



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

**Citation: 2014 TMOB 59**  
**Date of Decision: 2014-03-12**

**IN THE MATTER OF OPPOSITIONS by  
dm-drogerie markt GmbH + Co. KG to  
application Nos. 1,459,567 and 1,459,568  
for the trade-marks BALEA and Baléa in  
the name of 911979 Alberta Ltd.**

[1] This decision concerns oppositions brought by dm-drogerie markt GmbH + Co. KG (the Opponent) against application No. 1,459,567 for the trade-mark BALEA and No. 1,459,568 for the trade-mark Baléa filed by 911979 Alberta Ltd (the Applicant) for a variety of hair and skin care products. The statement of wares and filing bases of each application are identical; they are fully identified in Schedule “A” to this decision.

[2] Each opposition was brought under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) by statement of opposition filed on August 23, 2010. In each case, the Applicant requested an interlocutory ruling on the sufficiency of some of the pleadings, which resulted in the Opponent requesting leave to file an amended statement of opposition dated December 17, 2010. On January 25, 2011, the Registrar granted leave to file the amended statement of opposition and ruled on the sufficiency of the pleadings challenged by the Applicant in each case.

[3] Further to the Registrar’s ruling of January 25, 2011, the governing grounds of opposition in each case are premised on allegations that: the application does not comply with section 30 of the Act; the Applicant is not the person entitled to registration of the trade-mark in view of confusion with the Opponent’s trade-mark BALEA that has been previously made known in

Canada; and the Applicant's trade-mark is not distinctive. The grounds of opposition are summarized in Schedule "B" to this decision.

[4] In each case, the Opponent filed the affidavit of Petra Schäfer, the Opponent's Managing Director, and the affidavit of Leslie Gallivan, a trade-mark assistant employed by the firm acting as trade-marks agent for the Opponent. However, in view of Ms. Schäfer's failure to attend for cross-examination, her affidavit has been deemed not to be part of the Opponent's evidence [see Registrar's ruling dated April 18, 2012]. Thus, the Opponent's evidence of record consists only in the affidavit of Ms. Gallivan, who was not cross-examined.

[5] In support of each application, the Applicant filed a certified copy of its registration No. TMA725,049 for the trade-mark BALEA as well as affidavits of Jayson B. Dinelle and Gay Owens, both employed by the firm acting as trade-marks agent for the Applicant. Neither Mr. Dinelle nor Ms. Owens was cross-examined.

[6] Only the Applicant filed a written argument in each case. Both parties were represented at a hearing where the two cases were heard together.

[7] For the reasons that follow, each opposition shall be rejected. Since the grounds of opposition, evidence and submissions for the two proceedings are identical, for ease of reference, I will refer to the proceedings in the singular and to the trade-marks BALEA and Baléa collectively as the Mark.

#### Legal Onus and Evidential Burden

[8] The legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition of record. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d)

293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA); and *Wrangler Apparel Corp v The Timberland Company* (2005), 41 CPR (4th) 223 (FC)].

### Material Dates

[9] The material dates that apply to the grounds of opposition are as follows:

- sections 38(2)(a)/30 of the Act - the filing date of the application [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- sections 38(2)(c)/16(1)(a) of the Act - the date of first use claimed in the application;
- sections 38(2)(c)/16(3)(a) of the Act - the filing date of the application; and
- section 38(2)(d)/non-distinctiveness - the filing date of the statement of opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

### The Issues

[10] The issues that arise from the grounds of opposition, in order of pleading, are:

1. Did the Applicant specifically define in ordinary commercial terms all of the wares identified in the application?
2. Could the Applicant have been satisfied of its entitlement to use the Mark in Canada at the filing date of the application?
3. Had the Applicant used the Mark in Canada since the claimed date of first use at the filing date of the application?
4. Did the Applicant intend to use the Mark in Canada at the filing date of the application?
5. Was the Applicant the person entitled to registration of Mark as of the claimed date of first use or the filing date of the application?
6. Was the Mark distinctive of the Applicant's wares as of the filing date of the statement of opposition?

