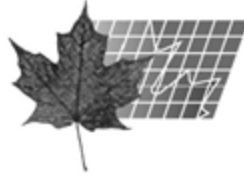


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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2018 TMOB 3**

**Date of Decision: 2018-01-16**

**IN THE MATTER OF AN OPPOSITION**

**Intimode Canada Inc.**

**Opponent**

**and**

**Jean Machine Clothing Inc.**

**Applicant**

**1,595,720 for jm Perfect fit & Design**

**Application**



INTRODUCTION


[1] MRP Retail Inc. filed an application for the trade-mark jm Perfect fit & Design (the Mark), as shown below.



[2] As a result of a subsequent assignment and change of name, the application for the Mark now stands in the name of the Applicant. The application is based upon proposed use of the Mark in Canada in association with the following goods: clothing, namely men's, ladies and children's pants, denim jeans, shirts, t-shirts, sweaters, jackets, belts, scarves, caps, overalls, coveralls, coats, hoods, vests, skirts, body suits, socks, blouses, shorts, dresses, sweatshirts and related accessories, namely jewellery and socks.

[3] The Opponent is the owner of the following trade-marks:

Trade-mark	Registration Number	Goods/Services
J.M.	TMA523,058	(1) Robes, lounge jackets, lounge robes, bath robes, pyjamas, bodysuits, undershorts, undertops, T-shirts, shirts, briefs, panties, bras, camisoles, socks, stockings, hose, hosiery, swimwear, swimsuits and swim trunks.
	TMA538,421	(1) Robes, lounge jackets, lounge robes, bath robes, pyjamas, bodysuits, undershorts, undertops, T-shirts, shirts, briefs, panties, bras, camisoles, socks, stockings, hose, hosiery, swimwear, swimsuits and swim trunks.
	TMA820,969	(1) Women's and girls' underwear, bodywear and nightwear, namely foundations, panties, underwear tops, undershirts, bras, girdles, garter belts, one piece bra and girdle, corselettes, body stockings, control briefs, control hipsters, control bikinis, bra slips, bra top camisoles, waist cinchers, bustiers, merry widows, camisettes, leotards and unitards, culottes, bikinis, hipsters, briefs, slips, blouse-slips, camisole-slips, chemise slips, culotte slips, evening slips, maternity slips, panty slips, princess slips, shadow panel slips, strapless slips, suite slips, tailored slips, half-slips, petti-slips, bra-slips, chemises, teddies, camisoles, bra top camisoles, bralettes, tap pants and petti-pants, nightgowns, toga nightgowns, night shirts, pajamas, shortie pajamas, baby-doll pajamas, T-shirt pajamas, Chinese pajamas, coat-style pajamas, cossack pajamas, culotte pajamas, French maid sleepers, harem

		pajamas, hostess culottes, lounging pajamas, rompers, sleep shorts, peignoirs, bed jackets, caftans, jumpsuits, bathrobes, dressing gowns, kimonos, socks, stockings, pantyhose.
	TMA902,195	(1) underwear tops, undershirts, under shorts, t-shirts, night shirts, T-shirt pajamas, shortie pajamas, lounging pajamas, sleep shorts, sleep pants, robes, lounge robes, bath robes, socks, swimwear, swimsuits and men's swimsuits

[4] The Opponent has opposed the application for the Mark, primarily based upon an allegation that there is a likelihood of confusion between the parties' trade-marks.

[5] For reasons that follow, the opposition is successful.

FILE HISTORY

[6] The application for the Mark was filed on September 17, 2012.

[7] The application for the Mark was advertised for opposition purposes in the *Trade-marks Journal* dated July 1, 2015. The Opponent opposed it on July 21, 2015 by filing a statement of opposition under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition are based upon sections 30(i), 12(1)(d), 16 and 2 of the Act.

[8] The Applicant filed a counterstatement denying each of the allegations set out in the statement of opposition.

[9] As evidence in support of its opposition, the Opponent filed the affidavit of Robert Battah, dated December 16, 2015 (the first Battah affidavit).

[10] As evidence in support of its application, the Applicant filed the affidavit of Linda Joyce Elford, sworn April 21, 2016 and the affidavit of Jason Perlman, sworn April 22, 2016.

[11] As evidence in reply, the Opponent filed the affidavit of Robert Battah, dated May 20, 2016 (the second Battah affidavit).

