



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 44**

**Date of Decision: 2020-05-12**

**IN THE MATTER OF AN OPPOSITION**

**Real Foods For Real Kids Inc.**

**Opponent**

**and**

**M&M Meat Shops Ltd.**

**Applicant**

**1,731,100 for REAL FOOD FOR  
REAL LIFE**

**Application**

INTRODUCTION

[1] Real Foods For Real Kids Inc. (the Opponent) opposes registration of the trademark REAL FOOD FOR REAL LIFE (the Mark), which is the subject of application No. 1,731,100 (the Application), filed on June 3, 2015 by M&M Meat Shops Ltd. (the Applicant).

[2] The Application, as amended, is based on proposed use of the Mark in Canada in association with the following services: “Operation of retail outlets dealing in meat and food products; food services, namely, recommending recipes, menu and meal ideas to customers” (the Services).

[3] The Application was advertised for opposition purposes in the *Trademarks Journal* on February 24, 2016. On April 5, 2016, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). I note that the Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised prior to that date).

[4] The Opponent raises grounds of opposition based on non-distinctiveness under section 2; non-registrability under section 12(1)(d); non-entitlement under sections 16(3)(a), (b) and (c); and non-compliance with sections 30(e) and 30(i) of the Act. The primary issue in this proceeding is whether there is a likelihood of confusion between the Mark and the Opponent's registered trademark Real Food for Real Kids design, depicted below (the Opponent's Trademark):



[5] The Applicant filed a counter statement on August 18, 2016 denying the grounds of opposition.

[6] When originally filed, the Application was also in association with numerous food and beverage goods. However, shortly after filing its counter statement, on September 12, 2016, the Applicant amended the Application to delete all of the goods and thus the Application is limited to the Services described above. The Opponent's grounds of opposition will accordingly be assessed only with reference to the Services.

[7] Both parties filed evidence, which is discussed below. Both parties filed written representations. A hearing was not requested.

[8] For the reasons that follow, the Application is refused.

## EVIDENCE

### **Opponent's Evidence**

[9] In support of its opposition, the Opponent filed the affidavit of David Starbuck Farnell, co-owner and CEO of the Opponent, sworn on March 17, 2017 (the Farnell Affidavit). His evidence is summarized below, and is discussed further in the analysis of the grounds of opposition.

[10] The Opponent is a food catering business whose core activity is the preparation and delivery of healthy food for children at childcare centres, schools and camps in the Greater Toronto Area (GTA). The business was launched by Mr. Farnell's wife, Lulu-Cohen Farnell, in May 2004, and was incorporated in July 2005.

[11] The Opponent's business has grown steadily. In early 2006, the Opponent was catering meals at over 40 daycares. By 2012, the Opponent was serving approximately 8,000 children per day in 171 childcare centres and 15 schools. As of the date of the Farnell Affidavit, the Opponent was serving meals and snacks to over 15,000 children throughout the GTA each day, in more than 300 daycares and schools. In each of the three years preceding the Farnell Affidavit, the Opponent generated annual revenues in excess of \$10 million.

[12] The Farnell Affidavit attaches as Exhibit "D" a certified copy of the Opponent's registration No. TMA669,508 for the Opponent's Trademark, which is registered in association with the following goods and services:

#### **Goods:**

(1) Natural and organic raw materials, namely grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks.

#### **Services:**

(1) Provision and production of natural and organic food, namely lunches and snacks to daycares and schools.

(2) Provision of educational seminars relating to nutrition and health for parents and caregivers at daycares and schools.

[13] Mr. Farnell describes the various ways in which the Opponent's Trademark is displayed in the conduct of its business, including the following:

- The Opponent has operated a website since 2005 advertising its services and prominently displaying the Opponent's Trademark. Examples of the website over the years are included as Exhibit "E". The Opponent also advertises its services through various social media accounts which display the Opponent's Trademark, examples of which are included as Exhibit "K".
- The Opponent's Trademark is displayed on invoices, purchase orders, and food service agreements exchanged with the Opponent's customers (such as schools and childcare centres) and suppliers. Examples are included as Exhibits "F" and "G".
- The Opponent operates 18 delivery trucks to deliver meals throughout the GTA, with each truck prominently displaying the Opponent's Trademark. Photographs of the trucks bearing the Opponent's Trademark are included as Exhibit "H".
- The Opponent promotes its products and services with printed brochures, calendars, menus and recipes, bearing the Opponent's Trademark, distributed to administrators and parents. Examples are included as Exhibit "I".
- Since 2007, the Opponent has sold various food items, including prepared meals, with labelling bearing the Opponent's Trademark. Examples of labels for prepared meals, bearing the Opponent's Trademark, are included as Exhibit "J".
- The Opponent has displayed its trademark in various other promotional initiatives over the years, including on clothing, bags, promotional videos, and the sponsorship of sports teams. Examples are included as Exhibits "L" through "O".

