Lipton Inc. v. Les Aliments Intergro Inc.* (1989), 26 C.P.R. (3d) 278 at 280-281).

Finally, I note that the purported written argument of the opponent entitled "argument in opposition to application no. 1053896" actually includes additional evidence in the form of an affidavit sworn by Mr. Larsson, with unnotarized exhibits identified as Exhibits A-V. The opponent did not request leave to file these documents as additional evidence pursuant to Rule 44(1) of the *Trade-mark Regulations*.

As the opponent has not requested leave to file these documents as additional evidence pursuant to Rule 44(1) of the *Trade-mark Regulations*, these documents cannot be considered insofar as they contain new evidence. Even if the opponent had requested leave to file these documents as additional evidence, it is the practice of the Opposition Board to only grant leave to

file additional evidence if it is in the interests of justice to do so having regard to: 1) the stage the opposition has reached; 2) the importance of the evidence; 3) the reason why the evidence could not be filed earlier; and 4) the prejudice that would be suffered by the other party. In view that the opponent did not even try to submit this evidence until the written argument stage, there does not appear to be anything in the evidence that explains why it could not have been filed earlier; and the applicant would be prejudiced for not having received the opportunity to comment on this evidence and also for not being able to cross-examine the opponent's affiant on this evidence if it were accepted at the hearing stage, I would not have considered that it was in the interests of justice to grant leave to file this evidence even if leave had been requested to do so.

I would like to add that these documents also refer to grounds of opposition that were not pleaded in the statement of opposition. Had the opponent wished to amend its statement of opposition to include these new grounds, it was required to request leave of the Registrar to do so pursuant to Rule 40 of the *Trade-mark Regulations*. The opponent did not do so. Therefore, since the opponent's statement of opposition did not cover such pleadings, I am precluded from considering them (see *Imperial Developments Ltd. v. Imperial Oil Ltd.* (1984), 79 C.P.R. (2d) 12 at 21 (F.C.T.D.)). In any event, I would like to add that actions for passing off and infringement under subsections 7(b) and 20(1) are normally brought before the Federal Court and not the Opposition Board. Accordingly, these allegations may not have been considered as individual grounds of opposition in this decision.

Opponent's Evidence

The evidence of Mr. Larsson may be summarized as follows.

Interlink Realty Corporation was federally incorporated in 1988, and conducts business locally, nationally and internationally under the protection of two registered trade-marks, TMA 479,955 and TMA 524,925. The mark INTERLINK is registered in association with the following services:

All activities pertaining to real estate; namely: real estate sales, leasing, appraisals, syndication, consulting, relocations, planning, development, construction, restoration, project marketing, investment, acquisitions, dispositions, planning, property management, facility management, estate management and asset management; financial planning and investment management; namely: personal financial planning, consulting, and investment management, corporate financial planning, consulting, and investment management, pension fund planning, consulting, and investment management; real estate publications; namely: books, brochures, newsletters, reports, magazines, on-line and in printed form; financial planning and investment management publications; namely: books, brochures, newsletters, reports, magazines, on-line and in printed form.

The mark INTERLINK REALTY CORPORATION is registered in association with the following services: “Real estate: sales, leasing, management consulting, investment development.”

Mr. Larsson explains that as property/asset/facility managers, his company’s areas of management and consulting activity encompass management, administration, finance, maintenance and investment. He further states that Interlink Consulting Services and Interlink Financial Services perform services described under his company’s registered trade-marks, have been in use since 1988, and conduct business locally, nationally and internationally as divisions of Interlink Realty Corporation. The services of Interlink Realty Corporation, Interlink Financial Services and Interlink Consulting Services are made available to the general public including individuals, families, corporations, financial institutions, religious organizations, governments and pension funds.