[12] Only the Opponent filed a written argument.

[13] No hearing was held.

#### ONUS

[14] 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

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

- sections 38(2)(a)/30(i) - 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(3)(a) – the date of filing of the application for the Mark [section 16(3)(a) of the Act]; 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 SUMMARILY REJECTED

[16] At the outset, I wish to note that the grounds of opposition are not set out in numbered paragraphs in the statement of opposition. In addition, the Opponent appears to have combined various grounds of opposition, resulting in duplicitous and/or partially improper pleadings in

some instances. For the purposes of clarity, I will refer to the grounds of opposition in the order in which they appear in the statement of opposition.

### **The First Three Grounds of Opposition**

[17] The Opponent has broadly referenced section 38(2)(a) in its first three grounds of opposition. Section 38(2)(a) of the Act provides that a ground of opposition may be based upon an allegation that the application does not conform to the requirements of section 30 of the Act. The Opponent has not identified which subsection of section 30 it is relying upon in any of the first three grounds of opposition. To the extent that the first three grounds of opposition may be understood to be based upon section 30(i) of the Act, they can be summarily rejected, as they appear to be based upon simple allegations of awareness of and confusion with the Opponent's trade-marks.

[18] Section 30(i) of the Act merely requires that an applicant include a statement in its application that it is satisfied that it is entitled to registration of its trade-mark. Where this statement has been provided, a section 30(i) ground should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co Ltd v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB)]. Mere knowledge of the existence of an opponent's trade-mark(s) does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use its mark [*Woot, Inc v WootRestaruantns Inc Les Restaurants Woot Inc* 2012 TMOB 197 (CanLII)].

[19] The application for the Mark contains the statement required under section 30(i) of the Act and there is no evidence that this is an exceptional case. Accordingly, to the extent that the first three grounds of opposition are based upon an allegation of non-compliance with section 30(i) of the Act, they are summarily rejected.

[20] The first, second and third grounds of opposition also reference section 38(2)(b) of the Act. Section 38(2)(b) of the Act provides that an opposition may be based upon an allegation that a trade-mark is not registrable. Section 12 of the Act sets out when a trade-mark is registrable. The Opponent has already pleaded section 12(1)(d) of the Act in its fourth ground of opposition and these first three grounds do not contain any material facts which could support a pleading

under another provision in section 12 of the Act. Accordingly, to the extent that the first three grounds are based upon allegations of non-registrability due to a likelihood of confusion with the Opponent's trade-marks, they are duplicitous and are summarily rejected.

[21] The third ground of opposition also references section 38(2)(c) of the Act. Section 38(2)(c) of the Act provides that an opposition may be based upon an allegation that the Applicant is not the person entitled to registration of a trade-mark. Section 16 of the Act sets out when an applicant is entitled to registration of a trade-mark. The Opponent has already pleaded non-entitlement under its sixth ground of opposition. Accordingly, to the extent that the third ground of opposition is based upon an allegation of non-entitlement due to a likelihood of confusion with the Opponent's trade-marks, it is duplicitous and is summarily rejected.

#### **The Fifth Ground of Opposition**

[22] The fifth ground of opposition has been raised under section 38(2)(b) of the Act. The Opponent has pleaded that the Mark is not registrable, having regard to the provisions of section 16 of the Act, as it is confusing with the Opponent's previously used and made known trade-marks. However, section 16 of the Act relates to entitlement, which is properly raised under section 38(2)(c) of the Act. Accordingly, this ground of opposition is summarily rejected on the basis that it has been improperly pleaded. If I was of the view that the reference to section 38(2)(b) was a typographical error, this ground of opposition would still have been summarily rejected on the basis that it is duplicitous of the sixth ground of opposition.

#### **The Seventh Ground of Opposition**

[23] The seventh ground of opposition has been raised under section 38(2)(b) of the Act. The Opponent has pleaded that the Mark is not a trade-mark as defined in section 2 of the Act. The Opponent alleges that the Mark cannot be used for the purpose of distinguishing or so as to distinguish, the goods of the Applicant from the goods of the Opponent. The Opponent has already pleaded non-distinctiveness in its eighth ground of opposition. To the extent that this ground of opposition may be understood to be based upon an allegation of non-distinctiveness due to a likelihood of confusion with the Opponent's trade-marks, it is duplicitous and is summarily rejected.