[11] Before analysing these issues, I shall deal with the Applicant's submissions that the affidavit of Ms. Gallivan, filed by the Opponent, consists almost entirely of inadmissible hearsay and otherwise improper evidence.

#### The Gallivan Affidavit

[12] The Applicant specifically objects to the admissibility of paragraphs 2 to 4, 6 and 7 as well as Exhibits "A" to "C", "F" and "G" of the affidavit as evidence in the proceeding.

[13] The Applicant submits that paragraphs 2 to 4 and Exhibits "A" to "C" are comprised of opinion evidence relating directly to a contentious issue and thus should be disregarded. The general argument is that employees are not independent witnesses giving unbiased evidence when they give opinion evidence on contested issues [see *Cross Canada Auto Body Supply (Windsor) Limited et al v Hyundai Auto Canada* (2005), 43 CPR (4th) 21 (FC); affirmed (2006), 53 CPR (4th) 286 (FCA)]. The Applicant also submits that the aforementioned paragraphs and exhibits as well as paragraphs 6 and 7 and Exhibits "F" and "G" constitute hearsay and should be deemed inadmissible or be given no weight. As the affidavit contains two paragraphs numbered "6", I note that the Applicant objects to the admissibility of the second one.

[14] At the hearing, the Opponent submitted that Ms. Gallivan provides no opinions and that her affidavit does not go to contentious issues; rather it goes to discharging the Opponent's evidential burden. The Opponent also submitted that paragraphs 2 to 4 and Exhibits "A" to "C" constitute necessary and reliable evidence. However, the Opponent did not make any submissions about paragraphs 6 and 7 and Exhibits "F" and "G" of the affidavit.

[15] Before addressing the parties' submissions, I summarize below the evidence introduced by Ms. Gallivan.

[16] On or about April 12, 2010, and again on or about June 13, 2011, Ms. Gallivan was instructed by a senior trade-mark counsel at the Opponent's trade-marks agent firm "to conduct an online search in order to locate websites demonstrating instances of consumer confusion between the goods sold by [the Opponent] and branded by the trade-mark BALEA and goods sold by Shoppers Drug Mart and branded by the trade-mark BALEA or Baléa". Ms. Gallivan

visited and reviewed the websites located through her search, “printing those which might suggest confusion on the part of the consumers”. She files as Exhibit “A” copies of information printed from the websites located [para. 2 of the affidavit].

[17] On or about April 12, 2010, Ms. Gallivan emailed the “editor and lead content contributor” for the website *www.lipglossandlaptops.com* to inquire whether the BALEA products offered by Shoppers Drug Mart were related to the BALEA products offered in Germany. Ms. Gallivan files as Exhibit “B” copy of the email she received from Aidrie Miller in response [para. 3 of the affidavit].

[18] Through her Internet searches, Ms. Gallivan noted reviews for BALEA products sold at Shoppers Drug Mart and BALEA products sold by the Opponent on the website *www.reviewstream.com*, which also featured a review for a BALEA body lotion with no indication as to the source of the product. She files copies of the reviews as Exhibit “C” [para. 4 of the affidavit].

[19] Finally, Ms. Gallivan files the following as exhibits to her affidavit:

- photographs of several “Baléa products” that she purchased at two different Shoppers Drug Mart retail stores in June 2011 [Exhibits “D” and “E”, para. 5 and 6 of the affidavit];
- copies of six Canadian copyright applications filed in the name of the Opponent on June 28 and July 4, 2011 as well as “pictures of the works covered by the applications” [Exhibit “F”, para. 6 of the affidavit]; and
- a copy of a corporate search concerning the Applicant, which Ms. Gallivan ordered through “the Alberta Registry Agent, Monarch Registries” [Exhibit “G”, para. 7 of the affidavit].

[20] I now revert to the parties’ submissions about the admissibility of the Gallivan affidavit, which I note is the entire evidence of the Opponent in support of its opposition.