Mr. Larsson then states that the primary business of Interlink Realty Corporation is the management of various businesses in the form of real property. Interlink Realty Corporation “establishes the value (rent) for the product (space), market the product, and then sell the use of the space (lease) and operates the business as any other business”. Interlink Realty Corporation’s involvement is that it is the manager of the business. Given that Interlink Realty Corporation has over one hundred clients, it operates over 100 businesses. Mr. Larsson further asserts that many of his company’s clients know his company only as “Interlink”.

Mr. Larsson goes on to explain that a significant portion of the operating budget for each business that his company manages is the activity of waste removal. He asserts that his company has performed this waste management function for 24 years. He further asserts that his company’s activities have and currently include management of a sewage treatment plant for a commercial property, oil storage and removal from restaurants and auto shops.

Finally, Mr. Larsson presents several examples of his company’s efforts to aggressively enforce its trade-mark rights.

Attached as Exhibits A and B to the document attached to his statutory declaration entitled “evidence” are copies of what appears to be the applicant’s web page on a Government of BC Web Site dated October 25,2001, and March 7, 2002, respectively. As Exhibit C he attaches the definitions of the terms “business” and “business activity” as defined and noted in Carswell’s The Dictionary of Canadian Law, Second Edition.

Applicant’s Evidence

The applicant’s evidence may be summarized as follows.

Ms. Shoukry identifies herself as President of InterLink Business Management Inc. She states that the applicant has offered the applied for services in association with the mark InterLink and Design, to selective Canadian companies in the environmental sector with high end environmental technologies for treatment of hazardous wastes, soil and groundwater remediation, air pollution and oil spill equipment, since as early as November, 1995. Attached as Exhibit A to her affidavit are copies of the B.C. Ministry of Competition, Science and Enterprise Internet home page, a list of companies under the Environmental Technology and Services Section where the applicant is listed, and the applicant's business profile under that section.

At paragraph 4, Ms. Shoukry states that the applicant's business also includes recommending to Canadian companies where to market their environmental products and services efficiently. The applicant's dealing in the finance area is to improve the financial situation of a Canadian company so it can acquire a business that would compliment their environmental technology, register them in stock exchange and/or raise funds to develop their environmental equipment.

At paragraph 5, Ms. Shoukry explains that the applicant business also involves exporting or linking Canadian environmental companies and their environmental technologies to international opportunities. The applicant also provides links between Canadian environmental technology developers and end-users, mostly in the areas of hazardous waste incineration, air pollution equipment, soil remediation, industrial waste water treatment and oil spill equipment.

Ms. Shoukry describes the applicant's marketing and development activities at paragraph 6 of her affidavit. She states at paragraph 13 that in Canada, the applicant deals only with environmental companies with high-end technologies and internationally deals with the Federal Government, State Departments, Department of Defence (Navy, Army, Air Force),

Environmental Protection Agency (EPA) for the treatment of hazardous waste, soil and ground water remediation, oil and gas companies world wide for oil spills, and hospitals for medical waste.

At paragraph 17, Ms. Shoukry states that the applicant is known by its trade-mark in dealing with the following: Ministry of Environment, Industry Canada, CEIA, BC Trade & Investment, Federal and Provincial Governments in Canada, Federal and State Departments in the U.S., Canadian environmental companies, Canada Foreign Affairs and International Trade World-wide, financial institutions, major waste management companies and clients that the applicant has signed legal contracts with for the applicant's services. Attached as Exhibits K and L are copies of the applicant's letter head and business card. As Exhibit N Ms. Shoukry attaches a copy of the applicant's profile of services that it provides to prospective clients in Canada.

Ms. Shoukry states that the applicant does not target, nor has it ever dealt with any clients within the real estate sector or in the property management business. Further, the applicant does not advertise in the white or yellow pages as it has a selective client list.

Likelihood of Confusion

With respect to the paragraph 12(1)(d) ground of opposition, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark 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 (FCA)). There is a legal burden on the applicant to establish that there would be no reasonable likelihood of confusion between the marks in issue. This means that if a determinate conclusion cannot be reached, the issue must be decided against the applicant (see *John Labatt Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R.

