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TRANSLATION  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2018 TMOB 75**

**Date of Decision: 2018-07-16**

**[UNREVISED ENGLISH  
CERTIFIED TRANSLATION]**

**IN THE MATTER OF AN OPPOSITION**

Pro-Tech Seal Products Inc.

**Opponent**

and

PROTECH S.A.M.

**Applicant**

1,601,601 for PROTECH Design

**Application**

INTRODUCTION

[1] Pro-Tech Seal Products Inc. (the Opponent) opposes the registration of the PROTECH Design trade-mark (as illustrated hereinafter) (the Mark), covered by application No. 1,601,601 in the name of PROTECH S.A.M. (the Applicant).

**ProTech**

[2] In filing the registration application, the Applicant intentionally amended its application so that the statement of goods and services now reads as follows:

(1) Chemicals used in the industry, namely chemical compositions for protection of varnishes and paints for all automobile vehicles, nautical vehicles and aeronautical vehicles, chemical compositions for protection of fabrics and textiles.

(2) Cleaning, buffing and polishing goods, namely cleaners, waxes, chamois, shampoos, polishes, renewers, stain removers for automobile vehicles, sports utility vehicles and minivans, nautical vehicles and aeronautical vehicles; goods for renewal and restoration of painted and varnished surfaces, namely cleaners, buffers, waxes, shampoos, polishes, renewers, stain removers for automobile vehicles, sports utility vehicles and minivans, nautical vehicles and aeronautical vehicles; goods for renewal and restoration of automobile vehicle bodies, boat hulls and aircraft cabins, namely cleaners, buffers, shampoos, polishes, renewers, stain removers, anti-tar, anti-resin and anti-adhesive goods, aerosol primers, paint, stripper, cleaning solvents, joint filler, disposable masks, body fillers, glass cleaners, waxes, odour destroyers; cleaners for fabrics, textiles, leathers, imitation leathers and plastics; goods for conditioning and protecting leather; goods for protecting imitation leathers, namely cleaners, nourishing care, stain removers, creams, lubricants and waxes, sponges; goods for removing tar stains, grease stains and paraffin, namely oils, aerosols, cleaners and strippers; cleaners and glazing agents for windows; cleaners for vehicle tires; goods to polish and buff tires, namely silicones, degreasers, polishes, cleaners; engine cleaners; vehicle wheel rim cleaners; cleaning foams for polishers and buffers; goods for protecting engines against dirt and moisture, namely buffers, waxes, cleaners. (the Goods)

(1) Provision of cleaning, buffing, waxing services for automobile vehicles, sports utility vehicles and minivans, nautical vehicles and aeronautical vehicles; provision of preparation, cleaning, buffing, paint and varnish maintenance services for automobile vehicles, boat hulls, aircraft cabins; provision of cleaning and protection services for fabrics and textiles, carpets and rugs, leathers, imitation leathers and all vehicle interior plastic parts; cleaning of vehicles, cleaning of vehicle engines; varnishing and buffing of vehicle engines; application of films on windows, metal surfaces and glazed surfaces.

(2) Tinting windows by surface treatments; application of protective coats to varnished and painted surfaces; treatment of varnished and painted surfaces; application of protective coats and treatment of paints and varnishes on automobile vehicle bodies, nautical vehicles and aeronautical vehicles; treatment and application of surface coatings, particularly application of plastic, PVC or polyester films on glazed and metal surfaces, coloured films for metal and glass, protective films for glazed and glass surfaces, PVC or adhesive polyester films; treatment and application of polyurethane films on automobile vehicle bodies, nautical vehicles and aeronautical vehicles. (the Services).

[3] The registration application, originally filed on November 8, 2012, is based on the proposed use of the Mark in Canada and its registration in Monaco.

[4] The Opponent bases its opposition on sections 30(e) and (i), 12(1)(d), 16(1)(a) and (c), 16(2)(a) and (c), 16(3)(a) and (c) and 2 (distinctiveness) of the *Trade-marks Act*, RSC 1985, c T-13 (the Act).