[14] The Opponent's business has also been the subject of favourable reports in various Canadian news publications, including the *Globe and Mail* and *National Post*. Examples are included as Exhibit "P".

[15] Mr. Farnell was cross-examined on his affidavit on January 9, 2018 and the related transcript forms part of the record.

### **Applicant's Evidence**

[16] In support of the Application, the Applicant filed the affidavit of Jennifer Leah Stecyk, sworn on August 3, 2017 (the Stecyk Affidavit). Ms. Stecyk is a trademark searcher employed by the agent for the Applicant.

[17] The Stecyk Affidavit includes the results of a search of the records of the Canadian Intellectual Property Office for active applications and registrations for trademarks including the elements "REAL" and "FOOD" in combination.

[18] Ms. Stecyk was not cross-examined.

### ONUS AND MATERIAL DATES

[19] The Applicant bears the legal onus of establishing, on a balance of probabilities that the application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. 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 [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

[20] The material dates with respect to the grounds of opposition are as follows:

- Sections 38(2)(a)/30 of the Act - the filing date of the Application, namely, June 3, 2015 [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- Sections 38(2)(b)/12(1)(d) of the Act - 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), (b) and (c) - the filing date of the Application, namely, June 3, 2015 [section 16(3)(a)-(c) of the Act];
- Sections 38(2)(d) of the Act - the filing date of the opposition, namely, April 5, 2016 [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

#### GROUND OF OPPOSITION SUMMARILY DISMISSED

##### **Non-compliance with section 30(e) of the Act**

[21] The Opponent pleads that the Application does not conform to the requirements of section 30(e) of the Act because the Applicant did not intend to use the Mark in Canada in association with the Services. However, there is no evidence in the record to support this allegation. Accordingly, this ground of opposition is dismissed, as the Opponent failed to meet its initial evidential burden.

##### **Non-compliance with section 30(i) of the Act**

[22] The Opponent pleads that, contrary to section 30(i) of the Act, the Applicant could not have been satisfied of its entitlement to use the Mark in association with the Services, because at the date of filing the Application, the Applicant was aware or should have been aware of the Opponent's prior use of the Opponent's Trademark, as well as four additional trademarks identified in Schedule "A" to the statement of opposition (REAL FOOD LUNCH CLUB; REAL FOOD FORWARD; REAL FOOD ROCKET DOG; THE REAL FOOD KITCHEN).

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

knowledge of the existence of an opponent's trademark is not sufficient to support a section 30(i) ground of opposition [see *Woot Inc v WootRestaurants Inc*, 2012 TMOB 197].

[24] In the present case, the Application contains the requisite statement and there is no evidence that this is an exceptional case involving bad faith or the violation of a federal statute. Accordingly, the section 30(i) ground of opposition is dismissed.

#### SECTION 12(1)(D) GROUND OF OPPOSITION

[25] The Opponent pleads that the Mark is not registrable because it is confusing with the Opponent's Trademark that is the subject of registration No. TMA669,508. I have exercised my discretion to check the Register to confirm that registration remains extant.

#### **Test for confusion**

[26] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[27] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 (SCC) at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 (SCC) at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[28] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

#### *Degree of resemblance*

[29] It is preferable to start the analysis by determining whether there is an aspect of each trademark that is "particularly striking or unique" [*Masterpiece, supra*, at paragraph 64].

[30] With respect to the Opponent's Trademark, in my view, the striking or unique aspect is the phrase "real food for real kids". I do not consider the design aspect of the Opponent's Trademark to be especially striking or unique, given that it is simply the particular font chosen to depict the letters. Also, in my view, it is apparent that the Opponent's Trademark is intended to be read as a unitary phrase, and so I do not consider any of the individual words (or subset thereof) to be particularly striking or unique.

[31] With respect to the Applicant's Mark, in my view, the striking aspect is the phrase "REAL FOOD FOR REAL LIFE" as a whole. As with the Opponent's Trademark, it is apparent that the Mark is intended to be read as a unitary phrase, and consequently it is the trademark as a whole that is striking, rather than any particular word or subset of words. Also, the Applicant has applied to register the Mark as a word trademark, without any design elements.

