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C I P O

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

**Citation: 2017 TMOB 141**

**Date of Decision: 2017-10-17**

**IN THE MATTER OF AN OPPOSITION**

**POSITEC GROUP LIMITED**

**Opponent**

**and**

**ORANGE WORKS KITCHEN &  
HOME CORP.**

**Applicant**

**1,626,625 for ORANGE WORKS**

**Application**

BACKGROUND

[1] On May 14, 2013, the Applicant filed an application for the trade-mark ORANGE WORKS (the Mark), for use in association with a wide range of goods including: coffee, tea and related equipment, supplies and accessories; kitchenware; barware; small electric appliances; small electric kitchen appliances; barbecue related goods; bathroom products; cleaning products; bedding; lighting products; home décor items; health products; furniture; and food. Its application also covers services relating to the operation of a website providing information regarding the aforementioned goods, as well as maintenance, repair, installation and training services relating to kitchen appliances, coffee machines and water treatment equipment.

[2] The application for the Mark claims November 19, 2011 and October 1, 2012 dates of first use in Canada for some goods and services, and others are based upon proposed use.

Attached as Schedule “A” is a list of all of the goods and services covered by the application, along with an indication as to whether they are based upon proposed use or use since a particular date.

[3] The Opponent specializes in the production of power tools and lawn and garden equipment. It owns a number of trade-marks consisting of or incorporating the word WORX, which it purports to have used in Canada in association with power tools, lawn and garden equipment and other related goods since prior to the filing date of the Applicant’s application for the Mark and prior to the Applicant’s claimed dates of first use in its application for the Mark. The Opponent’s WORX branded products feature the colour orange on the products themselves or on packaging or labeling associated with the products.

[4] The application for the Mark was advertised for opposition purposes in the *Trade-marks Journal* dated December 31, 2014 and opposed by the Opponent on May 25, 2015, by way of filing a statement of opposition under section 38(1) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act).

[5] The Opponent has raised a number of grounds of opposition including: i) non-compliance with sections 30(b), 30(e) and 30(g) of the Act; ii) non-registrability pursuant to section 12(1)(d) of the Act; iii) non-entitlement pursuant to sections 16(1)(a), 16(1)(b), 16(3)(a) and 16(3)(b) of the Act; and iv) non-distinctiveness (section 2 of the Act).

[6] As evidence in support of its opposition, the Opponent relies upon the affidavit of Marta Tandori Cheng, sworn November 24, 2015 (the Cheng Affidavit), the affidavit of Philip Fitzpatrick, sworn December 17, 2015 (the Fitzpatrick Affidavit), and certified copies of the Opponent’s WORX registration Nos. TMA780,142, TMA727,239, TMA900,383 and TMA735,908.

[7] As evidence in support of its application, the Applicant relies upon the affidavit of Robertus Timmerman, sworn April 8, 2016 (the Timmerman affidavit).

[8] Only the Opponent filed a written argument. Both parties attended a hearing.

## ONUS

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298].

## MATERIAL DATES

[10] The material dates that apply to the grounds of opposition are:

- sections 38(2)(a)/30(b)/30(e)/30(g) - the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- sections 38(2)(b)/12(1)(d) - the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)];
- sections 38(2)(c)/16(1)(a)/16(1)(b) – the date of first use alleged in the application [see section 16(1) of the Act]. However, if an opponent successfully contests the date of first use alleged, the relevant date for those particular goods or services becomes the filing date of the application [*Everything for a Dollar Store (Canada) Inc v Dollar Plus Bargain Centre Ltd* (1998), 86 CPR (3d) 269 (TMOB)];
- sections 38(2)(c)/16(3)(a)/16(3)(b) – the filing date of the application for the Mark [section 16(3)]; and
- sections 38(2)(d)/2 - the date of filing of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 2004 FC 1185 (CanLII), 34 CPR (4th) 317 (FC)].

## GROUND OF OPPOSITION

### **Section 30(g)**

[11] The Opponent alleges that the application does not conform to the requirements of section 30(g) of the Act, in that it does not include the address of the Applicant's principle office/place of business. The application for the Mark includes an address and the Opponent has not filed any evidence to suggest that it is not the address for the Applicant's principle office/place of business. No written or oral submissions were made by the Opponent with respect to this issue either. Accordingly, this ground of opposition is rejected.

### **Section 30(b)**

[12] The Opponent alleges that the application does not comply with the requirements of section 30(b) of the Act, in that the Applicant has not used the Mark in association with the goods identified in the application as goods (1), (2), (4), (5), (6) and (12) and the services identified as (1) and (2) since the November 19, 2011 claimed date of first use or in association with goods (16) since the October 1, 2012 claimed date of first use (see Schedule A).

[13] The evidential burden on an opponent respecting the issue of an applicant's non-compliance with section 30(b) of the Act is a light one, as it is difficult for an opponent to prove non-use and the applicant is generally in a better position to adduce evidence pertaining to use of its own mark. An opponent can meet its burden by reference not only to its own evidence, but also to the applicant's evidence [*Labatt Brewing Co Ltd v Molson Breweries, A Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 230; *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 (CanLII) at paras 33-38]. An opponent need only adduce sufficient evidence from which it may reasonably be concluded that the facts alleged to support its ground of opposition exist. Once an opponent has met its evidential burden, it is up to the applicant to prove that it has used its mark as of the date claimed.

[14] Section 4 of the Act sets out what constitutes "use" of a trade-mark in connection with both goods and services: It reads as follows:

4. (1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[15] In the present case, the Opponent relies upon a combination of its own evidence, namely the Cheng affidavit and the Applicant's evidence, namely the Timmerman affidavit in support of its section 30(b) ground of opposition. In my view, this evidence is sufficient to put the section 30(b) ground of opposition into issue for goods (1), (2), (4), (5), (6), (12) and (16) and services (1).

