

**IN THE MATTER OF AN OPPOSITION
by Vincor International Inc. to application
No. 1,086,247 for the trade-mark
PRESIDENTE MARGARITA & Design
filed by Brinker Restaurant Corporation**

On December 13, 2000, the applicant, Brinker Restaurant Corporation, filed an application to register the trade-mark PRESIDENTE MARGARITA & Design (shown below) for the following wares:

- (1) clothing, namely T-shirts and shirts,
- (2) alcoholic beverages, namely margaritas for consumption on or off the premises.

The application is based on proposed use in Canada for wares (1) and (2) and on use and registration (No. 2,518,659) in the United States for wares (2). The application was amended to include a disclaimer to the word MARGARITA and was subsequently advertised for opposition purposes on November 27, 2002. During the opposition proceeding, the application was amended to remove the words “or off” from wares (2).



The opponent, Vincor International Inc. (“Vincor”), filed a statement of opposition on January 27, 2003, a copy of which was forwarded to the applicant on February 18, 2003. The first ground of opposition is that the applicant's application does not conform to the

requirements of Section 30(e) of the Trade-marks Act because the applicant does not intend to use the applied for trade-mark in Canada. The second and third grounds read as follows:

(b) The Opponent further bases its opposition on the grounds set out in Section 38(2)(d), in that the Applicant has not used nor intends to use the Trade-mark in the United States of America in association with the wares and services as described in the Applicant's application herein and puts the Opponent to the strict proof thereof.

(c) The Opponent further bases its opposition on the grounds set out in Section 38(2)(a), namely that the application does not comply with the requirements of Section 30(i). The Applicant cannot be satisfied that it is entitled to use the Trade-mark in Canada in association with the wares listed in its application, namely clothing, namely, T-shirts and shirts; and alcoholic beverages, namely margaritas for consumption on or off the premises, because the Applicant has known that the trade-mark has been extensively used by the Opponent and its predecessor in title for confusingly similar wares being "wine."

The fourth ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Act because it is confusing with the trade-marks PRESIDENT and BRIGHTS PRESIDENT & Design (shown below) registered under Nos. UCA27871 and 251,873 respectively, both for "wines."



The fifth ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3)(a) of the Act because, as of the applicant's filing date, the applied for mark was confusing with the two registered trade-marks noted above previously used or made known in Canada by the opponent or its predecessors in title with wines. The sixth ground is that the applicant's trade-mark is not distinctive because it is confusing with the opponent's trade-marks.

The applicant filed and served a counter statement on June 13, 2003. Paragraph 2(a) of that document reads as follows:

(a) The Applicant denies the allegations made in paragraph 1(a), (b) & (c) of the Opponent's Statement of Opposition, and asserts that the trade-mark PRESIDENTE MARGARITA & Design, as claimed in application No. 1,086,247, was filed in compliance with the requirements of Section 30. The Applicant puts the Opponent to the strict proof of its allegations.

As its evidence, the opponent submitted the affidavits of Steven Bollinger, Robert W.

White and David Veneziano. As its evidence, the applicant submitted the affidavits of Michael W. Cormier and Laura C. Richard. Both Mr. Cormier and Ms. Richard were cross-examined on their affidavits and the transcripts of those cross-examinations and the replies to undertakings given form part of the record of this proceeding. As evidence in reply, the opponent submitted an affidavit of Mario Iafrate, a certified copy of registration No. 524,006 for the trade-mark LEO BEER & Design and a certified copy of a statement of opposition by the present opponent to application No. 1,165,579 for the trade-mark CUVÉE DU PRESIDENT. Both parties filed a written argument and an oral hearing was conducted on February 6, 2009 at which both parties were represented.

THE OPPONENT'S EVIDENCE

In his affidavit, Mr. Bollinger identifies himself as the Vice-President, Marketing of Vincor. He states that Vincor was incorporated on April 22, 1992 and describes the various mergers and acquisitions in the early 1990s that resulted in Vincor ultimately acquiring T. G. Bright & Co., Limited ("Bright") and Cartier & Inniskillin Vintners Inc. Mr. Bollinger further states that Vincor is Canada's largest producer and distributor of wine, wine kits, ciders and coolers. According to Mr. Bollinger, Vincor sells both wine coolers and distilled alcoholic beverage coolers.