(3d) 293). However, the opponent has an initial burden to prove the allegations of fact supporting its grounds of opposition.

The opponent has not furnished copies of its trade-mark registrations as evidence. I have therefore exercised my discretion to check the register in order to confirm the existence of the registrations relied upon by the opponent (see *Quaker Oats Co. of Canada Ltd. v. Menu Foods Ltd.* (1986), 11 C.P.R. (3d) 410 at 411).

The test for confusion is one of first impression and imperfect recollection. In applying the test for confusion set forth in subsection 6(2) of the Act, the Registrar must have regard to all the surrounding circumstances, including but not limited to those specifically enumerated in subsection 6(5) of the Act. Those factors specifically set out in subsection 6(5) are: the inherent distinctiveness of the trade-marks and the extent to which they have become known; the length of time each has 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 in appearance or sound or in the ideas suggested by them. The weight to be given to each relevant factor may vary, depending on the circumstances (see *Clorox Co. v. Sears Canada Inc.* 41 C.P.R. (3d) 483 (F.C.T.D.); *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)).

With respect to Paragraph 6(5)(a), the opponent's INTERLINK mark is inherently strong. The opponent's INTERLINK REALTY CORPORATION mark is also inherently distinctive, although to a lesser extent because of its reference to the type of business the opponent conducts. Although I agree with the opponent that the applicant's INTERLINK BUSINESS MANAGEMENT INC. and Design mark may not describe the exact type of business that the applicant conducts, whether this factor renders the applicant's mark misleading is not a relevant

consideration until Paragraph 6(5)(a). Having said that, while the applicant's design does add some distinctiveness to the applicant's mark, I do not consider the applicant's mark as strong as the opponent's INTERLINK mark because of its inclusion of the non-distinctive terms "business", "management" and "inc."

With respect to the extent to which the trade-marks have become known, there is no admissible evidence of sales or advertising of the opponent's services offered in association with either of its marks. The only admissible evidence relevant to this issue is Mr. Larsson's declaration that INTERLINK REALTY CORPORATION has over 100 clients. If I could conclude from this evidence that the opponent's mark had become known at all in Canada, it would be to a limited extent. As for the applicant's mark, from the evidence furnished I am satisfied that the applicant's mark has also become known to a limited extent in Canada, primarily by Canadian environmental companies and associations, government agencies and ministries.

With respect to subsection 6(5)(b) of the Act, while Mr. Larsson deposes that his company's registered marks have been in use since 1988, the admissible evidence furnished does not corroborate such assertion. However, according to the opponent's registrations, both of its marks have been in use in Canada since 1988. This is sufficient to allow me to conclude that the opponent's marks have been in use since that time (see *Cartier Men's Shops Ltd. v. Cartier Inc.* (1981), 58 C.P.R. (2d) 68 at 71 (F.C.T.D.)). Since the applicant's application is based on use of its mark since November, 1995, this factor favours the opponent.

With respect to the services and trades of the parties, it is the applicant's statement of services and the opponent's statement of services in its registration Nos. TMA 524,925 and TMA 479,955 that govern: see *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19

C.P.R.(3d) 3 at 10-11 (F.C.A.), *Henkel Kommanditgesellschaft v. Super Dragon* (1986), 12 C.P.R.(3d) 110 at 112 (F.C.A.) and *Miss Universe, Inc. v. Dale Bohna* (1994), 58 C.P.R.(3d) 381 at 390-392 (F.C.A.). However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties is useful, particularly where there is an ambiguity as to the wares or services covered in the application or registration at issue (see *McDonald's Corporation v. Coffee Hut Stores Ltd.* (1996), 68 C.P.R. (3d) 168 (FCA); *Procter & Gamble Inc. v. Huner Packaging Ltd.* (1999), 2 C.P.R. (4th) 266 (TMOB); *American Optical Corp. v. Alcom Pharmaceuticals Ltd.* (2000), 5 C.P.R. (4th) 110 (TMOB)).