[16] Attached to the Cheng affidavit are print screens from the homepage of the Applicant's website located at <http://orangeworks.ca>, which list the various categories of goods carried by the Applicant. These categories include "Espresso and Coffee", "Cookware", "Table and Glassware", "Blenders", "Knives and Cutlery", "Prep, Gadgets and Other". Each of these categories includes a list of the particular brands which are available within each category. None of the brands include ORANGE WORKS. Rather, the products all appear to be third party branded products, such as Breville, Le Creuset, Zwilling, Royal Doulton, Vitamix, etc. [Cheng affidavit, para 7; Exhibit B]. A similar print-out from the Applicant's website located at <http://orangeworks.ca> is provided as Exhibit C to the Timmerman affidavit [Timmerman affidavit, para 13; Exhibit C]. It shows the "Espresso and Coffee" category of products and the brands available under that category. Each of the brands listed appear to be third party branded goods. I note that the print-outs attached to the Cheng affidavit post-date the May 14, 2013 filing date of the application, as they were obtained on October 20, 2015. Mr. Timmerman does not indicate when he obtained the print-out attached as Exhibit C to his affidavit. However, his affidavit was sworn on April 8, 2016.

[17] Ms. Cheng also attached print screens of webpages from the website located at <http://orangeworkskitchenandhome.com>, obtained from the Internet Archive Wayback Machine [Cheng affidavit, paras 11-14; Exhibits E and F]. These pages are dated January 9, 2012 and

June 21, 2013 and they feature at least one entry which pre-dates the November 19, 2011 material date associated with some of the goods in the application and several entries which pre-date the October 1, 2012 material date associated with others. The webpages from this website also make reference only to third party branded goods. Ms. Cheng explains that when she attempted to click on the archived dates for the Applicant's website located at <http://orangeworks.ca>, she was redirected to the website located at <http://orangeworkskitchenandhome.com>. This website features the Applicant's Mark in the same distinctive form and the same address for the Applicant appears in the copyright notice for both sites. In its written argument and at the hearing, the Opponent characterized this website as being an earlier version of the Applicant's current website. I consider this to be a reasonable inference.

[18] As pointed out by the Opponent, nowhere in the Timmerman affidavit, does Mr. Timmerman specifically state that the Applicant sells or has sold in Canada since the dates of first use claimed in the application, any kitchenware, tableware, cookware and cutlery or coffee and espresso equipment and related accessories or other goods branded with the Mark. Rather, he simply states that the Applicant specializes in selling certain categories of goods. Moreover, Mr. Timmerman has not provided any photographs showing the Mark marked on or associated with any goods or provided any invoices or receipts which make reference to sales of any ORANGE WORKS branded goods.

[19] Mr. Timmerman has provided storefront photographs for one of its retail locations, which he states opened in Calgary Alberta on November 19, 2011, the claimed date of first use in Canada for the goods identified as (1), (2), (4), (5), (6) and (12) and services (1) and (2) [Timmerman affidavit, paras 4 and 5; Exhibit B]. The Mark is prominently featured on exterior storefront signage.

[20] The Opponent submits that the fact that the Applicant sells its goods through ORANGE WORKS retail stores does not establish use of the Mark in association with goods, since the goods sold in the Applicant's stores appear to be third party goods which are branded with their respective trade-marks rather than with the Applicant's Mark. In other words, the Opponent contends that the Applicant is not the source of the goods sold, but rather, is merely operating a retail store which sells third party goods. In view of this, the Opponent submits that consumers

would associate the Mark with the Applicant's retail store services but not with the goods sold by the Applicant.

[21] Hearing Officer Barnett recently dealt with a similar issue in *McMillan LLP v April Cornell Holdings*, 2015 TMOB 111 (CanLII) at para 24, where she said as follows:

It is true that the display of a trade-mark on signage in close proximity to goods at the time of transfer of possession or property of those goods *may* satisfy the requirements of section 4(1) of the Act. See for example the use of shelf talkers, counter cards, and other in-store displays in the following cases: *Loblaws Ltd v Richmond Breweries Ltd* (1983), 73 CPR (2d) 258 (TMOB); *General Mills Canada Ltd v Procter & Gamble Inc* (1985), 6 CPR (3d) 551 (TMOB); *Canadian Council of Professional Engineers v Randolph Engineering Inc* (2001), 19 CPR (4<sup>th</sup>) 259 at 262 (TMOB); *Lafco Enterprises Inc v Canadian Home Publishers*, 2013 TMOB 44 (CanLII); *Fogler, Rubinoff LLP v Blistex Inc*, 2014 TMOB 181 (CanLII). However, each case must be considered on its own merits and when considering if notice of association is given "in any other manner", the context is important. For example, whether or not other trade-marks are present and most notably the presence of trade-marks of other traders are factors to consider [see for example *Clark, Wilson v Myriad Innovative Designs Inc*, 2001 CanLII 37728 (CA TMOB), 2001 CanLII 37728 (TMOB); and *Batteries Plus, LLC v La Source (Bell) Electronics Inc*, 2012 TMOB 202 (CanLII)]. In other words, it is not necessarily determinative that a trade-mark is displayed on signage in close proximity to goods. In the case of the sale of third party goods, in fact, it is likely irrelevant.

[22] The issue of use of a trade-mark in connection with third party branded goods was also more recently discussed by the Federal Court in *Mcdowell v Laverana GmbH & Co KG*, 2016 FC 1276 (CanLII). The *Mcdowell* case involved the trade-mark HONEY, in word and design form. In *Mcdowell*, the Court found that the Hearings Officer had made several contested findings regarding the evidence presented by Ms. McDowell. These included whether Ms. McDowell's mark was in fact "marked on the goods themselves", whether the "HONEY" branded hang tags were essentially price tags, and therefore did not distinguish the goods but only the retailer's services; and whether the display of Ms. McDowell's mark on shopping bags and boxes, on the exterior and in-store signage, advertising cards, business cards, and loyalty cards and at the top of receipts gave the requisite notice of association pursuant to s 4(1) of the Act or constituted use in association with the retail store services only.

[23] The Court found that these determinations by the Hearing Officer of fact and law were contentious matters that were unsuited to resolution under the summary process envisaged by

section 45 of the Act, particularly given the existence of a separate and ongoing *inter partes* dispute involving a competing trade-mark registered by the requesting party.