Vincor and its predecessors in title have sold wine for many years in association with the trade-mark PRESIDENT and, in particular, a product called Canadian champagne. For many years, that product was sold by Bright under the trade-mark BRIGHTS PRESIDENT with the word PRESIDENT separately and more prominently featured on the

label. More recently, the product has featured the trade-mark **PRESIDENT** without reference to the word **BRIGHTS**. Mr. Bollinger states that over 40 million liters of wine bearing the **PRESIDENT** marks have been sold in Canada and that the opponent's **PRESIDENT** sparkling wine has been Canada's best selling Canadian champagne since at least 1978. Sales of that product for the period 1999-2004 were about \$20 million. Advertising expenditures for that same period were in excess of one million dollars and sponsorship expenditures were more than \$400,000.

Mr. Bollinger describes the retail market in Canada for alcoholic beverages which includes retail outlets operated by provincial liquor boards in most provinces. Sales are also effected through bars, hotels and restaurants licensed by those boards. In addition, Vincor sells its wines through more than 160 **WINE RACK** retail outlets in Ontario. Mr. Bollinger states that his company's **PRESIDENT** product is featured on restaurant wine lists and menus as well as on "menu shells" and "table talkers" placed on tables in restaurants. Exhibits Q and R to Mr. Bollinger's affidavit comprise samples of such items.

Mr. Bollinger states that it is common for manufacturers of wine and other alcoholic beverages to sell collateral merchandise such as clothing items. He appended as an exhibit photocopies of such clothing items from his company. However, none of those items bears the opponent's trade-mark **PRESIDENT**.

In his affidavit, Mr. Veneziano identifies himself as a student-at-law with the firm acting as the opponent's trade-mark agent. Mr. Veneziano appends as exhibits to his

affidavit photocopies of four magazine articles which mention **PRESIDENT** or **BRIGHTS PRESIDENT**, one of which was from “Canadian Business” and one of which was from “Flare.” Mr. Veneziano also describes his visit to an outlet called The Beer Store in Toronto where he noted that many articles bearing beer trade-marks were on sale including sweaters, gloves, jerseys and baseball caps. He also accessed a web site for The Beer Store which includes a catalogue of such items.

Mr. White is the Senior Vice President, Canada of the Audit Bureau of Circulations. In his affidavit, he provides audited circulation figures for the magazines “Canadian Business” and “Flare.”

THE APPLICANT’S EVIDENCE

In his affidavit, Mr. Cormier identifies himself as a trade-mark agent with the firm acting as the trade-mark agent for the applicant. Mr. Cormier searched the word “president” on the web site for the SAQ, the provincial liquor authority for the province of Quebec. Exhibit B to his affidavit lists the five products his search revealed, two of which appear to be products of the opponent. The remaining three are red wines from France and Morocco. Mr. Cormier was unable to purchase any of these wines due to a labor disruption and he did not provide any sales figures for these wines.

Mr. Cormier was instructed to obtain certified copies of a number of applications and registrations for trade-marks which include the word “president.” However, almost all of those applications and registrations cover wares other than alcoholic beverages. One

registration is for the trade-mark **LEO BEER & Design** for beer and soft drinks which includes the word **PRESIDENT** as only a very minor component of the mark. Another registration is for the mark **THOMAS JEFFERSON & Design**(which includes the word **PRESIDENT**) for whiskey based on use and registration in South Africa.

Mr. Cormier conducted a search of the Trade-marks Office records for trade-marks owned by Loblaws Inc. that include the word **PRESIDENT** or **PRESIDENT'S**. Exhibit H to his affidavit is a list of such marks. However, there is no indication that any of the marks cover alcoholic beverages and no copies of the applications and registrations were provided. Similarly, Exhibit I lists five trade-mark applications and registrations apparently owned by an entity identified as **B.S.A. societe anonyme**. Again, there is no indication that any of the marks are for alcoholic beverages and no copies of the applications and registrations located were provided.