[5] I consider it appropriate to reject the opposition.

#### THE RECORD

[6] The statement of opposition was filed on September 2, 2015. On November 16, 2015, the Applicant filed a counter statement denying the grounds of opposition argued by the Opponent.

[7] In support of its opposition, the Opponent filed an affidavit by Blair Jones to which certain documents are attached. Mr. Jones refers to them as Exhibits A1 to A13. I will return in more detail to the question of the documents attached to this affidavit.

[8] For its part, the Applicant filed the affidavit of Thomas James, and its Exhibit TJ-1.

[9] Only the Applicant filed a written argument and no hearing was held.

#### PRELIMINARY REMARKS

[10] I have studied all the evidence of record. I will refer in my decision only to the points that appear relevant to rule on the question in dispute. More specifically, Mr. Jones describes in detail the research and development history of the Opponent's goods. He also provides many details on the Opponent's different investments. Although this information is interesting, it is not relevant to the questions in dispute that will be addressed in this decision. This is why I do not intend to describe it.

#### EVIDENTIARY BURDEN

[11] It is initially up to the Opponent to establish that its opposition is well-founded. However, the ultimate onus of showing that the Mark is registrable rests with the Applicant, according to the balance of probabilities [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); and *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

## RELEVANT DATES

[12] The relevant dates to analyze the grounds of opposition raised by the Opponent are:

- the filing date of the application (November 8, 2012) for the grounds based upon sections 30(e) and (i) of the Act [see *Canadian National Railway Co v Schwauss* (1991), 35 CPR (3d) 90 at p. 94 (TMOB) and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 (TMOB)];
- the date of the Registrar's decision for the grounds of opposition based upon section 12(1)(d) of the Act [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA), at p. 424 ]
- the date of first use alleged in the registration application for the grounds based upon section 16(1) of the Act [see section 16(1) of the Act];
- the filing date of the registration application (November 8, 2012) for the grounds based upon sections 16(2) and (3) of the Act [see sections 16(3) and (3) of the Act]; and
- the filing date of the statement of opposition (September 2, 2015) for the ground based upon section 2 of the Act (non-distinctiveness of the Mark ) [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

## GROUND OF OPPOSITION SUMMARILY REJECTED

### **Ground based on section 30 of the Act**

[13] For the grounds of opposition based upon section 30(e) of the Act, it is recognized that the Opponent's initial burden is light and that it may discharge this burden by referring to the evidence adduced by the Applicant [see *Labatt Brewing Company v Molson Breweries, Partnership* (1996), 68 CPR (3d) 216 (FCTD)].

[14] In the case at bar, the Opponent's evidence only concerns the Opponent's commercial activities. No element of its evidence could support the ground of opposition based on section 30(e) of the Act.

[15] Regarding the Applicant's evidence, as more fully described later, it is limited to evidence taken from the Canadian Trade-mark Registry. Consequently, it can be of no use to the Opponent in support of this ground of opposition.

[16] Consequently, the ground of opposition based on section (30)(e) of the Act is rejected, because the Opponent did not fulfill its initial burden.

[17] Regarding the ground of opposition based on section 30(i) of the Act, this section requires only that the Applicant declares it is satisfied it has the right to use the Mark in Canada in association with the Goods and Services. This statement is included in the present application for registration.

[18] However, this section of the Act may be invoked in support of a ground of opposition and in very specific cases, such as when the Applicant's statement was made in bad faith [see *Sapodilla Co Ltd v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB)].

[19] Yet there is no evidence this nature on the record. I therefore reject this ground of opposition, as the Opponent has not discharged its initial burden.

#### **Grounds of opposition based on section 16(1) of the Act**

[20] As the Applicant pointed out, this registration application is based on a proposed use in Canada and not on a use. Section 16(1) applies only when the registration application is based on a use of the trade-mark in Canada.

[21] Thus the different grounds of opposition based on section 16(1) of the Act are unfounded and therefore rejected.