[24] The Court stated as follows at paras 22-23:

[22] The Hearings Officer found that the evidence presented by Ms. McDowell was ambiguous, and the ambiguity should be resolved against the interests of the trade-mark owner:

At best, the evidence is ambiguous with respect to whether any of the goods sold at the HONEY retail stores were HONEY goods rather than third-party goods. Pursuant to *Plough [Plough (Canada) Ltd v Aerosol Fillers Inc*, 1980 CanLII 2739 (FCA), [1981] 1 FC 679 (CA)], this ambiguity must be resolved against the interests of the Owner.

[23] This conclusion was clearly wrong. Any ambiguity in the evidence should have been resolved in favour of the registered owner, Ms. McDowell (*Black & Decker Corporation v Method Law Professional Corporation*, 2016 FC 1109 (CanLII) at para 15, citing *Fraser Sea Food Corp v Fasken Martineau Dumoulin LLP*, 2011 FC 893 (CanLII) at para 19; see also *Fairweather Ltd v Registrar of Trade-marks*, 2006 FC 1248 (CanLII) at para 41, *aff'd* 2007 FCA 376 (CanLII)).

[25] To the extent that the decision in *Mcdowell* can be taken to mean that a retailer selling the branded goods of other manufacturers may be considered to be “using” its own mark in association with those goods, so long as, for example, it affixes price tags or hang tags bearing its mark thereto, I am of the view that it is distinguishable from the present case.

[26] In the present case, I do not consider there to be any ambiguity in the evidence. It is clear from the evidence on its face that the Applicant carries third party branded goods, and there is an absence of sufficient evidence to support a contention that the Mark has been used in association with any goods of the Applicant or that the requisite notice of association pursuant to s 4(1) of the Act has been given so as to support a contention of use in association with any third party branded goods.

[27] In my view, the evidence before me therefore supports the Opponent’s allegation that the Mark has not been used in Canada within the meaning of section 4 of the Act since the November 19, 2011 claimed date of first use for goods (1), (2), (4), (5), (6) and (12) or since the



October 1, 2012 claimed date of first use for goods (16). I consider it sufficient to enable the Opponent to meet its evidential burden to put the section 30(b) ground of opposition into issue for those particular goods.

[28] Since the Opponent has met its initial evidential burden in respect of goods (1), (2), (4), (5), (6), (12) and (16) the onus shifts to the Applicant to prove on a balance of probabilities that it was using (within the meaning of section 4 of the Act) the Mark in association with those goods at the filing date of its application and had been doing so since the claimed dates of first use. The only evidence showing display of the Mark is on the Applicant's website and storefront signage. In the absence of any other supporting testamentary or documentary evidence, such as evidence that the Mark appears on the goods themselves, on price tags, etc. I am unable to conclude that the Mark has been used within the meaning of section 4 of the Act. The Applicant has failed to file sufficient evidence to meet its burden. Accordingly, the section 30(b) ground of opposition succeeds with respect to goods (1), (2), (4), (5), (6), (12) and (16).

[29] To meet its burden with respect to services (1) and (2) in the application, which claim a November 19, 2011 date of first use, the Opponent also relies upon a combination of the Cheng and Timmerman affidavits.

[30] For ease of reference, these services have been reproduced below:

(1) Maintenance and repair of espresso machines, coffee machines, coffee grinders and small kitchen appliances; Installation of espresso machines, coffee machines and coffee grinders; Training in the use of espresso machines, coffee machines and coffee grinders; Installation of water treatment equipment

(2) Operating a website providing information in the fields of kitchenware, small kitchen appliances, housewares, espresso machines, coffee machines, coffee grinders, home decoration, tea, and tea accessories

[31] With respect to services (2), the Opponent points out that the Timmerman affidavit makes reference to the website located at <http://orangeworks.ca> [Timmerman affidavit, para 12; Exhibit C]. The Opponent further points out that Exhibit A to the Cheng affidavit establishes that the Applicant's website located at <http://orangeworks.ca> was created on April 13, 2013, which was after the November 19, 2011 claimed date of first use in the application. The Opponent therefore

submits that the Applicant could not have been providing its website services as of the claimed date of first use.

[32] I have some difficulty with this argument, given that Ms. Cheng has provided archived webpages from the website located at *http://orangeworkskitchenandhome.com* dating back to January 9, 2012, which have at least one entry dating back to October, 20, 2011 [Cheng affidavit, Exhibit F]. As mentioned previously, the Opponent itself has characterized this website in its written submissions as being “an earlier version” of the Applicant’s website and it has relied upon the webpages from that website to support its submissions that the Mark was not in use as of the November 19, 2011 and October 1, 2012 material dates associated with some of the goods in the application..

[33] With respect to maintenance and repair services identified in services (1), the Opponent points out that none of the archived webpages obtained from the Internet Archive Wayback machine make reference to any maintenance or repair services being provided by the Applicant [Cheng affidavit, Exhibits E and F]. The Opponent further points out that while Mr. Timmerman states in his affidavit that the Applicant services and repairs coffee and espresso equipment, he does not indicate that it has done so since the claimed date of first use in the application. I note that in contrast to the webpages obtained from the Internet Archive Wayback machine, those which were obtained after the material date from the *http://orangeworks.ca* website do refer “service and repair” services. There is no mention of any installation and training services on any of the webpages attached to either the Cheng or Timmerman affidavits and Mr. Timmerman’s affidavit is silent with respect to use of the Mark for those services at any time.