The balance of the Cormier affidavit deals with Mr. Cormier's visits to two beverage web sites which refer to a product called **PRESIDENTE** brandy. To the extent the related exhibits are admissible, they suggest that this is a product produced in Mexico. On cross-examination, Mr. Cormier admitted that he did not try to purchase a bottle of **PRESIDENTE** brandy.

In her affidavit, Ms. Richard identifies herself as the Assistant Secretary of Brinker International, Inc., the parent company of the applicant Brinker Restaurant Corporation,

and refers to both companies as “my company” (hereinafter referred to as “Brinker”). Brinker operates a number of restaurant chains worldwide with 1,400 restaurants and sales of more than \$3 billion per year. One of those chains operates under the trade-mark CHILI'S with eight locations in Alberta and plans to expand elsewhere in Canada.

Ms. Richard states that Brinker has developed special menu themes for its CHILI'S restaurants including something called Chili's Margarita Bar. As part of that theme, the applicant offers several margarita-based drinks including the PRESIDENTE MARGARITA drink sold under the applied for trade-mark. According to Ms. Richard, that particular drink is made with PRESIDENTE brandy which is a Mexican grape brandy. Sample menus appended as Exhibit 5 to her affidavit include the applied for trade-mark and a description of the associated drink as “a distinctive hand-shaken margarita made with Sauza Commemorativo Tequila, Cointreau & Presidente Brandy.” On cross-examination, Ms. Richard stated that she did not know how Canadian franchisees obtain the PRESIDENTE brandy to make the drink (see page 13 of the Richard transcript).

Ms. Richard states that the PRESIDENTE MARGARITA drink is only sold through the applicant's premises and the applicant's Canadian franchisee is not permitted by law to sell such a drink for consumption off the premises. On cross-examination, she stated that the applicant had no intention to sell this drink off premises notwithstanding the original text of the applicant's statement of wares (see page 15 of the Richard transcript). The applicant's sales in the United States for margaritas including the PRESIDENTE

MARGARITA drink were greater than USD 26 million for the period 1998-2005. Canadian margarita sales for the years 2001-2004 were about \$180,000 in total with the **PRESIDENTE MARGARITA** drink being the most popular type. As of the date of Ms. Richard's affidavit, there were no sales in Canada of clothing items bearing the applied for trade-mark.

THE OPPONENT'S REPLY EVIDENCE

As noted, the opponent submitted a certified copy of the present opponent's statement of opposition against the trade-mark **CUVEE DU PRESIDENT** applied for under application No. 1,165,579. The opponent also submitted a certified copy of registration No. 524,006 for the trade-mark **LEO BEER & Design** which illustrates that the word **PRESIDENT** is a very minor component of the mark and also evidences that the registration was expunged on September 27, 2005 for failure to show use of the mark in Canada.

In his affidavit, Mr. Iafrate identifies himself as a private investigator and states that he was hired to determine if any of the products identified as **PRESIDENTE** brandy, **LEO BEER** and **PRESIDENT LEO BEER** were available in Canada. He conducted various Internet searches and found a reference to **PRESIDENTE** brandy at a site for Corby Distilleries Ltd. ("Corby"). He phoned Corby's executive offices and spoke to a woman who indicated that she believed that Corby never listed this product for sale to the general public although they did effect a one-time special purchase for **CHILI'S** restaurants through the Liquor Control Board of Ontario. On cross-examination, Mr. Iafrate admitted that he did not investigate any of the **CHILI'S** restaurants in Canada to see if they had **PRESIDENTE**

brandy in stock.

Mr. Iafrate conducted Internet searches regarding LEO BEER as well. Those searches led him to a site for Boon Rawd Brewery as the producer of that product which identified Pacific Wine & Spirits at the authorized distributor in Canada. When Mr. Iafrate visited their premises, the person he spoke to confirmed that they were the Canadian distributor for Boon Rawd Brewery but that they had never carried the LEO BEER brand.