[32] Against this backdrop, in my view, there is a high degree of resemblance between the two trademarks in terms of appearance, sound and idea suggested. With respect to appearance and sound, the marks are both comprised of phrases having the identical component "real food for real..." as the first four words in a five-word phrase. The trademarks are identical but for the final word, which in both cases is a single syllable word comprised of four letters. The idea conveyed by the trademarks is also very similar, or at least strongly related, in that they are both suggestive of goods/services relating to the provision of healthy food.



[33] Consequently, when considering the parties' trademarks as a whole, in my view, they bear a high degree of resemblance in terms of appearance, sound and ideas suggested. Accordingly, I find the section 6(5)(e) factor strongly favours the Opponent.

*Inherent distinctiveness of the trademarks and the extent they have become known*

[34] In my view, both parties' trademarks possess a low degree of inherent distinctiveness in association with the relevant goods and services.

[35] With respect to the Opponent's Trademark, it is suggestive of the provision of healthy food for children. In my view, the stylized letters used to depict the Opponent's Trademark do not significantly enhance its inherent distinctiveness [see *Canadian Jewish Review Ltd v The Registrar of Trade-marks* (1961), 37 CPR 89 (Ex Ct); and *John Labatt Ltd v Canada (Registrar of Trade Marks)* (1984), 79 CPR (2d) 110 (FCTD)].

[36] With respect to the Applicant's Mark, in my view, it is similarly suggestive of services related to the provision of healthy food, in this case for persons in general rather than children specifically.

[37] The degree of distinctiveness of a trademark may be increased by means of a trademark becoming known through promotion and/or use. In the present case, the Opponent's evidence demonstrates substantial use of the Opponent's Trademark over many years and that its trademark has become known, at least in the GTA, in association with its food catering services. In contrast, the Applicant's Application is based on proposed use and there is no evidence that the Applicant's Mark has ever been used or become known in Canada.

[38] Consequently, taking into account the combination of inherent and acquired distinctiveness of the parties' trademarks, I find that this factor favours the Opponent.

*Length of time the trademarks have been in use*

[39] The Opponent's evidence demonstrates that it has used the Opponent's Trademark in Canada since 2005, and before that the trademark was used by the Opponent's predecessor in title since May 2004.

[40] The Applicant's Application is based on proposed use and there is no evidence of any use of the Mark in Canada.

[41] Accordingly, this factor also favors the Opponent.

*Nature of the goods, services or business; and nature of the trade*

[42] When considering the goods and services of the parties, it is the statement of goods and services in the parties' trademark application and registration that govern the issue of confusion arising under section 12(1)(d) [*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)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties can be useful, particularly where there is an ambiguity as to the goods or services covered in the application or registration at issue [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB); and *American Optical Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[43] The description of the goods and services in the Opponent's registration is as follows:

**Goods:**

- (1) Natural and organic raw materials, namely grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks.

**Services:**

- (1) Provision and production of natural and organic food, namely lunches and snacks to daycares and schools.
- (2) Provision of educational seminars relating to nutrition and health for parents and caregivers at daycares and schools.

[44] The nature of the Opponent's services, as described in the Farnell Affidavit, is consistent with the description of the services in the Opponent's registration. The Farnell Affidavit describes the Opponent's core business as providing food catering for childcare centres, schools and camps, and the related promotion and education involved in that service, including the provision of menus and recipes bearing the Opponent's Trademark to administrators and parents.

[45] The description of Services in the Applicant's Application is as follows:

**Services:**

Operation of retail outlets dealing in meat and food products; food services, namely, recommending recipes, menu and meal ideas to customers.

[46] In my view, there is a substantial degree of overlap between the Opponent's services and the Services listed in the Application (or the services are at least closely related in nature), particularly in the absence of any evidence from the Applicant as to the nature of its business and likely channels of trade. Both parties' services relate to the provision of food to customers, and both parties' services involve the provision of menus and recipes to customers.

[47] While the Applicant argues that the Opponent is not operating a "retail outlet", in my view, that is not a persuasive distinction in the present case. The Opponent's business is the sale of food to its customers, including in some cases the sale of prepared meal items labelled with the Opponent's Trademark (see Exhibit "J" to the Farnell Affidavit).

[48] Accordingly, I find that the sections 6(5)(c) and (d) factors favour the Opponent.

Additional surrounding circumstances

*State of the Register*

[49] Evidence concerning the state of the Register is relevant to the extent that inferences may be drawn regarding the state of the marketplace [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FC)]. Inferences regarding the state of the market may be drawn from such evidence only if a large number of relevant registrations are located [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA); *McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at paras 41-46]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the marks at issue, and (iii) include the component at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197; *Allergan Inc v Lancôme Parfums & Beauté & Cie, société en nom collectif* (2007), 64 CPR (4th) 147 (TMOB) at 169].