[34] As further support for its allegation that the Applicant has not used the Mark in association with services (1) since the claimed date of first use in the application, the Opponent relies upon Exhibit A to the Timmerman affidavit. Exhibit A is a copy of the Applicant’s Business License, issued by the City of Calgary. The start date of the license is listed as being November 30, 2012. The Opponent points out that this is eleven days after the Applicant’s alleged date of first use with respect to its services. The Opponent submits that this would render the Applicant unable to offer and perform any of its services as of the November 29, 2011 claimed date of first use. This may or may not be an accurate statement. However, when taken

into account with the fact that the Applicant's evidence makes no assertion as to actual use of any services since the claimed date of first use, the fact that there is no mention of any training services in the evidence and the fact that the archived versions of the Applicant's earlier website do not appear to make reference to repair related services, whereas the later version does, I find this evidence sufficient to put the section 30(b) ground into issue for services (1). This shifts the burden to the Applicant to demonstrate that it has used the Mark in connection with those services since the claimed date of first use. Since the Applicant has failed to file evidence to establish use of the Mark in connection with those services since the claimed date of first use through to the filing date of the application, the section 30(b) ground of opposition succeeds in relation to services (1).

[35] In summary, the section 30(b) ground of opposition is successful with respect to goods (1), (2), (4), (5), (6), (12) and (16) and services (1), but unsuccessful in relation to services (2).

#### **Section 30(e)**

[36] The Opponent pleads that the application for the Mark does not comply with the requirements of section 30(e) of the Act because as of the filing date of the application, the Applicant had no intention of using the Mark in association with goods (3), (7), (8), (9), (10), (11), (13), (14), (15), (17), (18) and (19) or in association with services (3), as set out in the application.

[37] Insofar as the goods are concerned, I am of the view that the evidence relied upon by the Opponent to meet its burden with respect to the goods in relation to the section 30(b) ground of opposition is also sufficient for it to meet its burden under this ground of opposition. There is no reason to infer that the Applicant would have intended to use the Mark any differently on its proposed use goods than it has in association with the goods it has sold to date. Accordingly, I find that the evidence in this case is also sufficient to call into question whether the Applicant intended to use the Mark, within the meaning of section 4 of the Act, in association with its proposed use goods. As was the case with the section 30(b) ground of opposition, this means that the burden shifts to the Applicant to establish on a balance of probabilities, that it did, in fact, intend to use the Mark (within the meaning of section 4 of the Act) in association with those goods at the time that it filed its application. The Applicant has failed to file sufficient evidence

in this regard. Accordingly, the section 30(e) ground of opposition is successful in relation to goods (3), (7), (8), (9), (10), (11), (13), (14), (15), (17), (18) and (19).

[38] With respect to services (3) (reproduced below), there is no evidence to suggest that the Applicant did not intend to offer these services in association with the Mark at the time that it filed its application or that it does not still intend to do so in the future.

(3) Operating a website providing information in the fields of barbeque products, furniture, indoor lighting, household products, food, health food, and water treatment equipment

[39] On the contrary, the evidence establishes that the Applicant has already been operating a website for quite some time. Accordingly, the section 30(e) ground of opposition is unsuccessful in relation to services (3).

#### **Section 12(1)(d)**

[40] The Opponent has pleaded that the Mark is not registrable in view of the provisions of Section 12(1)(d) of the Act in that it is confusing with the Opponent's WORX trade-marks, which are the subject of registration Nos. TMA727,239 (WORX & design), TMA735,908 (WORX), TMA780,142 (WORX & DESIGN); and TMA900,383 (WORX DESIGN). Notably, all of these marks are design marks. They are shown in Schedule B to my decision.

[41] With respect to a section 12(1)(d) ground of opposition, an opponent's initial evidential burden is met if a registration relied upon in the statement of opposition is in good standing as of the date of the decision. The Registrar has discretion to check the register in order to confirm the existence of a registration relied upon by an opponent [*Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. In this case, I have exercised that discretion and I confirm that the Opponent's registrations are all extant and in good standing. I note that the Opponent also filed certified copies of these registrations as part of its evidence. The Opponent has therefore met its initial evidential burden in respect of this ground. Accordingly, I must determine whether the Applicant has met the legal onus upon it to establish that there is no likelihood of confusion between the parties' trade-marks.

## Test for Confusion

[42] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[43] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight [*Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC)].

[44] In *Masterpiece (supra)*, at para 49, the Supreme Court of Canada had the following to say about conducting a confusion analysis under section 6(5) of the Act:

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

[45] Bearing this in mind, I have elected to begin my confusion analysis in this case by assessing the degree of resemblance between the parties' marks.

## Consideration of Section 6(5) Factors

### *Degree of Resemblance*

[46] When considering the degree of resemblance between trade-marks, they must be considered in their totality; it is not correct to lay them side by side and compare and observe

similarities or differences among the elements or components of the marks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 (CanLII), CarswellNat 1402 at para 20].

[47] In *Masterpiece (supra)*, at para 64, the Supreme Court further advises that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trade-marks that is particularly striking or unique.

[48] In the present case, the Mark consists of ORANGE and WORKS, both of which are ordinary dictionary words. I do not consider either of these words to be any more striking or unique than the other. The Opponent's trade-marks consist of the stylized word WORX partially surrounded by a rectangular border. The design aspect is an integral part of the trade-marks, but does not significantly add or detract from the word WORX in the marks. In view of the foregoing, I consider it appropriate in the present case, to focus on the parties' marks as a whole, while still bearing in mind the principle that the first word or syllable of a trade-mark is often the most important, for the purpose of distinguishing [*Conde Nast Publications Inc v Union des éditions modernes* (1979), 46 CPR (2d) 183 (FCTD)].

[49] The Opponent submits that the parties' marks are visually and aurally similar. It argues that the fact that the Mark contains the first word ORANGE does not assist in distinguishing it, since "orange" is an adjective that serves to modify "works". The Opponent further submits that because its lawn and garden equipment uses the color orange on the goods themselves and on the labelling and packaging for the goods, the similarities between the parties' marks would be reinforced as a matter of first impression [Fitzpatrick affidavit, para 15]. An example of how the Opponent uses the colour orange in association with its goods is shown in Exhibit B to the Fitzpatrick affidavit. For ease of reference, I have reproduced this example as Schedule C to my decision.

[50] As previously noted, the registered trade-marks relied upon by the Opponent in this case are all design marks and none of its registrations claim colour as a feature of the mark. Thus, I consider it more appropriate to take the Opponent's use of the color orange into account as a relevant surrounding circumstance, rather than as part of my assessment of the degree of resemblance. If I am wrong in doing so, I wish to add that it would not have changed my conclusion with respect to this ground of opposition.