*Paragraphs “2” to “4”; Exhibits “A” to “C” of the Gallivan affidavit*

[21] I disagree with the Opponent’s submission that this evidence does not go to contentious issues. Rather, I agree with the Applicant that it does. For one thing, Ms. Gallivan states expressly at paragraph 2 of her affidavit that her mandate was to conduct an online search *in order to locate websites demonstrating instances of consumer confusion*. Also, Ms. Gallivan clearly had to form an opinion for the purposes of her Internet searches.

[22] In the end, I find that paragraphs 2 to 4 and Exhibits “A” to “C” of the Gallivan affidavit should not be given any weight because they are not confined to facts or non-controversial issues; they constitute evidence of the type that ought to be excluded from consideration pursuant to *Cross Canada*. If I am wrong in so finding, then this evidence should be deemed inadmissible hearsay or be given no weight for the reasons that follow.

[23] I am unable to place any weight on the email filed as Exhibit “B” – it is hearsay and cannot be adduced as evidence of the truth of its content. Likewise, I am unable to place any weight on the content of the website pages filed as Exhibits “A” and “C”. At most, Ms. Gallivan has evidenced that these website pages existed at the time she performed her searches – she has not evidenced the truth of their content. In that regard, I would add that I have difficulty to reconcile the Opponent’s contention that it does not rely on the website pages for the truth of their content with its contention that they establish Canadian consumers’ awareness of the Opponent’s trade-mark. In other words, how can the Opponent contend that the website pages establish consumers’ awareness of its trade-mark without relying on the truth of their content?

[24] Finally, I agree with the Applicant that any reputation of the Opponent’s trade-mark BALEA could have been evidenced through an affidavit of an individual with direct knowledge of the Opponent’s activities. As pointed out by the Applicant, the Opponent filed an affidavit Petra Schäfer, its Managing Director, but it elected not to make Ms. Schäfer available for cross-examination.

*Paragraphs “6” and “7”; Exhibits “F” and “G”*

[25] I agree with the Applicant that there is no indication that Ms. Gallivan was involved at all in the filing of the copyright applications referenced in paragraph 6 of her affidavit and filed as Exhibit “F”. I also agree with the Applicant that there is no basis from which it can be concluded that the images included in Exhibit “F” are in fact the works sought to be protected by the copyright applications. Thus, I find that paragraph 6 and Exhibit “F” constitute *prima facie* inadmissible hearsay evidence.

[26] The question becomes whether this evidence satisfies the criteria of necessity and reliability, which will also determine the weight to be accorded to the evidence [see *Labatt Brewing Company Limited v Molson Breweries, A Partnership* (1996), 68 CPR (3d) 216 (FCTD)]. Reliable evidence of the copyright applications could have been easily produced by way of certified copies of the relevant applications, or from an individual involved in filing the applications and with knowledge of the relevant works sought to be protected. The Opponent has not explained why it was necessary for Ms. Gallivan to file the evidence.

[27] In the end, I am not affording weight to paragraph 6 and Exhibit “F” of the Gallivan affidavit as I find they constitute inadmissible hearsay.

[28] Finally, the Opponent did not make any submissions as to what it is trying to establish with Exhibit “G”, which is a print-out from the Alberta Corporate Registration System concerning the Applicant. Even if Exhibit “G” is found admissible, at best it shows that the Applicant was an active legal entity under the Alberta Corporation Registration System at the date shown on the print-out, i.e. “2011/06/10”.

Analysis of the Issues

[29] In turning to the analysis of the issues, I note that the Opponent has focussed its oral submissions on the issue of whether the Applicant could have been satisfied of its entitlement to use the Mark in Canada at the filing date of the application.

*Did the Applicant specifically define in ordinary commercial terms all of the wares identified in the application?*

[30] This issue arises from the ground of opposition alleging that the application does not comply with section 30(a) of the Act.