GROUND OF OPPOSITION BASED ON SECTION 12(1)(D) (CONFUSION WITH THE OPPONENT'S REGISTERED MARK)

[22] The Opponent argues that the Mark is not registrable because it would be confusing with the PROT-TECH (sic) SEAL & Design registered mark.

[23] Mr. Jones is the Chief Executive Officer of the Opponent. Nowhere in his affidavit does Mr. Jones refer to the certificate of registration TMA413,008 alleged in the Opponent's statement of opposition. However, the Registrar has discretion to consult the register and I exercised it in this case.

[24] I can confirm that the Opponent is the owner of the PRO-TECH SEAL & Design registered mark reproduced hereinafter, certificate of registration TMA413,008 and that it still exists:



[25] This registration covers the following goods: *chemicals namely; rust inhibitors, paint sealants and fabric, leather and vinyl protectors* (the Opponent's goods).

[26] In the circumstances, the Opponent has therefore fulfilled its initial burden.

[27] The test to apply in the matter of confusion is stated in section 6(2) of the Act. This test does not address confusion between the marks themselves, but rather confusion regarding the source of the Goods and Services. Thus, I must determine whether a consumer who has an imperfect memory of the Opponent's PRO-TECH SEAL & Design mark and who sees the Mark used for the first time in association with the Goods and/or Services would believe they are offered or authorized by the Opponent.

[28] I must take into account all relevant circumstances, including those listed in section 6(5) of the Act, i.e. the inherent distinctiveness of the trade-marks and the extent to which they have

become known; the period during which the trade-marks have been in use; the type of goods, services or enterprises; the type of business; the degree of similarity between the trade-marks in their presentation or sound, or in the ideas they suggest. This list is not exhaustive and it is unnecessary to assign the same weight to each of these factors [see *Mattel Inc v 3894207 Canada Inc* 2006 SCC 22, 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* [2006] 1 SCR 824, 2006 SCR 23; and *Masterpiece Inc v Alavida Lifestyles Inc et al* 2011 SCC 27, 92 CPR (4th) 361 (SCC) for a more in-depth analysis of the general principles governing the test for confusion].

### **Degree of Resemblance**

[29] As mentioned by the Supreme Court in the *Masterpiece* decision, *supra*, the degree of resemblance is the most important factors in the analysis of the factors enumerated in section 6(5) of the Act.

[30] The Mark and the PRO-TECH portion of the Mark are phonetically identical. However, the marks involved are distinguished visually, phonetically and by the ideas they suggest, due to the addition of the word SEAL and a seal for the Opponent's mark. The Mark suggests protection, while the Opponent's mark suggests that its goods are protective sealants certified by this seal.

[31] On the whole, this factor therefore slightly favours the Applicant.

### **Inherent distinctiveness of trade-marks and the extent to which they have become known**

[32] Needless to say, the word PROTECH is highly suggestive, to say the least, of the quality of the parties' goods and services. The Applicant argues that the Mark has an inherent distinctiveness due to its visual, namely the use of a special font and the capital T.

[33] It nonetheless remains that this is a very weak trade-mark in the context of the Goods and Services.

[34] The Opponent's PRO-TECH SEAL & Design mark is also a very weak trade-mark. The word mark part PRO-TECH SEAL is also highly suggestive. This mark includes a graph

element, which is insufficient in itself to significantly reduce the highly suggestive character of the word mark part.

[35] The distinctiveness of a mark may be enhanced through its use and promotion.

[36] There is no evidence of record of the use or promotion of the Mark in Canada.

[37] For the PRO-TECH SEAL & Design mark, Mr. Jones provides in his affidavit a history of different events dating back to 1984. He alleges that the Opponent started using the PRO-TECH SEAL & Design trade-mark in 1986. This allegation of use is clearly insufficient to conclude the use of this trade-mark in Canada in association with any goods or services within the meaning of section 4 of the Act. None of the facts described in his affidavit specifically refers to the use of the PRO-TECH SEAL & Design mark in association with the Opponent's goods.