[51] Given that the word WORX in the Opponent's trade-marks is similar to the word WORKS in the Mark, there can be said to be some similarity between the parties' marks in appearance, sound and suggested idea. However, in light of the fact that the word ORANGE appears in the dominant first position of the Mark and the Opponent's trade-marks also feature a design component and corrupted spelling in the word WORX, the marks may also be said to differ from one another in all three aspects. With respect to the Opponent's submission that the word ORANGE simply acts as a modifier for WORKS and does nothing to distinguish the Mark, I note that ORANGE can be both a noun (a fruit) and an adjective (a colour). Both of these meanings result in a strong visual impression and associated idea which differs from that which is created by the Opponent's trade-marks. Overall, I consider the parties' marks to be slightly more different than they are alike.

*Inherent Distinctiveness and Extent to which the Trade-marks have Become Known*

[52] Although the Mark is composed of ordinary dictionary terms, I consider it to be somewhat inherently distinctive, as it is not clear what the significance of the combination of the words ORANGE and WORKS might be in relation to the Applicant's goods and services.

[53] Given that the Opponent's goods are tools and equipment for doing work (i.e. landscaping and gardening), its WORX trade-marks, which essentially consist of a corrupted spelling for the word WORKS, may be said to be somewhat suggestive.

[54] Overall, I consider the Opponent's WORX trade-marks to be slightly less inherently distinctive than the Mark.

[55] With respect to the extent to which the parties' marks have become known, the evidence establishes that the Opponent's trade-mark has become more well-known than the Mark.

[56] The Timmerman affidavit speaks to use of the Mark. According to Mr. Timmerman:

- The Applicant is a retail company that opened its first store in Calgary, Alberta on November 19, 2011 [para 4]. Attached as Exhibit A is a copy of the Applicant's business license, which as noted previously, shows a November 30, 2011 start date. Attached as Exhibit B are two storefront photos. The Mark is shown prominently displayed at the

front of the exterior of the store. Notably, the letter “O” in “WORKS” is stylized and appears as an orange (i.e. the fruit);

- The Applicant specializes in selling high-end kitchenware, tableware, cookware, and cutlery with a focus on coffee and espresso equipment and related accessories [para 7];
- For the years of 2011-2015, coffee and espresso equipment and related accessories have accounted for between 18.3% (2011) and 44.9% (2015) of the Applicant’s sales and blenders have accounted for between 0.8% (2011) and 29.4% (2013 and 2014) of the Applicant’s sales [paras 8 and 9]. No sales figures have been provided;
- The Applicant also services and repairs coffee and espresso equipment [para 10]; and
- The Applicant operates a website located at *orangeworks.ca* [para 12; Exhibit C]. No information has been provided with respect to how long this website or the *orangeworkskitchenandhome.com* website referenced in the Cheng affidavit have been operational or how many Canadian visitors they have had each year. No further information has been provided with respect to other possible advertising and promotional activities and expenditures of the Applicant.

[57] This evidence, either alone or when considered in conjunction with the Cheng affidavit filed by the Opponent, does not establish that the Mark has become known in association with any of the goods which are listed in the application. With respect to the repair related services (services (1)), Mr. Timmerman simply states that the Applicant offers these services. However, no information is provided with respect to how the Applicant advertises and performs these services and no figures relating to revenue or advertising expenditures associated with these services have been provided. The same is true for the Applicant’s website related services (services (2) and (3)). Other than an indication that the Applicant has operated a website, the Applicant has not provided any information to enable me to draw any meaningful conclusions with respect to the extent to which the Mark has become known in relation to services (2) and (3).



[58] The Fitzpatrick affidavit speaks to the issue of the Opponent's promotion and use of its trade-marks. According to Mr. Fitzpatrick:

- The Opponent is known in Canada for its WORX branded power tools and yard and garden equipment (the WORX branded products) [paras 2-3] ;
- Since July 2006, the Opponent has sold WORX branded blower vacuums, hedge clippers, line trimmers and lawn mowers (the WORX branded lawn and garden equipment), through subsidiaries, to various nationwide retailers such as Canadian Tire, Home Hardware, Sears and Rona [paras 9-13];
- Since July 2006, sales in Canada of the Opponent's WORX branded lawn and garden equipment have exceeded \$53.6 million. Annual sales of WORX branded products (including, but not limited to the WORX branded lawn and garden equipment), have ranged from \$1, 308, 950 (2007) to \$11,448,315 (2015). While sales in Canada in association with only WORX branded lawn and garden equipment are not available, it is estimated that approximately 90% of the aforementioned sales relate to WORX branded lawn and garden equipment [para 14];
- Since its introduction into the Canadian marketplace, the colour orange has always been featured in association with the WORX branded lawn and garden equipment, on the equipment itself, on related accessories or on packaging and labels [paras 15-20]. Examples of such uses of the colour orange are attached as exhibits B to E of Mr. Fitzpatrick's affidavit [see Schedule C to my decision, which shows the example provided in Exhibit B of the Fitzpatrick affidavit];
- The Opponent has spent over \$155.7 million on television and marketing advertising for its WORX branded lawn and garden equipment in North America since 2007 (no country by country breakdown is available) [paras 27- 30; Exhibits I and J];
- The Opponent's WORX branded lawn and garden equipment is promoted at trade shows in Canada and the United States [paras 31 and 32; Exhibits K and L];

- The Opponent's WORX branded lawn and garden equipment have been advertised and/or featured in various Canadian magazines including House and Home, Canadian Living, etc. [para 33; Exhibit L]; and
- From 2006 to November 2015, non-television advertising and promotional expenditures in Canada for the Opponent's WORX branded Products have exceeded approximately \$7.3 million [para 35].

[59] The foregoing leads me to conclude that the Opponent's trade-marks have become more well-known than the Mark, in association with its lawn and garden equipment.

