

**IN THE MATTER OF AN OPPOSITION  
by Dimo's Tool & Die Ltd. to application  
no. 1243712 for the trade-mark QUANTUM  
919 DIGITAL filed by Quantum Electronics Inc.**  
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On January, 17, 2005, William Fraser, trading as Quantum Electronics (1900), filed an application to register the trade-mark QUANTUM 919 DIGITAL based on proposed use in Canada in association with

moisture meters and circuit boards for use  
in the agricultural sector.

The application disclaims the right to the exclusive use of the components 919 and DIGITAL apart from the mark as a whole. During the course of this proceeding the application was assigned to the current applicant of record namely, Quantum Electronics Inc.

The application was advertised for opposition purposes in the *Trade-marks Journal* issue dated April 27, 2005, and was opposed by Dimo's Tool & Die Ltd. on October 18, 2005. A copy of the statement of opposition was forwarded by the Registrar of Trade-marks to the applicant, on August 11, 2005, as required by Section 38(5) of the *Trade-marks Act*. The applicant responded by filing and serving a counter statement.

PARTIES' FILINGS

The opponent filed the affidavit of Jason Diehl as its evidence in chief, however, Mr. Diehl was not made available for cross-examination. Consequently, Mr. Diehl's affidavit was

returned to the opponent pursuant to Section 44(5) of the *Trade-marks Regulations*: see the Board ruling dated November 29, 2006. In the result, there is no evidence of record submitted on behalf of the opponent. Similarly, the applicant elected not to file any evidence in support of its application. However, both parties filed written arguments and both attended at an oral hearing.

#### EVIDENTIAL BURDEN ON OPPONENT

The statement of opposition pleads various grounds of opposition pursuant to Sections 12(1)(b); 16(3)(a); 30(a), (e), (i) and 38(2)(d) of the *Trade-marks Act*. In this regard, the opponent relies on its use of the trade-marks MODEL 919 and 919 in association with moisture meters used to determine the moisture content of grain. As always, the legal onus is on the applicant to show that its application does not contravene the provisions of the *Trade-marks Act* as alleged by the opponent in the statement of opposition. However, there is also, in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in the allegations pleaded in the statement of opposition: see *John Labatt Limited v. The Molson Companies Limited*, 30 C.P.R. (3d) 293 at 298. The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. In the instant case the opponent has not submitted any evidence to support any of the grounds of opposition.

In particular, the opponent has not evidenced any use of its marks. At the oral hearing,

counsel for the opponent requested that I take judicial notice of its two trade-mark applications for the marks MODEL 919 and 919 pleaded in the statement of opposition. I indicated that I would exercise the Registrar's discretion to check the trade-marks register to confirm that the applications were extant: see *Royal Appliance Mfg. Co. v. Iona Appliance Inc.* (1990), 32 C.P.R.(3d) 525 at 529 (TMOB). However, counsel for the opponent also requested that I accept as fact that its marks MODEL 919 and 919 have been used in Canada since 1952 and 1977, respectively, as claimed in the opponent's trade-mark applications. I decline to do so because the Registrar's discretion does not extend so far. Rather, it is the responsibility of the opponent to establish that it has in fact used its marks and to establish the time period of such use. In other words, while the Registrar's discretion may be exercised to take cognizance of the filing of a trade-mark application to support a ground of opposition pursuant to Section 16(3)(b), the Registrar will not take cognizance, on the basis of the application, that a party has in fact been using the mark which is the subject of the application.

I would also note that in respect of the ground of opposition based on Section 12(1)(b), it is not apparent from dictionary entries for the words QUANTUM and DIGITAL why the applied for mark QUANTUM 919 DIGITAL is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares.

#### DISPOSITION

In the absence of evidence from the opponent, the opponent has not met its evidential burden in respect of any of the grounds of opposition. Further, the Registrar's exercise of

discretion respecting the opponent's trade-marks applications and dictionary entries for components of the applied for mark do not assist the opponent. In the result, the opponent cannot succeed on any of the grounds of opposition pleaded in this proceeding. Accordingly, the opposition is rejected.

DATED AT VILLE DE GATINEAU, QUEBEC, THIS 27th DAY OF JANUARY, 2009.

Myer Herzig,  
Member,  
Trade-marks Opposition Board