[31] The Opponent did not file any evidence and did not make any submissions to establish that the wares “mens (sic) and womens (sic) hair care preparations, skin care preparations, facial wipes, deodorants, sun care preparations, face serum, face cream, bath gift sets comprising preparations for use in the bath, men’s skin care preparations” have not been defined specifically in ordinary commercial terms.

[32] Accordingly, the ground of opposition based upon non-compliance with section 30(a) of the Act is dismissed.

*Could the Applicant have been satisfied of its entitlement to use the Mark in Canada at the filing date of the application?*

[33] This issue arises from the three-pronged ground of opposition alleging that the application does not comply with section 30(i) of the Act.

[34] Section 30(i) of the Act requires an applicant to include a statement in the application that the applicant is satisfied that it is entitled to use the trade-mark in Canada. Where an applicant has provided the required statement, the jurisprudence suggests that non-compliance with section 30(i) can be found only where there are exceptional circumstances that render the applicant’s statement untrue, such as evidence of bad faith or non-compliance with a federal statute [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155; and *Canada Post Corporation v Registrar of Trade-marks* (1991), 40 CPR (3d) 221 (FCTD)].

[35] As I previously indicated, at the hearing the Opponent focused on the ground of opposition based upon non-compliance with section 30(i) of the Act. It should be noted however that the Opponent restricted its submissions to the first prong of the ground of opposition revolving around allegations that the Applicant was well aware, or should be deemed to have



been aware, of the Opponent's trade-mark BALEA previously made known in Canada and extensively used elsewhere.

[36] I have found that Exhibits "A" and "C" of the Gallivan affidavit are inadmissible or of no probative value as evidence. Thus, the Opponent's submissions that the website pages filed with the Gallivan affidavit establish third party awareness of its trade-mark BALEA, and so must be accepted as sufficient to establish the Applicant's awareness of the mark, are a moot point.

[37] In the end, there is no evidence to conclude that the Applicant was aware of the Opponent's alleged trade-mark at anytime whatsoever. I would add that even if the Opponent had established use or making known of its mark in Canada at the relevant time, the Applicant's awareness of the Opponent's allegedly confusing mark would not by itself have been sufficient to support the ground of opposition based on non-compliance with section 30(i) of the Act.

[38] I turn to the second prong of the ground of opposition based on allegations that the use of the Mark is in violation of the Opponent's copyright existing in labels shown in print-outs attached to the statement of opposition.

[39] I have found that paragraph 6 and Exhibit "F" of the Gallivan affidavit constitute inadmissible hearsay. Further, the Opponent did not make any submissions about the second prong of the ground of opposition. Thus, I conclude that the Opponent has failed to make out a *prima facie* case of copyright infringement [see *E Remy Martin & Co SA v Magnet Trading Corp (HK) Ltd* (1988), 23 CPR (3d) 242 (TMOB)].

[40] Likewise, there is no evidence supporting the third prong of the ground of opposition alleging that the adoption of the Mark is contrary to sections 7(a) to (c) and 7(d)(iii) of the Act, nor has the Opponent made any submissions about this prong of the ground of opposition.

[41] Accordingly, the ground of opposition based upon non-compliance with section 30(i) of the Act is dismissed in its entirety

*Had the Applicant used the Mark in Canada since the claimed date of first use at the filing date of the application?*

[42] This issue arises from the ground of opposition alleging that the application does not comply with section 30(b) of the Act.

[43] The Opponent did not make any submissions on this ground of opposition. Further, the Opponent did not file any evidence to establish that the Mark had not been used in Canada by the Applicant since at least as early as October 2009 in association with the wares identified at (1) in the application.

[44] Accordingly, the ground of opposition based upon non-compliance with section 30(b) of the Act is dismissed on account of the Opponent's failure to meet its evidential burden.

*Did the Applicant intend to use the Mark in Canada at the filing date of the application?*

[45] This issue arises from the two-pronged ground of opposition alleging that the application does not comply with section 30(e) of the Act in that the Opponent did not have a *bona fide* intention to use the Mark.