Mr. Iafrate also investigated the web sites for the various provincial and territorial liquor boards and found no listings for PRESIDENTE brandy or LEO BEER. Since Alberta has privatized its retail liquor industry, Mr. Iafrate telephoned sixteen liquor stores in Calgary and none stated that they carried either of the products.

On cross-examination, Mr. Iafrate was asked about the results of his search of the Quebec liquor board or SAQ web site and admitted that his search revealed “dozens of hits with the word Presidente” but that he didn’t report them because they weren’t relevant to his specific investigation (see page 50 of the Iafrate transcript). However, in the absence of additional information, it is impossible to know the relevance of these “hits.” It may be that many of them were for products of the opponent. Furthermore, such numbers seem to be at odds with the limited results obtained by Mr. Cormier during his search of the SAQ site. If there were dozens of relevant products available at the SAQ, the applicant should have evidenced that fact directly.

THE GROUNDS OF OPPOSITION

The first ground based on non-conformance with Section 30(e) of the Act does not raise a proper ground of opposition since it is not in compliance with Section 38(3)(a) of the Act. The opponent was required to include sufficient allegations of fact to support its conclusion that the applicant did not intend to use the applied for mark in Canada in order for the applicant to know the case it had to meet. Thus, the first ground is unsuccessful.

At the oral hearing, the opponent's agent contended that the first ground was sufficiently pleaded simply by stating that the applicant did not intend to use the applied for trade-mark. He noted that although Ms. Richard referred to the applicant's Canadian franchisees in Alberta and the applicant's strict control over the use and advertising of its trade-marks by its franchisees, she did not specifically state that the applicant licensed its Canadian franchisees to use the applied for trade-mark nor did she state that the applicant exercises direct or indirect control of the character or quality of the franchisees' wares in accordance with the wording of Section 50(1) of the Act. While the opponent is correct in these observations, they are not inconsistent with the applicant having properly licensed the applied for mark to its Alberta franchisees and its stated intention in its application to use its trade-mark in Canada by itself or through a licensee. Thus, even if the first ground had been properly pleaded, it would not likely have been successful.

The applicant contends that the second ground is mistakenly based on Section

38(2)(d) of the Act and that the allegations of fact do not support a ground of non-distinctiveness. However, given the allegations of fact in that ground, it is apparent that the opponent mistakenly referred to Section 38(2)(d) rather than Section 30(d) of the Act. Paragraph 2(a) of the applicant's counter statement suggests that it understood that to be the case. If it did not, it should have raised an objection at the counter statement stage rather than waiting to raise one for the first time in its written argument. In any event, the opponent has failed to meet its evidential burden respecting its allegation that the applicant did not use its trade-mark in the United States and the second ground is therefore also unsuccessful.

On the other hand, the applicant's objection to the third ground is well founded. The opponent has relied on its own use of the mark applied for but did not evidence any use by it of that mark. Thus, the third ground is also unsuccessful. Even if the opponent had referred to its own mark PRESIDENT, the ground would not have raised a proper ground of opposition pursuant to Section 30(i) of the Act. The fact that the applicant may have been aware of the opponent's trade-mark does not by itself preclude the applicant from honestly making the statement in its application required by Section 30(i). The opponent did not allege that the applicant adopted its mark knowing it to be confusing with the opponent's mark. Thus, the third ground would have been unsuccessful, in any event.

As for the fourth 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 the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). The onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Furthermore, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act. Finally, the opponent's mark PRESIDENT is the more relevant of its two registered marks and thus a consideration of the issue of confusion with that mark will effectively decide the outcome of the fourth ground.

As for Section 6(5)(a) of the Act, I have had regard to the following wording from paragraph 10 of the opposition decision in Vincor International Inc. v. Cerveceria Nacional Dominicana C. por A. 2004 CarswellNat 4534 (October 15, 2004; S. N. 789,165):

Neither the opponent's mark PRESIDENT nor the applied for mark PRESIDENTE & Design possesses a high degree of inherent distinctiveness as PRESIDENT is a common word having a somewhat laudatory connotation in relation to wares, that is, suggesting a "leading" or first rate product.