[50] My consideration of state of the Register evidence in this case is set out below.


### Third party trademarks

[51] Ms. Stecyk's search located several third party trademark applications and registrations that include both the words "REAL" and "FOOD", in association with goods and services related to food. However, I do not consider these marks relevant or instructive, since in the present case the common component between the parties' marks is not simply the words "REAL" and "FOOD". The common component is the four words "real food for real..." in that specific order. Of the third party marks identified in the Stecyk Affidavit which are the subject of either allowed applications or registrations, none include the component "real food for real..." (I note that application no. 1,878,833 for the trademark WILDROOTS REAL FOOD FOR REAL PEOPLE includes the relevant component, but that application has not been advertised, and there is no evidence in this proceeding of the use of that trademark in Canada).

[52] The only trademarks identified in the Stecyk Affidavit which are the subject of allowed applications or registrations, and which include the component "real food for real...", are the Opponent's registration, the Applicant's Application, and two other applications owned by the Applicant which are discussed below.

### Trademarks owned by the Applicant

[53] The Stecyk Affidavit identifies the following two trademark applications owned by the Applicant which include the component "real food for real...":

App. No.	Trademark	Goods/Services
1,781,853	HELPING YOU MAKE REAL FOOD FOR REAL LIFE	<p><b>Goods:</b> Meats, fish, seafood namely scallops, lobster, crab, shrimp, seafood stuffed fish fillets, coquilles st. jacques; poultry; frozen vegetables; frozen french fries and potatoes; prepared entrees; prepared appetizers consisting primarily of meat, vegetables, cheese or pastry; [...]</p> <p><b>Services:</b> Operation of retail outlets dealing in meat and food products; food services, namely, recommending recipes, menu and meal ideas to customers.</p>
1,814,671	REAL FOOD FOR REAL LIFE Logo 	<p><b>Services:</b> Operation of retail outlets dealing in meat and food products; food services, namely, recommending recipes, menu and meal ideas to customers.</p>

[54] At the time of filing the Stecyk Affidavit, application No. 1,814,671 had been advertised and application No. 1,781,853 had been allowed, and both applications remained pending. By the time the parties filed their written arguments, application No. 1,814,671 had proceeded to registration (TMA1,003,021), and the Applicant requested at paragraph 23 of its written argument that the Registrar take judicial notice of that fact.

[55] In general, the Registrar will not take judicial notice of the state of the Register (other than in respect of marks specifically referred to by an opponent in a statement of opposition) [see *Molson Breweries v John Labatt Ltd (Labatt Brewing Co Ltd)* (1999), 3 CPR (4th) 543 (TMOB) at 552]. However, in the present case, even if I were to take judicial notice that application No. 1,814,671 had proceeded to registration (indeed, I note that application No. 1,781,853 has now also proceeded to registration), in my view, those two registrations do not assist the Applicant in this case.

[56] First, it is well established that section 19 of the Act does not give the owner of a registration an automatic right to obtain any further registrations, no matter how closely they may be related to the original registration [see *Groupe Lavo Inc v Proctor & Gamble Inc* (1990), 32 CPR (3d) 533 (TMOB) at para 15; see also *Highland Feather Inc v American Textile Co*, 2011 TMOB 16 at para 20].

[57] Second, with respect to the Applicant's trademark REAL FOOD FOR REAL LIFE Logo, application No. 1,814,617 (now registration No. TMA1,003,021) is for a design trademark with specific design elements and with the words presented in a specific configuration. In contrast, the present Application is for the word trademark REAL FOOD FOR REAL LIFE, registration of which would entitle the Applicant to depict the Mark in any font, style, colour, or configuration. Thus, in the present case, I must consider the possibility that the Applicant could depict the Mark in manner similar to the Opponent's Trademark [see *Cheah v McDonald's Corp*, 2013 FC 774, 114 CPR (4th) 241, at paras 3-4]. In short, the potential for confusion is increased when considering the present Application for a word trademark, as compared to application No. 1,814,617.

[58] Third, with respect to the Applicant's trademark HELPING YOU MAKE REAL FOOD FOR REAL LIFE, in my view, that trademark creates a different overall impression than the Mark in issue in this case, given the presence of the precursor phrase "HELPING YOU MAKE...".