## ANALYSIS OF REMAINING GROUNDS OF OPPOSITION

[24] At the outset, I wish to note that the Perlman and the Battah affidavits resemble a written argument in some respects. I am disregarding those portions which go beyond introducing evidence (for example, personal opinions on whether the parties' marks are confusing, personal assessments of the impressions conveyed by the parties' marks, personal statements regarding what the parties should be entitled to, and personal conclusions regarding the evidence).

### **The Fourth Ground of Opposition – Non-registrability - Section 12(1)(d) of the Act**

[25] The Opponent has pleaded that the Mark is not registrable, having regard to the provisions of section 12(1)(d) of the Act, as it is confusing with the Opponent's family of registered trade-marks, namely, J.M. (registration No. TMA523,658), J.M design (registration No. TMA538,921), JW design (registration No. TMA820,969) and JM design (registration No. TMA902,195). I note that registration Nos. TMA523,658 and TMA538,921 do not appear to be associated with the trade-marks identified by the Opponent. I consider it reasonable to infer that this is due to typographical errors and that TMA523,658 should read as TMA523,058 and TMA538,921 should read as TMA538,421, as set out on page 2 of the statement of opposition.

[26] An opponent's initial evidential burden is met with respect to a section 12(1)(d) ground of opposition if the registration(s) 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)]. I have exercised the Registrar's discretion and confirm that the Opponent's registrations are all extant. The Opponent has therefore met its initial evidential burden in respect of this ground. I must therefore 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

[27] 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.

[28] 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. [See, in general, *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)]. Finally, the test under section 6(2) of the Act does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source.

[29] I will focus my analysis on the Opponent's trade-marks J.M. (registration No. TMA523,058), J.M design (registration No. TMA538,421) and JM logo (registration No. 902,195), as these marks are more similar to the Mark than the Opponent's trade-mark JW design (registration No. TMA820,969) and no use has been shown in respect of its JW design trade-mark. If the Opponent cannot succeed on the basis of one of its JM marks, it would not succeed on the basis of its JW design trade-mark.

#### *Consideration of Section 6(5) Factors*

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

[30] The Opponent's JM trade-marks essentially consist of a simple combination of letters, with few additional elements. The trade-mark J.M. is simply a combination of letters separated by periods. The trade-mark JM logo (registration No. TMA902,195), simply consists of the letters JM in stylized font, and the trade-mark JM design (registration No. TMA538,421) simply consists of the letter JM in stylized font separated by a stylized period. Trade-marks consisting of a simple combination of letters or initials are generally considered to be weak marks with a low degree inherent distinctiveness [see *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR



(2d) 154 (FCTD) at 163-164; *Alfred Grass Gesellschaft mbH Metallwarenfabrik v Grant Industries Inc.* (1991), 47 FTR 231 (FCTD)].

[31] The Mark is a design mark consisting of the letters JM and the descriptive words PERFECT FIT in stylized font within a rectangular border. The design aspect and additional reading matter add some inherent distinctiveness to the Mark. However, I do not consider it to be significantly more inherently distinctive than the Opponent's trade-marks.

[32] Trade-marks can acquire distinctiveness through promotion and/or use. In this case, the application for the Mark is based upon proposed use. However, according to Mr. Perlman, the Applicant has used the Mark since as early as 2012 in Canada throughout its business [Perlman affidavit, para 6]. He states that the Mark has been used and continues to be used in connection with store supplies, as well as store design and merchandising materials [Perlman affidavit, para 6]. Attached as Exhibit E to his affidavit are examples of use of the Mark on the back of sales slips, on clothing tags, clothing packaging, electronic sales coupons, front-of-store designs and in-store window displays [Perlman affidavit, para 6]. It is not clear from the statements made in Mr. Perlman's affidavit or from the attached exhibits whether the Mark has been used within the meaning of section 4 of the Act in association with the goods which are covered in the application. It appears as though the Mark may have primarily been used in connection with retail store services. Notably, in paragraph 2 of his affidavit, Mr. Perlman describes the Applicant as a retail clothing chain offering denim fashions and casual sportswear in a variety of leading brands. He does not indicate whether the Applicant currently carries its own brand of clothing or accessories. No sales or advertising figures have been provided with respect to use of the Mark in connection with the goods covered by the application for the Mark or otherwise.