The design component and the disclaimed word MAGARITA do little to enhance the inherent distinctiveness of the applicant's mark. Thus, neither the applicant's mark nor the opponent's mark can be said to be inherently strong.

The Richard affidavit evidences some minor use of the applicant's mark for margaritas in its Alberta restaurants although it is difficult to determine what portion of total margarita sales was for the PRESIDENTE MARGARITA drink. The most that I can

conclude is that the applicant's mark has become known to a very limited extent in Alberta. There is no evidence of use of the mark in association with clothing.

The opponent's mark PRESIDENT, on the other hand, has been widely and substantially used for many years. Based on the Bollinger affidavit, I can conclude that the opponent's mark has become well known throughout Canada in association with wine.

As for Section 6(5)(b) of the Act, the length of time the marks have been in use clearly favors the opponent. As for Sections 6(5)(c) and 6(5)(d) of the Act, it is the applicant's statement of wares and the statement of wares in the opponent's registration 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: see the decision in McDonald's Corporation v. Coffee Hut Stores Ltd. (1996), 68 C.P.R.(3d) 168 at 169 (F.C.A.).

The applicant's wares "alcoholic beverages, namely margaritas for consumption on the premises" are not the same as "wines." However, the wares of both parties are alcoholic beverages and are therefore products of one industry: see Champagne Möt & Chandon v.

Chatam International Inc. (2001), 12 C.P.R.(4th) 549 at 554-558 (T.M.O.B.). As for the applicant's clothing wares, they are different from wine.

The evidence shows that the trades of the parties overlap. Although the opponent's **PRESIDENT** wine is sold through retail liquor stores, it is also sold in bars and restaurants, the latter being the type of establishment through which the applicant's margaritas are sold. Just as the applicant's product is featured on its menus, so, too, does the opponent's trade-mark appear on wine lists, menus and on-table promotional items. The fact that the applicant has restricted sales of its margaritas to its own restaurants to date is immaterial since there is no such restriction in the applicant's statement of wares.

The opponent sought to evidence a connection in the trades of the parties respecting the applicant's clothing wares. However, Mr. Bollinger was unable to evidence any sales of clothing in association with the opponent's trade-mark **PRESIDENT**. He did evidence a few shirts bearing other trade-marks of the opponent but they appear to be simply promotional items. Furthermore, Mr. Bollinger did not evidence the number of such shirts that are produced, sold or distributed.

As for Section 6(5)(e) of the Act, there is a high degree of visual resemblance between the marks at issue in all respects since the most distinctive element of the applicant's mark is the word **PRESIDENTE** which is almost identical to the opponent's registered mark **PRESIDENT**. Phonetically, the dominant component of the applicant's mark would likely

be pronounced as the English word “president”, the French word “presidente” or as “presi-den-tay” for those familiar with the Spanish language.

The applicant submitted that a relevant surrounding circumstance in the present case is the absence of incidents of actual confusion notwithstanding the contemporaneous use of both marks. However, the absence of such evidence is not surprising given the limited use of the applicant’s mark to date and the fact that any such use has been restricted to the applicant’s restaurants.

The applicant further submitted that the significance of any resemblance between the marks is mitigated by the state of the register evidence introduced by means of the Cormier affidavit. State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace: see the opposition decision in Ports International Ltd. v. Dunlop Ltd. (1992), 41 C.P.R.(3d) 432 and the decision in Del Monte Corporation v. Welch Foods Inc. (1992), 44 C.P.R.(3d) 205 (F.C.T.D.). Also of note is the decision in Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd. (1992), 43 C.P.R.(3d) 349 (F.C.A.) which is support for the proposition that inferences about the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located.