[46] The first prong of the ground of opposition is based on an allegation that any intention to use the Mark was arrived at in bad faith. The second prong is based on allegations that the Applicant did not intend to use the Mark, nor was in a position to properly license the Mark.

[47] Assuming the allegation of "bad faith" supports a ground of opposition based upon non-compliance with section 30(e) of the Act, the first prong of the ground of opposition is dismissed for the Opponent's failure to prove the facts alleged in its pleading.

[48] Likewise, the second prong of the ground of opposition is dismissed for the Opponent's failure to meet its evidential burden.

[49] Indeed, as the application contains a statement that the Applicant by itself and/or through a licensee intends to use the Mark in Canada, the application formally complied with

section 30(e) of the Act on November 18, 2009. The question becomes whether or not the application substantially complied with section 30(e) of the Act, namely: Was the Applicant's statement that it intended to use the Mark true? [See *Home Quarters Warehouse, Inc v Home Dépôt, USA, Inc* (1997), 76 CPR (3d) 219 (TMOB); *Jacobs Suchard Ltd v Trebor Bassett Ltd* (1996), 69 CPR (3d) 569 (TMOB)]. There is no evidence that the Applicant falsely made the statement that it intended to use the Mark in association with the wares identified at (2) in the application.

[50] Accordingly, the ground of opposition based upon non-compliance with section 30(e) of the Act is dismissed in its entirety.

*Was the Applicant the person entitled to registration of the Mark as of the claimed date of first use or the filing date of the application?*

[51] This issue arises from the grounds of opposition alleging that the Applicant is not the person entitled to registration of the Mark under sections 16(1)(a) and 16(3)(a) of the Act owing to confusion with the Opponent's trade-mark BALEA previously made known in Canada in association with a variety of wares, including hair and skin care products.

[52] Despite the onus resting on the Applicant, the Opponent must establish that its alleged trade-mark had been made known in Canada by the specific means set out in section 5 of the Act, such that the trade-mark had become well known at the relevant material date. The material date varies according to the basis of the application: October 2009 for the wares identified at (1) and November 18, 2009 for the wares identified at (2) in the application. The Opponent must also establish that its trade-mark had not been abandoned at the date of advertisement of the application for the Mark, i.e. June 23, 2010 [see section 16(5) of the Act].

[53] Suffice it to say there is no evidence establishing that the Opponent's alleged trade-mark BALEA has been made known in Canada Act, at any time whatsoever, pursuant to section 5 of the Act which reads as follows:

5. A trade-mark is deemed to be made known in Canada by a person only if it is used by that person in a country of the Union, other than Canada, in association with wares or services, and

(a) the wares are distributed in association with it in Canada, or

(b) the wares or services are advertised in association with it in

(i) any printed publication circulated in Canada in the ordinary course of commerce among potential dealers in or users of the wares or services, or

(ii) radio broadcasts ordinarily received in Canada by potential dealers in or users of the wares or services,

and it has become well known in Canada by reason of the distribution or advertising.

[54] Accordingly, each of the non-entitlement grounds of opposition is dismissed.

*Was the Mark distinctive of the Applicant's wares as of the filing date of the statement of opposition?*

[55] This issue arises from the two grounds of opposition alleging that the Mark is not distinctive under section 2 of the Act.

[56] The Opponent has failed to provide any evidence in support of the ground of opposition revolving around the likelihood of confusion between the Mark and the Opponent's "BALEA trade-marks". Indeed, there is no evidence establishing that any BALEA trade-marks of the Opponent had become known in Canada, as of August 23, 2010, so as to negate the distinctiveness of the Mark [see *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

[57] Likewise, the Opponent has failed to provide any evidence in support of the ground of opposition alleging that the use of the Mark does not meet the requirements of section 50 of the Act. In that regard, I agree with the Applicant that the Opponent has not provided any evidence establishing that the use of the Mark did not meet the requirements of section 50 of the Act, or indeed that section 50 of the Act is even relevant.