*Length of Time the Marks have been in Use*

[60] It is not clear whether the Mark has ever been used (within the meaning of section 4 of the Act) in association with any of the goods in the application. While the Applicant claims a November 19, 2011 date of first use for services (1), it is unclear whether use commenced on that date or at a later date. Although the Opponent did not file sufficient evidence to put the Applicant's claimed date of first use into issue for services (2) or its intent to use into issue for services (3), the evidence also doesn't provide a clear picture with respect to the length of time of use for those services. In any event, since the Opponent has evidenced use of one or more of its trade-marks dating back to July, 2006, I find that this factor favours the Opponent.

*Nature of the Parties' Goods, Services or Business and Trades*

[61] It is the Applicant's statement of goods and services as defined in its application versus the Opponent's registered goods that governs my determination of these factors [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr. Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); and *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)].

[62] With respect to the nature of the parties' goods and services, I do not consider there to be any direct overlap.

[63] The application for the Mark covers maintenance, repair, training and installation services for coffee and kitchen related goods, as well as water treatment equipment installation services. It also covers website related services for providing information in the field of coffee machines/equipment and other goods covered in the application for the Mark.

[64] The goods covered by the application for the Mark may be generally categorized as including coffee and tea related goods and accessories; kitchen accessories; barware; food and beverage products; small electric kitchen appliances; small electric appliances; barbecue related goods; bathroom products; bedding; furniture; home décor items; lighting products; household cleaning products; and water treatment equipment and supplies.

[65] By contrast, the Opponent is a tool manufacturing company which specializes in the production of power tools and lawn and garden equipment [Fitzpatrick affidavit, para 2]. These are the types of goods covered by the Opponent's registrations.

[66] At the hearing, the Opponent argued that at the very least, there would be overlap in the "vacuums" identified in the application for the Mark and one of the Opponent's products, namely, the Trivac Blower Vac. According to Mr. Fitzpatrick, the Trivac Blower Vac is multifunctional, in that it is a blower, a vacuum and a mulcher and can therefore be used both outside and indoors, in places like the garage [Fitzpatrick affidavit, para 21; Exhibit F]. It is not clear that this particular product falls within the scope of the goods set out in the Opponent's registrations. In any event, while this particular item could theoretically be used indoors in, for example, a garage, I still don't consider it to be of the same nature as the household related goods which are covered in the application for the Mark. I note that in Exhibit F, it is referred to as being "powerful yard vac", with an "angled nose for easy access under decks and shrubs", that can help to "ease up on your next outdoor cleanup". In view of this, I do not consider it to be of the same nature as the vacuums which are listed along with "clothing irons" in the application for the Mark as "small electric appliances".

[67] With respect to the parties' channels of trade, I note that the Opponent's goods are sold through national retailers such as Canadian Tire, Home Hardware, Sears and Rona, as well as online [Fitzpatrick affidavit, paras 13-20; Exhibits B to E]. According to Mr. Timmerman, the Applicant sells its goods through its own retail store. However, since there are no restrictions in

the application for the Mark, its goods could be sold through the same or similar channels as those of the Opponent.

*Surrounding Circumstances*

*Use of Third Party Marks for Household and Landscaping Goods*

[68] According to Mr. Fitzpatrick, there are companies that make and sell in Canada, a variety of goods including small kitchen appliances, small electric appliances, lawn and garden equipment as well as power tools. Two such companies are Bosch and Black & Decker. Attached as Exhibit G to Mr. Fitzpatrick's affidavit is a printout from the Canadian Tire website which features a BOSCH coffee machine and various BOSCH branded power tools and accessories. Attached as Exhibit H, is a printout from the Canadian Tire website showing BLACK & DECKER small kitchen appliances as well as various BLACK & DECKER branded power tools, accessories and lawn and garden equipment.

[69] In addition to the evidence put forward in the Fitzpatrick affidavit, as part of the Cheng affidavit, the Opponent filed state of the register evidence to show that BLACK & DECKER and BOSCH are registered trade-marks in association with power tools, kitchen appliances, small electric appliances and lawn and garden equipment, etc. [paras 15-20; Exhibits G to J].

[70] The Opponent submits that this supports its position that consumers in Canada would expect a company that makes and sells lawn and garden equipment such as the Opponent to expand its product line to other goods such as small electric appliances, kitchen appliances, etc.

[71] While evidence of this nature can be relevant, the Opponent has provided only two examples of companies which appear to carry lawn and garden equipment and tools in addition to small household appliances. Given that only two examples have been provided, and in the absence of any indication as to what share of the market these companies enjoy, it is difficult to draw any meaningful conclusion about what consumer perceptions or expectations of the Applicant's goods might be.

[72] The Opponent also points out that it owns an application for WORX Design (no. 1,690,631) which covers "small electric kitchen appliances". However, I note that this

application was filed after the Applicant filed its application for the Mark and there is no evidence that the Opponent has in fact used its trade-marks in association with such goods.

*Use of the Color Orange on the Opponent's goods, packaging and labels*

[73] As previously mentioned, as a further surrounding circumstance, the Opponent points out that since its products were introduced into the Canadian marketplace in July 2006, the colour orange has always appeared on the Opponent's WORX-branded lawn and garden equipment and related accessories as well as on their packaging and labels (Fitzpatrick affidavit, para 15; Exhibit B). The Opponent submits that because its lawn and garden equipment uses the color orange on the goods themselves and on the labelling and packaging for the goods, the similarities between the parties' marks would be reinforced as a matter of first impression. I agree that this is a relevant surrounding circumstance to be taken into account. However, it is one of many factors which must be taken into account in the confusion analysis.

*Conclusion Regarding Likelihood of Confusion*

[74] The test to be applied is a matter of first impression in the mind of a casual consumer "somewhat in a hurry" who sees the Mark in association with the Applicant's goods and services at a time when he or she has no more than an imperfect recollection of the Opponent's WORX trade-marks used in association with its registered goods and does not pause to give the matter any detailed consideration or scrutiny [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al.*, 2006 SCC 23 (CanLII) at para 20].

[75] The question that must be asked in the present case is whether a consumer confronted with the Mark in association with the Applicant's goods and services would be likely to be confused and think that they emanate from the Opponent.