[38] Mr. Jones refers to Exhibits A1 to A13 inclusive in his affidavit. A bundle of documents is attached to his affidavit, but without having been numbered and authenticated by the Commissioner for Oaths. To the extent that I can trace an exhibit in the documents attached in looseleaf based on its description in Mr. Jones' affidavit, I will disregard the technical anomalies described above [see *Borden & Elliot v Raphaël Inc* (2001), 16 CPR (4th) 96 (TMOB)].

[39] Mr. Jones refers to advertising brochures, a business card, letterhead, and truck photos. Even though the PRO-TECH SEAL & Design trade-mark can be perceived in these documents and photos, this does not constitute evidence of a transfer of ownership in Canada of one of the Opponent's goods in association with this trade-mark within the meaning of section 4(1) of the Act, except if one of these documents accompanied the Opponent's goods during their transfer of ownership. I have no evidence to this effect.

[40] No invoices are produced. Mr. Jones provides sales figures, but it is impossible to know if they refer to the Opponent's total sales or sales figures for the Opponent's goods in association with the PRO-TECH SEAL & Design trade-mark.

[41] There is indeed a photo of equipment used by the Opponent. A "seal" can be seen in this photo, but it is impossible to determine if the PRO-TECH SEAL & Design mark appears in it or if this is another trade-mark. Mr. Jones explains this is the same equipment used since 1986 by



retailers to apply the Opponent's goods. However, the registration alleged in support of the statement of opposition does not cover services but only goods.

[42] I therefore conclude that there is no evidence of record that allows me to conclude that the Opponent's PRO-TECH SEAL & Design trade-mark is known in Canada in association with its goods.

[43] On the whole, I find that this factor favours the Opponent to the extent that the Opponent's goods are concerned.

#### **Period of use of the trade-marks**

[44] As concluded previously, I have no evidence of use of the PRO-TECH SEAL & Design mark in association with the Opponent's goods. The excerpt from the register refers to a use in Canada since August 1, 1986. However, this evidence constitutes evidence of *de minimis* use of this trade-mark [see *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB) at p. 430].

[45] Although this factor very slightly favours the Opponent on the whole, it does not constitute a determining factor in this case.

#### **Type of goods, services or enterprises and the nature of the trade**

[46] The Applicant argues that the registration TMA413,008 for the PROTEC SEAL & DESIGN mark does not cover any service. It thereby submits that there can be no question of an overlap between the marks in this regard. However, absence of overlap does not exclude absence of connection. If there is an overlap between some of the parties' goods, and the Services include the sale or application of these goods, there is certainly a connection between these goods and these services.

[47] The Applicant argues that the evidence of record shows that the Opponent sells its goods to retailers who are vehicle vendors and who use the Opponent's goods on the vehicles they sell to their customers, as evidenced by Mr. Jones' allegations. However, nothing prohibits one of

these retailers from procuring the Opponent's goods to apply them on the vehicles to be sold to its customers.

[48] The Applicant argues that its Goods would not be likely to be found in the same distribution channels as the Opponent's goods because, it submits, as a provider of services related to its Goods, the Applicant will sell its Goods under its own banner and not through distributors or retailers as the Opponent does, and will not sell the Opponent's goods.

[49] There is no evidence of record to support such an argument. The Applicant chose not to adduce evidence concerning its commercial activities. In the circumstances, we must rely on the description of the goods and services of the parties. Nothing indicates in the description of the Services that only the Applicant's Goods will be used in their performance.

[50] In its written argument, the Applicant does not address the overlap between the goods of the parties. Simply by reading the statement of the Goods and the statement of the goods described in the certificate of registration TMA413.008, it is clear there is an overlap concerning the following goods of the Applicant:

[TRANSLATION] (1) Chemicals used in the industry, namely chemical compositions for protection of varnishes and paints for all automobile vehicles, chemical compositions for protection of fabrics and textiles.