The opponent asserts that a significant portion of the operating budget for each business that it manages is the activity of waste removal, and that it has performed this waste management function for 24 years. Although “waste removal” is not identified in the opponent’s registration as one of the services it offers in association with its mark, I consider this waste removal function to fall under the opponent’s property management or facility management services, both of which fall under the umbrella of “real estate services”.

The opponent further asserts that the applicant’s mark, which includes the words “business management” is confusing with the opponent’s INTERLINK REALTY CORPORATION mark and the “Interlink Financial Services” and “Interlink Consulting Services” that it provides under its mark. In this regard, the opponent points to its print out of the applicant’s website wherein the applicant describes its services as “business development and marketing development, management consulting and corporate finance”. Mr. Larsson claims that these are the very activities that his company performs.

As the applicant's agent points out, however, the opponent's financial and consulting services are services registered in association with the opponent's real estate services. The opponent's waste management function, as noted above, would also be offered in the context of the opponent's residential and commercial real estate services. The applicant's business, on the other hand, centers on providing environmental business development and marketing consultancy services to Canadian companies in the environmental sector with an emphasis on high end environmental technologies for the treatment of hazardous wastes, soil and groundwater remediation, air pollution and oil spill equipment. This is a highly specialized business service, aimed at a sophisticated and distinct business sector. I therefore consider that the services offered by the parties are different, despite the fact that they both relate to the environment.

With respect to the parties' channels of trade, both parties' services have been restricted to some extent. In this regard, both of the opponent's registrations are restricted to services pertaining to real estate. The applicant's "environmental business development and marketing consulting services" are restricted to "high-tech environmental manufacturers, environmental remediation businesses, hazardous and oily waste destruction businesses and air pollution control and waste water treatment businesses". The applicant's evidence also shows that the applicant targets its services to environmental companies with high end technologies and does not target nor deal with clients in the real estates sector or in the property management business. I therefore do not consider that the parties' channels of trade would overlap.

As for paragraph 6(5)(e), I consider there to be more resemblance between the opponent's INTERLINK mark and the applicant's mark than between the opponent's INTERLINK REALTY CORPORATION mark and the applicant's mark. In this regard, there is some degree of resemblance between the opponent's INTERLINK mark and the applicant's mark in appearance and when sounded since the applicant has adopted the entirety of the opponent's

INTERLINK mark as the first component of its mark. The visual resemblance is less than the aural resemblance, however, because of the applicant's design, the words "business", "management" and "inc." and the letters ILMB. The ideas suggested are different as the applicant's mark suggests a business management service that links various companies together while the opponent's INTERLINK mark suggests parts of a chain entwined together.

In view of the above, and bearing in mind the differences in the services of the parties and in their respective channels of trade, and that the services of the parties would not likely be purchased in a hurried manner by the average consumer, I have concluded that the applicant has established that there would be no reasonable likelihood of confusion between the marks at issue, within the meaning of subsection 6(5) of the Act. Therefore the opponent's paragraph 12(1)(d) ground is not successful.

The remaining grounds of opposition also turn on the determination of the issue of the likelihood of confusion between the applicant's trade-mark and the opponent's trade-marks. The material dates for assessing the likelihood of confusion in respect of the non-entitlement grounds and non-distinctiveness grounds are, respectively, the applicant's date of first use, i.e. November, 1995, and the date of opposition, i.e. January 8, 2002 (see *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 412 at 424 (F.C.A.)). The differences in the material dates do not have any significant impact on the determination of the issue of confusion between the trade-marks of the parties. Thus, my finding above that the trade-marks at issue are not confusing likewise applies to these grounds of opposition which I therefore reject.

Accordingly, and with the authority delegated to me under subsection 63(3) of the Act, I reject the opposition pursuant to subsection 38(8) of the Act.

DATED AT GATINEAU, QUEBEC, THIS 16th DAY OF February, 2005.

C. R. Folz
Member,
Trade-Marks Opposition Board