[76] On a balance of probabilities I do not find that they would. I am of the view that the differences between the parties' trade-marks in the present case are sufficient to avert confusion, despite the fact that the colour orange appears along with the Opponent's trade-marks on its goods, packaging and labels. I acknowledge that the Opponent's trade-marks have been used for a longer period of time than the Mark and that they have more acquired distinctiveness.

However, I consider the Mark to be more inherently distinctive, and given the very distinct nature of the parties' goods and services, and the fact that there is no direct overlap between them, I find that the differences between the parties' trade-marks in appearance, sound and suggested idea are sufficient to avoid any reasonable likelihood of confusion.

[77] Accordingly, the section 12(1)(d) ground of opposition is rejected.

### **Sections 16(1)(a) and 16(3)(a)**

[78] The Opponent has pleaded 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 in that as of the filing date of the application, namely, May 14, 2013 or of the claimed dates of first use, as the case may be, the Mark was confusing with the Opponent's trade-marks WORX and WORX Logos as set out in Schedule B to the Statement of Opposition. I have reproduced these trade-marks in Schedule D to my decision.

[79] In view of the Opponent's success under its section 30(b) ground of opposition, the material date for assessing both the section 16(1)(a) and 16(3)(a) grounds of opposition is the filing date of the application for the Mark for all of the goods and services, with the exception of services (2), for which the material date in respect of the section 16(1)(a) ground remains as the claimed date of first use, namely, November 19, 2011.

[80] Regardless of which material date confusion is assessed at, these grounds of opposition are unsuccessful for reasons to those set out in my analysis with respect to the section 12(1)(d) ground of opposition.

[81] I acknowledge that one of the marks relied upon by the Opponent in support of its section 16 grounds of opposition features the colour orange, and that I must therefore consider this when assessing the degree of resemblance between this trade-mark and the Mark. However, I do not find that this results in a different outcome in my conclusion regarding the likelihood of confusion.

[82] Although the Opponent has alleged use in association with some overlapping goods in support of its section 16 grounds of opposition, it has failed to show use of its trade-marks in

association with any of those goods. I am still of the view that the differences between the parties' trade-marks in appearance, sound and suggested idea are sufficient to avoid any reasonable likelihood of confusion, particularly in view of the distinct nature of the parties' goods and services, and the fact that there is no direct overlap between them.

[83] Accordingly, the section 16(1)(a) and 16(3)(a) grounds of opposition are rejected.

### **Sections 16(1)(b) and 16(3)(b)**

[84] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark in view of its previously filed application nos. 1,171,658 (WORX), 1,232,192 (WORX & DESIGN), 1,426,461 (WORX DESIGN) and 1,495,553 (WORX DESIGN).

[85] In view of the Opponent's success under its section 30(b) ground of opposition, the material date for assessing both the section 16(1)(b) and 16(3)(b) grounds of opposition is the filing date of the application for the Mark for all of the goods and services, with the exception of services (2), for which the material date for section 16(1)(b) remains as the claimed date of first use, namely, November 19, 2011.

[86] An opponent may not rely on a previously filed application if the application was not pending as of the date of advertisement of the opposed mark [section 16(4) of the Act]. I have exercised my discretion to check the Register in this case and I confirm that only application nos. 1,426,461 (WORX DESIGN) and 1,495,553 (WORX DESIGN) were still pending as of the date of advertisement, namely, December 31, 2014.

[87] At the time that both of these applications were filed, they contained goods which may be said to be related or overlap with some of the Applicant's goods. For example, items such as "electric coffee machines", "toaster ovens", and "electric kitchen machines" and "vacuum cleaners". However, all overlapping goods were subsequently removed from the applications at the time that the declarations of use were filed. In assessing confusion with respect to services (2), I am obliged to consider the applications as they appeared on the November 19, 2011 claimed date of first use, and for the remaining goods and services, I am obliged to consider the applications as they appeared on the May 14, 2013 filing date of the application for the Mark, as these are the relevant material dates. At both of these dates, the applications still contained goods

which overlap with or which may be said to be related to, those of the Applicant. Notably, these goods were also still in the applications at the date of advertisement for the Mark.

[88] The analysis in respect of these grounds of opposition therefore differs somewhat from my analysis of the section 12(1)(d). However, the conclusion I reach is the same. The Mark is more inherently distinctive than the Opponent's trade-marks. Although there are some overlapping goods in the Opponent's applications, there is no evidence that the Opponent has ever used its WORX trade-marks in association with those goods, either with or without the colour orange. Thus, the extent to which the parties' trade-marks have become known and the length of time for which they have been used does not favour the Opponent in respect of any of the overlapping goods. When all of the relevant surrounding circumstances are taken into account, I still find that the differences between the parties' marks in appearance, sound and suggested idea are sufficient so as to avoid any reasonable likelihood of confusion.

[89] Accordingly, the sections 16(1)(b) and 16(3)(b) grounds of opposition are rejected.

## **Section 2**

### *Non-distinctiveness – Section 2*

[90] The Opponent has pleaded that the Mark is not distinctive within the meaning of section 2 of the Act in that it does not distinguish, nor is it adapted to distinguish the goods and services of the Applicant from the goods and services of the Opponent.

[91] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its wares from those of others throughout Canada, there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness [see *Muffin Houses Incorporated v The Muffin House Bakery Ltd* (1985), 4 CPR (3d) 272 (TMOB)].

[92] Pursuant to its evidential burden, the Opponent is under an obligation to show that, as of the date of filing of the statement of opposition, one or more of its trade-marks had become known sufficiently to negate the distinctiveness of the Mark [see *Bojangles' International, LLC v Bojangles Café Ltd* 2006 FC 657 (CanLII), 48 CPR (4th) 427 (FC)].



[93] As discussed more fully in the analysis of the section 12(1)(d) ground of opposition, the Opponent has established that one or more of its trade-marks had become known sufficiently as of the date of filing the statement of opposition. As a result, the Opponent has met its evidential burden in respect of this ground of opposition.