(2) Cleaning, buffing and polishing goods, namely cleaners, waxes, chamois, shampoos, polishes, renewers, stain removers for automobile vehicles, sports utility vehicles and minivans; goods for renewal and restoration of painted and varnished surfaces, namely cleaners, buffers, waxes, shampoos, polishes, renewers, stain removers for automobile vehicles, sports utility vehicles and minivans; goods for renewal and restoration of automobile vehicle bodies, namely cleaners, buffers, shampoos, polishes, renewers, stain removers, anti-tar, anti-resin and anti-adhesive goods, aerosol primers, paint, stripper, cleaning solvents, waxes; cleaners for fabrics, textiles, leathers, imitation leathers and plastics; goods for conditioning and protecting leather; goods for protecting imitation leathers, namely cleaners, nourishing care, stain removers, creams, lubricants and waxes; goods for removing tar stains, grease stains and paraffin, namely oils, aerosols, cleaners and strippers; cleaners for vehicle tires; goods to polish and buff tires, namely silicones, degreasers, polishes, cleaners; engine cleaners; vehicle wheel rim cleaners; cleaning foams for polishers and buffers; goods for protecting engines against dirt and moisture, namely buffers, waxes, cleaners (hereinafter sometimes collectively referred to as the Similar Products).

[51] Regarding the Services, there is a certain connection between the following services of the Applicant and the Opponent's goods:


(1) Provision of cleaning, buffing, waxing services for automobile vehicles, sports utility vehicles and minivans; provision of preparation, cleaning, buffing, paint and varnish maintenance services for automobile vehicle bodies; provision of cleaning and protection services for fabrics and textiles, carpets and rugs, leathers, imitation leathers and all vehicle interior plastic parts; cleaning of vehicles, cleaning of vehicle engines; varnishing and buffing of vehicle engines; application of films on metal surfaces.

(2) Application of protective coats to varnished and painted surfaces; treatment of varnished and painted surfaces; application of protective coats and treatment of paints and varnishes on automobile vehicle bodies; treatment and application of surface coatings, particularly application of plastic, PVC or polyester films on metal surfaces; treatment and application of polyurethane films on automobile vehicle bodies (hereinafter sometimes collectively referred to as the Similar Services).

### Other Relevant Factors

#### State of the Register

[52] The Applicant filed state of the register evidence as mentioned above. In its written argument, it reproduced 33 of the 101 citations, considered the most relevant. I agree with the Applicant that at least ten relevant citations exist, including these:

Trade-mark	Application number/ Registration number	Goods and services
PROTEX	TMA740,249	<i>Chemical automotive fuel system cleaners</i>
PROTEK	TMA564,859	<i>Interior and exterior surface sealers</i>
	TMA558,260	<i>Interior and exterior surface sealers</i>
PROTEK	TMA835,484	Nettoyants pour toutes surfaces lavables [Cleaners for all washable surfaces]
PROTEX	TMA924,820	<i>Paint protection film for use on new and used vehicles, motorbikes, boats and planes.</i>
PROTECT	TMA646,069	Reconstruction, repair, servicing, dismantling, cleaning, maintenance and varnishing of vehicles, motors and their parts, including, vehicle repair in the course

		of vehicle breakdown service.
PROTEX	TMA728,279	Polymeric fabric laminate used as an intermediate barrier to prevent bulk moisture infiltration in building envelopes and vehicle envelopes.
PROTEX	TMA264,053	<i>Chemical composition to be applied to a metal surface preventing adherence of slag or metal spatter during cutting, gouging, or welding operations, preventing scaling of metal surfaces during heat treating or stress relieving treatment, and improving arc stability and preventing excessive spatter loss during arc welding operations.</i>
PROTECT IT ALL	TMA656,614	Exterior coatings, namely, natural oil wood finish, deck finish and roof coatings in the nature of paints. Exterior coatings, namely, anti-graffiti coating. Exterior coatings, namely, clear sealers for concrete and wood. All surface cleaner used to prepare surfaces before the application of paints or coatings. Exterior coatings, namely, natural oil wood finish, deck finish, roof coatings in the nature of paint, anti-graffiti coatings, and clear sealers for concrete and wood.
PROTECT-IT	TMA768,637	Adhesive plastic film used to temporarily protect surfaces while work is being performed.

[53] These ten registered marks are the property of nine distinct entities.