[59] Finally, the Applicant has not provided any evidence of use of the Applicant's trademarks REAL FOOD FOR REAL LIFE Logo or HELPING YOU MAKE REAL FOOD FOR REAL LIFE, to demonstrate that Canadian consumers are familiar with these marks such that the scope of protection afforded to the Opponent's Trademark might be narrowed.

[60] For the above reasons, in my view, the state of the Register evidence does not assist the Applicant in this case.

#### *Family of trademarks*

[61] The Opponent, at paragraph 43 of its written argument, asserts that its position in this case is strengthened by a family of trademarks comprised of the Opponent's Trademark, the

Opponent's trade name, and two additional registered trademarks owned by the Opponent which include the acronym RFRK (registration Nos. TMA929,543 for RFRK, and TMA929,531 for RFRK Design, attached as Exhibit S to the Farnell Affidavit).

[62] I note that there is no reference to a family of trademarks in the Opponent's statement of opposition, nor is there any reference in the statement of opposition to registration Nos. TMA929,543 and TMA929,531. On that basis alone, I reject the Opponent's argument regarding a family of marks as it was not sufficiently pleaded.

[63] In any event, in order to benefit from the wider scope of protection that may be afforded to a "family" of trademarks, an opponent must prove use of each of the marks in the family [see *McDonald's Corp v Alberto-Culver Co* (1995), 61 CPR (3d) 382 (TMOB)]. In my view, the Opponent has not established a family of trademarks which would assist it in this case. The component in common between the two parties' trademarks is "real food for real..." and the Opponent has demonstrated use of one trademark having that component. There is no evidence of record to suggest that the Opponent has been using multiple different trademarks each having the component "real food for real...". For this reason as well, the Opponent's argument regarding a family of marks does not advance its case.

### **Conclusion regarding confusion**

[64] The issue to be decided is whether a typical consumer with an imperfect recollection of the Opponent's trademark Real Food for Real Kids design, upon seeing the trademark REAL FOOD FOR REAL LIFE in association with the Services, would be likely to think that the parties' goods and services share a common source. Having considered all of the surrounding circumstances, and in particular the high degree of resemblance between the marks and the fact that each of the remaining section 6(5) factors favours the Opponent, I conclude that the Applicant has not satisfied its burden to show that there is no reasonable likelihood of confusion between the parties' trademarks.

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

SECTION 16(3)(A) GROUND OF OPPOSITION

[66] With this ground of opposition, the Opponent pleads that the Applicant is not the person entitled to registration of the Mark because as of the filing date of the Application the Mark was confusing with the Opponent's Trademark, as well as four additional trademarks identified in Schedule "A" to the statement of opposition, all of which are alleged to have been previously used in Canada. I will focus my analysis on the Opponent's Trademark (rather than those identified in Schedule "A" to the statement of opposition), as that mark presents the Opponent's strongest case. I note that the Applicant in its counter statement contests the validity of the Opponent's non-entitlement ground of opposition (included in paragraph 2(c) of the statement of opposition) insofar as it relies on trademark applications filed by the Opponent. However, paragraph 2(c) of the statement of opposition also includes a non-entitlement ground of opposition based on prior use of the Opponent's Trademark under section 16(3)(a) of the Act, which is the ground considered here.

[67] To meet its evidential burden with respect to this ground, the Opponent must show that as of the filing date of the Application, the Opponent's Trademark was previously used in Canada and had not been abandoned as of the date of advertisement of the Applicant's Application. As discussed above, I am satisfied that the Opponent's evidence demonstrates that it has used its trademark in Canada in association with food catering services since well before June 3, 2015, and had not abandoned its trademark as of February 24, 2016. Consequently, the Opponent has met its initial evidential burden.

[68] The Opponent having met its initial evidential burden, the Applicant then has a legal burden to demonstrate that there was no likelihood of confusion as of the filing date of the Application. In my view, the earlier material date for the non-entitlement ground of opposition does not materially alter the confusion analysis set out above for the section 12(1)(d) ground of opposition, and I similarly find that the Applicant has not met its legal burden to demonstrate no likelihood of confusion as of the filing date of the Application.

[69] Accordingly, the section 16(3)(a) ground of opposition succeeds.



REMAINING GROUNDS OF OPPOSITION

[70] Having already found in favour of the Opponent with respect to the section 12(1)(d) and section 16(3)(a) grounds of opposition, I do not consider it necessary to address the remaining grounds of opposition under section 2, section 16(3)(b) and section 16(3)(c).

DISPOSITION

[71] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the Application pursuant to section 38(12) of the Act.

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Timothy Stevenson  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

Shift Law

For the Opponent

Osler, Hoskin & Harcourt LLP

For the Applicant