[33] Information pertaining to the promotion and use of the Opponent's trade-marks can be found in the first Battah affidavit. Mr. Battah does not clearly indicate the date(s) the Opponent began using each of its trade-marks in Canada. Instead, he provides a general statement that the Opponent has used its trade-marks in Canada since prior to the September 17, 2012 filing date of the application for the Mark [first Battah affidavit, para 7]. In paragraphs 8 to 15 he identifies the dates on which the Opponent obtained each of its registrations as set out in the statement of opposition, as well as other registrations for trade-marks not relied upon in the statement of

opposition. A copy of the certificate of registration or certificate of renewal for each registration is attached as Exhibits 1 to 8 of Mr. Battah's affidavit. In paragraph 16, Mr. Battah states that the Opponent has not abandoned or ceased using any of the registered trade-marks referenced in paragraphs 8 to 15 of his affidavit. He collectively refers to all of these marks as the Opponent's family of "JM" marks [first Battah affidavit, para 16].

[34] Attached as Exhibit 9 are randomly selected invoices of sales of the Opponent's goods in Canada. Attached as Exhibit 11 are additional randomly selected invoices relating to on-line sales [para 20]. Mr. Battah states that although the invoices do not specifically reference a "JM" trade-mark of the Opponent, they do relate to goods that are and have been marketed in Canada under or more of the Opponent's family of JM trade-marks [paras 18 and 23].

[35] Mr. Battah has provided examples of use of the Opponent's family of JM trade-marks in connection with various goods, including, underwear, tops, pants and swim suits [paras 19 and 24-30; Exhibits 10, 12, 13, 14, 15, 16, 17 and 18]. Notably, the majority of the examples relate to underwear and use of the mark which is the subject of registration No. TMA902,195, namely JM logo [Exhibits 10, 12, 13, 14 and 18]. Exhibit 16 is an example of use of the mark which is the subject of registration No. TMA538,421, namely, J.M design in connection with pyjama tops and Exhibits 15,16, 17 and 18 show use of JM in various fonts in connection with pyjama tops and pants and swim suits. Such use would constitute use of the mark J.M., which is the subject of registration No. TMA523,058 [*Canada (Registrar of Trade-marks) v Cie International pour l'informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523 (FCA); *Promafil Canada Ltee v Munsingwear Inc.*, 44 CPR (3d) 59 (FCA); *Nightingale Interloc Ltd v Prodesign Ltd.* (1984), 2 CPR (3d) 535 (FCTD)].

[36] Mr. Battah has not provided actual dates of first use on a trade-mark by trade-mark basis or any sales figures. However, I note that the invoices provided in Exhibits 9 and 11 date back to 2009, and in paragraph 34 of his affidavit, Mr. Battah states that in the last fifteen years, the Opponent has sold and distributed across Canada, millions of units of its goods in association with its family of JM trade-marks. This evidence was not challenged on cross-examination.

[37] Overall, I find that this factor, which involves an assessment of a combination of the inherent and acquired distinctiveness of the parties' trade-marks, favours the Opponent, owing to the greater acquired distinctiveness of its trade-marks.

*Length of Time the Marks have been in Use*

[38] This factor also favours the Opponent. It is not clear from Mr. Perlman's affidavit that the Mark has been used, within the meaning of section 4 of the Act, in Canada, in association with the applied-for goods. By contrast, the Opponent has shown examples of use of its trade-marks, attested to the sale and distribution of millions of units of its goods in association with its trade-marks over a fifteen year period, and provided invoices dating back to 2009.

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

[39] It is the Applicant's statement of goods 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); *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)]. There is direct overlap in some of the parties' goods, and others are closely related. Both parties' goods essentially consist of clothing and related accessories. The Applicant sells its clothing and related accessories in its own stores located across Ontario, Canada [Perlman affidavit, para 2; Exhibit A]. The Opponent's clothing and related accessories are sold on-line and by retailers across Canada [First Battah affidavit, paras 20, 23 and 34]. The parties' channels of trade therefore currently differ. However, I note that there are no restrictions with respect to the channels of trade in the application for the Mark or in the Opponent's registrations. Moreover, despite current differences in the parties' channels of trade, given the overlap in the nature of their goods, there may be some overlap in the target consumers.

*Degree of Resemblance*

[40] 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].

[41] 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.