[58] Accordingly, both non-distinctiveness grounds of opposition are dismissed.

Disposition

[59] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the oppositions to application Nos. 1,459,567 and 1,459,568 under section 38(8) of the Act.

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

## Schedule "A"

### Statement of Wares and Bases of Application Nos. 1,459,567 and 1,459,568

(1) Mens (*sic*) and womens (*sic*) hair care preparations, skin care preparations, disposable razors, bath oil, body lotions, shampoos, hair conditioners, facial wipes, body soaps, bath powder, leg wax strips, face and bikini wax, make up remover, lip balm, shave cream, deodorants, face and foot masks, body creams, foot creams, hair masks, foam bath, hair detangler, body wash and hairspray, based on use in Canada since at least as early as October 2009.

(2) Hair bleach, hair removal lotion, sun care preparations, facial cleanser, facial tonic, eye cream, face serum, face cream, face lotion, bath gift sets comprising preparations for use in the bath, foam bath, body wash, body mist, after shower gel, body salt, massage oil, body scrub, foaming shower gel, bath bomb, body butter, hair putty, hair gel, hair mousse, hand sanitizer, hand and body soap in sheet form, anti bacterial hand wipes, anti bacterial liquid soap, men's skin care preparations, razor cartridges and razor systems comprising razor handles and razor blades, based on proposed use in Canada.

## Schedule “B”

### Summary of the Grounds of Opposition

Since the governing grounds of opposition are the same in the two proceedings, the singular form is used for ease of reference and the trade-marks BALEA and Baléa are referred to collectively as the Mark.

- (a) The application does not comply with section 30(a) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) because the following designations do not meet the requisite degree of specificity, nor are they ordinary commercial terms: mens (sic) and womens (sic) hair care preparations, skin care preparations, facial wipes, deodorants, sun care preparations, face serum, face cream, bath gift sets comprising preparations for use in the bath, men’s skin care preparations.
- (b) The application does not comply with section 30(i) of the Act because the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the wares specified in the application in view of the following:
  - (i) the Applicant was well aware or should be deemed to have been aware of the Opponent’ trade-mark BALEA previously made known in Canada and extensively used elsewhere. Also, for any of the reasons indicated in the statement of opposition, the Applicant must be deemed to have been aware that it was not entitled to use the Mark. Furthermore, the Applicant could not in bad faith “coat tail” on the reputation of the Opponent’s BALEA trade-marks;
  - (ii) the use of the Mark is in violation of the Opponent’s copyright in the labels shown in the print-outs attached under Enclosure A to the statement of opposition; and
  - (ii) the adoption and use of the Mark is contrary to sections 7(a), (b), (c) and (d)(iii) of the Act since the Applicant has made false or misleading statements relating to the Mark that discredit the business, wares or services of the Opponent; the Applicant has passed off other wares or services for those ordered or requested since customers

believed themselves to be purchasing the Opponent's goods or related services; and the Applicant had directed public attention to its wares, services and business in such a way as would likely cause confusion in Canada between its wares, services or business and the wares, services or business of the Opponent in respect of the geographical origin of the goods.

- (c) The application does not comply with section 30(b) of the Act because the Applicant has not used the Mark in association with any or all of the wares listed in the application since at least as early as October 2009.
- (d) The application does not comply with section 30(e) of the Act because the Applicant could not have intended to use the Mark in Canada since it was aware of the Opponent's prior rights in the trade-mark BALEA previously made known in Canada in association with the wares identified hereafter (collectively the Opponent's wares) and therefore would not have a *bona fide* intention to use the Mark which is confusing with the Opponent's trade-mark:

cleaning, polishing, degreasing and abrasive preparations; soaps; perfumeries, essential oils, massage oils for cosmetic use, preparations for hygienic and beauty use; washing and shower gels, creams, soaps and oil; skin care cosmetic preparations; face, skin and body cosmetic creams; cleansing preparations for hygienic and beauty care use; bath salts, not for medical use; deodorants for personal use (perfumeries), antiperspirants (toiletries); beauty masks, lip gloss; make-up; peelings; depilatory preparations; shampoos, hair care preparations, hair lotions, hair dyeing preparations, hair sprays, after shaves, colognes, shaving preparations, preparatory shaving preparations, shaving soaps, after shave lotions, shaving foams, shaving gels, shaving creams, shaving sticks; cleaning preparations for tooth care, mouth washes, not for medical use; cosmetic kits; eye brows cosmetics; cosmetic slimming preparations; artificial nails; nails varnish; nail care preparations; nail varnish remover; artificial eye lash; tissues, impregnated with cosmetic lotions; cotton wool for cosmetic use, cotton sticks for cosmetic purposes; pharmaceutical and medical preparations and substances; sanitary products for medical use; disinfectants; disinfectants for medical use; mouth washes for medical use; bath preparations, medicated, and for therapeutic use; air freshening preparations; biological preparations for medical use; lozenges for medical use; deodorants for clothing and textiles; remedies for respirations; dietary products for medical use, food for babies; dietary foods for health care on the basis of vitamins, minerals, amino acids, trace elements; enzyme preparations for medical use; preparations for health care; food supplements, not for medical use, on the basis of minerals, amino



acids, trace elements and plants fibres; slimming products for medical use, appetite suppressants for medical purposes; tonics for medical use; anti-allergic preparations; foot care preparations for medical use, preparations against callouses for medical use; pharmaceutical and medical preparations for athletes, such as salves, gels and sprays against pull muscles or tendons and muscles strain; plasters, wound dressing materials, medicine cases, portable, filled; sun protection preparations for pharmaceutical use; haemostatic pencils; bandages for dressings and bandages for medical purposes; women's hygienic products, namely sanitary tissues, tampons and panty liners; eye bandages for medical use, eye pads for medical use; cotton wool for medical use; cleaning preparations and solutions for contact lenses; razors, electric and non-electric, razor blades, razors; shaving kits; razor cases; hair clippers and shearing apparatus (for personal use); nail clippers; nail nippers; nail files and fingernail polishers (electric and non-electric); electric manicure sets; pedicure sets; pincers; eyelash curlers; depilation appliances, electric and non-electric; hand implements for hair curling (non-electric).

Any intention to use the Mark was arrived at in bad faith as the Applicant knew of the Opponent's trade-marks BALEA because: representatives from both the Applicant and the Opponent meet to discuss various topics including the BALEA trade-marks; representative of the Opponent visited Canada, met with representatives of Shoppers Drug Mart and visited some shops; one or more representative from Shoppers Drug Mart visited the Opponent in Germany; and directing minds at Shopper Drug Mart / the Applicant were well aware of the use and making known of the Opponent's BALEA trade-marks. Furthermore, there was no intention on the part of the Applicant to use the Mark, nor was it in a position to properly license the Mark.

- (e) The Applicant is not the person entitled to registration of the Mark under sections 16(1)(a) and 16(3)(a) of the Act since it is confusing with the trade-mark BALEA owned by the Opponent, which has been previously made known in Canada by the Opponent in association with the Opponent's Wares.
- (f) The Mark is not distinctive within the meaning of section 2 of the Act in that it is not adapted to distinguish the Applicant's wares from the Opponent's wares and services offered in association with the Opponent's "BALEA trade-marks".
- (g) The Mark is not distinctive within the meaning of section 2 of the Act in that the Applicant does not control the character and quality of the goods under the licensing requirements of

section 50 of the Act. More particularly, a corporate entity other than the Applicant is responsible for controlling the character and quality of the goods; the Applicant is nothing more than a shell company and therefore cannot and does not exert the requisite control. Yet at the same time, the Applicant is shown as the owner of the Mark. For this reason there is ownership claimed by at least two separate entities with the result that the Mark is not distinctive of any one company.