As discussed, the evidence from the trade-marks register introduced by the Cormier affidavit has little, if any, relevance to the issue at hand. While Mr. Cormier did evidence a

number of **PRESIDENT** marks owned by Loblaws Inc., none covered alcoholic beverages. As for the registration for the trade-mark **LEO BEER & Design**, it has been expunged for non-use and the Iafrate affidavit suggests that the product has never been sold in Canada. As for the trade-mark **CUVEE DU PRESIDENT**, it has not been registered and, in fact, is the subject of an opposition by Vincor. The registration for the trade-mark **THOMAS JEFFERSON & Design** which includes the word **PRESIDENT** as a subsidiary item is based on use and registration in South Africa. Thus, the applicant has failed to evidence any relevant **PRESIDENT** marks on the register for alcoholic beverages. Even if the two or three marks relied on by the applicant had been relevant, such small numbers are far from sufficient to allow inferences to be made about common use and adoption of any common elements in such marks.

Mr. Cormier also sought to evidence marketplace use of third party **PRESIDENT** marks for alcoholic beverages. Again, that evidence falls far short of what is required to show common adoption and use of similar marks by third parties. Of the five **PRESIDENT** products located on the SAQ site, two are the opponent's products and there is no evidence of the extent of sales of the remaining three. Mr. Cormier was also unable to evidence any sales in Canada of **PRESIDENTE** brandy although the Iafrate affidavit suggests that one special order of that product was made on behalf of the applicant to supply its Alberta restaurants.

In applying the test for confusion, I have considered that it is a matter of first

impression and imperfect recollection. The onus or legal burden is on the applicant to show no reasonable likelihood of confusion on a balance of probabilities. That means that if the probabilities favor neither side, I must resolve the issue against the applicant. In view of my conclusions above, and particularly in view of the resemblance between the marks at issue, the similarities between the alcoholic wares, the potential overlap in the trades, the extent to which the opponent's mark has become known and the dearth of relevant third party PRESIDENT marks on the register or in the marketplace, I find that the probabilities are, at best, equally balanced in respect of the applicant's alcoholic beverage product. Thus, I must find against the applicant in respect of those wares. Had the applicant been able to evidence significant contemporaneous use of the marks at issue without actual confusion, significant evidence of use of third party PRESIDENT marks for alcoholic beverages or a significant number of registrations for such third party marks on the trade-marks register, my conclusion might well have been different.

As for the remaining wares, given the differences between the wares and trades and the absence of evidence of use of the opponent's mark with such wares, I find that the applicant's mark is not confusing with the opponent's registered mark in respect of the clothing wares. Thus, the fourth ground is successful in part.

As for the fifth ground of opposition, the opponent has evidenced use of its trade-mark PRESIDENT prior to the applicant's filing date and non-abandonment of that mark as of the applicant's advertisement date. The fifth ground therefore remains to be

decided on the issue of confusion as of the material date which, in this instance, is the applicant's filing date. For the most part, my conclusions respecting the fourth ground are equally applicable here. Thus, I find that the fifth ground is successful only in respect of the applicant's alcoholic beverage wares.

As for the sixth ground of opposition, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Furthermore, the material time for considering the circumstances respecting this issue is as of the filing of the opposition (i.e. - January 27, 2003): 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.). Finally, there is an evidential burden on the opponent to prove the allegations of fact in support of its ground of non-distinctiveness.

The sixth ground of opposition essentially turns on the issue of confusion between the applicant's proposed mark and the opponent's trade-mark **PRESIDENT**. For the most part, my conclusions respecting the fourth ground of opposition also apply to the sixth ground. Thus, I find, on a balance of probabilities, that the applicant has failed to show that its proposed mark was not confusing with the opponent's trade-mark as of the filing of the opposition in respect of the applicant's alcoholic beverage wares. On the other hand,

the applicant's mark as applied to clothing items is not confusing with the opponent's mark.

Thus, the sixth ground is also successful in part.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application in respect of the wares "alcoholic beverages, namely margaritas for consumption on the premises" and I otherwise reject the opposition. Authority for such a divided result may be found in Produits Menagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH (1986), 10 C.P.R.(3d) 482 at 492 (F.C.T.D.).

DATED AT GATINEAU, QUEBEC, THIS 17th DAY OF FEBRUARY, 2009.

**David J. Martin,
Member,
Trade Marks Opposition Board.**