[42] In the case of both parties' marks, it is the letters JM which stand out the most. This results in some visual and phonetic similarities, as well as similarities in suggested idea, to the extent that both might be perceived as being initials or an acronym for something. Overall, there is a fairly high degree of resemblance between the parties' trade-marks, as a result of JM being the dominant part of each of the parties' trade-marks.

#### *Surrounding Circumstances*

##### *State of the Register*

[43] The Opponent has introduced state of the register evidence by way of the Elford affidavit. Such evidence has been held to be relevant only insofar as one can draw inferences from it about the state of the marketplace [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD)]. Inferences about the state of the marketplace can only be drawn where a large number of relevant registrations have been located [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)]. The small number of relevant registrations located by Ms. Elford is not sufficient to enable me to draw any meaningful conclusions with respect to the state of the marketplace. Accordingly, I do not consider the state of the register evidence to be of any assistance to the Applicant as a relevant surrounding circumstance in this case.

##### *The Applicant's use of the Mark and/or the letters JM as an Integral part of its Branding*

[44] In paragraph 6 of his affidavit, Mr. Perlman states that the Mark is integral to Jean Machine's branding. He identifies Jean Machine as being a subsidiary of MRP Retail Inc., the entity which originally filed the application for the Mark [para 1]. Mr. Perlman states that since at least as early as 2012, Jean Machine has used the Mark in Canada throughout its business in

connection with store supplies and store design and merchandising materials [para 6]. As examples, Mr. Perlman provides sample sales slips, clothing tags, etc. [Exhibit E]. According to Mr. Perlman, the letters JM are also used in connection with store supplies and marketing collateral [para 7]. As examples, he provides sample gift cards, online and print marketing materials and in-store displays.

[45] The Applicant takes the position that as a result of the extensive use of the trade-mark JEAN MACHINE in Canada and the public's familiarity with it as a brand, customers of the retail fashion industry in Canada would associate the Mark with the Applicant, particularly because of its extensive use of JM as trade-mark in Canada.

[46] Even if I were to infer the existence of a license between Jean Machine and the Applicant and/or its predecessor-in-title, in accordance with section 50 of the Act, the evidence filed by the Applicant falls short of establishing such extensive use that this would be considered to be a relevant surrounding circumstance that would significantly favor the Applicant.

#### *Conclusion Regarding Likelihood of Confusion*

[47] Section 6(2) of the Act does not concern confusion of the marks themselves, but confusion of goods and services from one source as being from another source. 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 goods and/or services at a time when he or she has no more than an imperfect recollection of the Opponent's trade-mark and does not pause to give the matter any detailed consideration or scrutiny [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* 2006 SCC 23 (CanLII) at para 20].

[48] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. Having considered all of the surrounding circumstances, I find that the Applicant has not satisfied the onus on it to prove that, on a balance of probabilities, there is not a reasonable likelihood of confusion between the parties' trade-marks as of today's date. I acknowledge that marks comprised of letters with little other distinctive indicia are considered weak marks and are generally entitled to only a narrow scope of protection, but this is a case where there is no evidence that the Applicant's Mark has acquired any distinctiveness in

association with the goods covered by its application, the Opponent's Mark has acquired some distinctiveness, and all of the relevant surrounding circumstances favour the Opponent. Had the Applicant filed additional state of the register and/or marketplace evidence to support its case, my conclusion may have been different.

[49] In view of the foregoing, the section 12(1)(d) ground of opposition succeeds.

#### **The Sixth Ground of Opposition – Non-entitlement – Section 16(3)(a) of the Act**

[50] The reputation acquired by the Opponent's trade-marks as of the filing date of the application is less than it is as of today's date. Nevertheless, the Opponent had acquired some reputation as of the filing date, and the other surrounding circumstances still favour the Opponent as of that date. Having considered all the surrounding circumstances as of the date of filing, I find that the Applicant has not satisfied its legal burden concerning the likelihood of confusion as at this date either. Accordingly, the section 16(3)(a) ground of opposition also succeeds.

#### **The Eighth Ground of Opposition – Non-distinctiveness – Section 2 of the Act**

[51] Having already found in favor of the Opponent under two grounds, I need not address this remaining ground.

#### DISPOSITION

[52] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(8) of the Act.

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

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

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

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FOR THE OPPONENT

McCarthy Tetrault LLP

FOR THE APPLICANT