[94] The difference in material dates is insignificant and for the reasons set out above in my analysis of the section 12(1)(d) ground of opposition, I am satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the parties' trade-marks.

[95] Accordingly, the non-distinctiveness ground is rejected.

#### DISPOSITION

[96] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application with respect to all of the goods and with respect to services (1), and I reject the opposition with respect to services (2) and (3) pursuant to section 38(8) of the Act [see *Produits Ménagers Coronet Inc v Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 CPR (3d) 482 (FCTD) as authority for a split decision].

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Lisa Reynolds  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

SCHEDULE A

**Application No. 1,626,625**

Goods:

- (1) Espresso machines; Stove-top espresso makers; Coffee machines; Coffee brewers; French presses; Coffee grinders; Espresso and coffee machine cleaning and maintenance supplies, namely, cleaning preparations and detergents, brushes, and blind filters for back flushing; Coffee accessories, namely, coffee cups, travel mugs, coffee storage containers, coffee spoons, tampers, espresso filters, milk frothing pitchers, and knock boxes
- (2) Coffee and coffee beans
- (3) Coffee bean roasters; Coffee vending machines; Disposable coffee cups
- (4) Tea leaves and tea bags; Tea accessories, namely, teakettles, teapots, teacups, tea glasses, and tea infusers
- (5) Kitchen accessories, namely, bakeware, cookware, cutlery, dinnerware, tableware, flatware, cooking utensils, cookbooks, cutting boards, food preparation hand tools, food storage containers, and containers and racks for kitchen organization; Barware, namely, cocktail shakers, corkscrews, drinking glasses, beverage pitchers, and coasters
- (6) Small electric kitchen appliances, namely, food mixers, food processors, blenders, juicing machines, ice cream makers, electric kettles, toasters, panini presses, pressure cookers, slow cookers, and waffle makers
- (7) Small electric appliances, namely, clothing irons, and vacuum cleaners
- (8) Barbecue grills and barbecue cooking utensils; Outdoor fire pits; Charcoal briquettes
- (9) Bathroom products, namely, bath towels, bath mats, bath sponges, bath soaps, shower curtains, soap dishes, toothbrush holders, toilet brushes, facial tissue holders, and bathroom tissue holders
- (10) Bedding, bedspreads, duvet covers, mattresses, mattress pads, and pillows
- (11) Furniture, namely, bathroom, bedroom, dining room, kitchen, living room, office and patio furniture
- (12) Home decor items, namely, bowls, vases, stained glass, and fragrance lamps

(13) Home decor items, namely, candles, clocks, picture frames, rugs, sculptures, decorative figurines, mirrors, tapestries, and decorative pillows; Linens, namely, kitchen, bathroom, bedroom and table linens; Boxes, baskets and hampers for storage

(14) Indoor lighting products, namely, light fixtures, ceiling fans, and lamps

(15) Household cleaning products, namely, all-purpose cleaning preparations, detergents, floor cleaning liquids, dish washing liquids, perfumes for the house, leather lotions, household gloves for general use, cleaning cloths, cleaning brushes, cloth towels, waste bins, and trashcans.

(16) Packaged foods, namely, biscuits, cookies, candies, chocolate, and popcorn

(17) Foods, namely, fruit juices, non-alcoholic tea and coffee-based beverages, bread, cakes, muffins, dairy products, desserts, crackers, meat, seafood, edible nuts, fruits and vegetables, pickled fruits and vegetables, prepared soups and stews, noodles, tomato sauce, pasta sauce, cereal-based snack foods, potato-based snack foods, seasonings, and spices; Wine

(18) Health foods, namely, dietary supplements for promoting weight loss, protein powders, herbal supplements for general health and well-being, processed and unprocessed grains for eating, and vitamin and mineral supplements

(19) Water treatment equipment and supplies, namely water softeners, reverse osmosis filters, and water filters

#### Services:

(1) Maintenance and repair of espresso machines, coffee machines, coffee grinders and small kitchen appliances; Installation of espresso machines, coffee machines and coffee grinders; Training in the use of espresso machines, coffee machines and coffee grinders; Installation of water treatment equipment

(2) Operating a website providing information in the fields of kitchenware, small kitchen appliances, housewares, espresso machines, coffee machines, coffee grinders, home decoration, tea, and tea accessories





(3) Operating a website providing information in the fields of barbeque products, furniture, indoor lighting, household products, food, health food, and water treatment equipment

Used in CANADA since November 19, 2011 on goods (1), (2), (4), (5), (6), (12) and on services (1), (2).

Used in CANADA since October 01, 2012 on goods (16).

Proposed Use in CANADA on goods (3), (7), (8), (9), (10), (11), (13), (14), (15), (17), (18), (19) and on services (3).

SCHEDULE B

Registration Number	Trade-mark	Goods
TMA727,239		(1) Lawn mowers, grass trimmers, hedge trimmers; woodworking machines; saws (machines); electric hammers; mechanically operated hand-held tools, namely, electric screwdrivers.
TMA735,908		(1) Lawn mowers, grass trimmers, hedge trimmers; woodworking machines; saws (machines); drilling machines; drill bits, saw blades; drills.
TMA780,142		(1) Tool bags, tool boxes; battery chargers, battery packs.
TMA900,383		1) Peeling machines, namely, planers and routers; engraving machines; electric hammers; electric machines and apparatus for polishing, namely, polishers; hand-held tools, other than hand-operated, namely, electric screwdrivers, electric grinders, electric shears, electric sanders, electric wrenches; electric machines and apparatus for cleaning, namely, high pressure cleaners; abrading instruments (hand instruments), namely, diamond cutting disks; hot air guns; high pressure washers; power tool accessories, namely,

		screwdriver bits, sand sheets; sanding discs, cutting discs; combined vice and workbench.
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SCHEDULE C



SCHEDULE D

**WORX**





**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE** 2017-08-10

**APPEARANCES**

Michael Adams

FOR THE OPPONENT

Robertus Timmerman

**AGENT(S) OF RECORD**

Riches McKenzie & Herbert LLP

FOR THE OPPONENT

No Agent Appointed

FOR THE APPLICANT