[54] The state of the register evidence must show a sufficient number of relevant registrations to conclude there are numerous trade-marks on the market that include this common characteristic such that the average Canadian consumer is accustomed to distinguish between the marks that include such a characteristic [See *Welch Foods Inc v Del Monte Corp* (1993), 44 CPR (3d) 205 (FCTD) and *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB)].

[55] The register evidence shows that a sufficient number of marks exist, held by distinct owners, containing the particle PROTEC or PROTEX in association with goods and/or services for cleaning or protection of various surfaces. In the circumstances, I find that the state of the register is an important relevant factor that favours the Applicant. Thus, the consumer is accustomed to distinguishing among all these trade-marks containing the particle “PROTEC” in

association with protection goods or services for sale or application of protection goods. In other words, the addition of another element to PROTEC and/or a difference in the nature of the goods and services of the parties may prove sufficient to distinguish the source of the goods or services associated with these trade-marks.

[56]

### **Conclusion**

[57] In view of the very weak inherent distinctiveness of the marks involved and the state of the register, I find that the differences between the marks, visually, phonetically and in the ideas they suggest, are sufficient to allow the consumer to distinguish the source of the parties' goods and services.

[58] Consequently, in my opinion, it is appropriate to reject this ground of opposition.

[59] I must point out that, had it not been for the state of the register evidence, I would have arrived at a different conclusion concerning the Similar Goods and the Similar Services.

### GROUND OF OPPOSITION BASED ON SECTIONS 16 (RIGHT TO REGISTRATION) AND 2 (DISTINCTIVENESS) OF THE ACT

[60] The Opponent argues that the Applicant was not entitled to registration of the Mark because it was confusing with the Opponent's PRO-TECH SEAL & Design trade-mark used previously in Canada in association with the Opponent's goods, and with its PRO-TECH trade name used in Canada since 1986.

[61] To satisfy its initial burden under sections 16(2) and (3) of the Act, the Opponent had to prove the use of its PRO-TECH SEAL & Design trade-mark in Canada before the filing date of this registration application (November 8, 2012) and that it had not discontinued it as of the date of publication of the Applicant's registration application (April 8, 2015) [see section 16(2) and (3) of the Act and *Optic Nerve Art & Design Ltd v Optic Nerve Design*, 2005 CanLII 78205, 2005, CarswellNat 4726 (TMOB)].

[62] To satisfy its initial burden under the ground of opposition based upon the non-distinctiveness of the Mark, the Opponent had to prove that its PRO-TECH SEAL & Design trade-mark was known in Canada or well known in one specific area of Canada as of the filing date of its statement of opposition, such that the Mark could not be distinctive of the Goods and Services at that date [see *Bojangles' International, LLC v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 (FC)].

[63] I find that the Opponent did not discharge its initial burden concerning each of these grounds of opposition based on the previous use of its PRO-TECH SEAL & Design trade-mark. Indeed, such as it appears from the detailed summary of the Opponent's evidence described in the previous ground of opposition, there is no evidence of use of this mark in Canada in association with the Opponent's goods.

[64] Thus, the grounds of opposition based upon sections (16)(2)(a), 3(a) and 2 of the Act are rejected, because the Opponent did not discharge its initial burden.

[65] For the grounds of opposition based upon the previous use of the PRO-TECH trade name (sections 16(2)(c) and (3)(c) of the Act), the evidence shows the use of the Pro-Tech Seal, Pro-Tech Seal Products Inc. and Pro-Tech Seal Manufacturing Inc trade names. None of these trade names was alleged in the Opponent's statement of opposition. For the Pro-Tech trade name, there is no evidence of record of its use in Canada.

[66] Since the Opponent has not discharged its initial burden, I reject the grounds of opposition based upon sections 16(2)(c) and 3(c) of the Act.

DISPOSAL

[67] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, I reject the opposition.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified true translation  
Arnold Bennett

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS REGISTERED IN THE CASE**

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**No hearing held**

**AGENT(S) OF RECORD**

ARVIC

FOR THE OPPONENT

Fasken Martineau DuMoulin

FOR THE APPLICANT