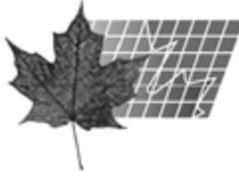


O P I C



C I P O

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 124

Date of Decision: 2020-10-30

IN THE MATTER OF AN OPPOSITION

GT Hiring Solutions (2005) Inc.

Opponent

and

Hard Hat Hunter Incorporated

Applicant

1,757,293 for HARD HAT HUNTER

Application

INTRODUCTION

[1] GT Hiring Solutions (2005) Inc. (the Opponent) opposes registration of the trademark HARD HAT HUNTER, applied for under application No. 1,757,293 by Hard Hat Hunter Incorporated (the Applicant).

[2] The application was filed based on use in Canada since at least as early as November 27, 2015, in association with the following services:

- (1) Operating and providing a website, computer database and online bulletin board that includes employment opportunities and job wanted postings for employers and job seekers, profile postings for employers and job seekers, tender and proposal requests, educational resources, industry news and social networking.
- (2) Employment counselling and recruiting.

(the Services)

[3] A key issue in this proceeding is the likelihood of confusion with the Opponent's registered trademark HARDHATS in association with the services "training and placement in jobs of unemployed individuals including those on income assistance or employment/unemployment insurance".

[4] For the reasons that follow, I find that the application should be refused.

THE RECORD

[5] The Applicant filed the application for the Mark on December 1, 2015. The application was advertised for opposition purposes in the *Trademarks Journal* of July 13, 2016.

[6] On September 13, 2016, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The grounds of opposition pleaded by the Opponent include sections 12(1)(d), 16(1)(a), 2, and 30 of the Act. As 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 (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 before this date).

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

[8] Both parties filed evidence and written representations. Only the Applicant was represented at a hearing.

[9] Before assessing the allegations advanced in the statement of opposition, I will briefly review the parties' evidence, the evidential burden on the Opponent, and the legal onus on the Applicant.

OVERVIEW OF THE EVIDENCE

The Opponent's evidence

[10] The Opponent filed a certified copy of registration No. TMA625,476 for the trademark HARDHATS. The Opponent also filed the affidavits of Frank Bourree (sworn March 17, 2017) and Dulce Campos (sworn March 20, 2017).

[11] Mr. Bourree is an officer and director of the Opponent. He provides the particulars of the Opponent's registration, makes a confirmatory statement regarding the Opponent's use and non-abandonment of its trademark, and attaches what he describes as an example of the "current brochure for the HARD HATS program offered". Ms. Campos, a trademark researcher and assistant employed by the agent for the Opponent, provides copies of various documents including: a Certificate in Good Standing from the BC Corporate Registrar for the Opponent; domain name particulars for *www.hardhats.ca*; printouts of the current website *www.hardhats.ca* as well as archived pages of this website from the Internet Wayback Machine's Internet Archive; and a printout of the current website *www.gthiringsolutions.ca*. Ms. Campos also provides a printout from the Canadian Intellectual Property Office's (CIPO) Examination Manual, and various search results from CIPO's Goods and Services Manual.

The Applicant's evidence

[12] The Applicant's evidence consists of the affidavits of Paul Robillard (sworn July 17, 2017), Teresa Alison Gowan (sworn July 14, 2017), and Thomas James (sworn July 12, 2017).

[13] Mr. Robillard, the Vice President of the Applicant, provides information on the Applicant's business, and in particular, the Applicant's online social platform located at *www.hardhathunter.com*. Samples of representative marketing and promotional materials displaying the Mark are also provided.

[14] Ms. Gowan is employed as a Patent and Trademark Clerk with the agent for the Applicant. She ordered a Canada Full Dilution/Web Common Law search for HARDHAT or HARD HAT (a copy of which is provided as an exhibit). She also conducted internet searches

for various third party ‘HardHat’ products and provided printouts for a number of third party websites including the word ‘hard hat/hardhat’. Mr. James is a trademark research analyst employed by CompuMark; he conducted the above-referenced search ordered by Ms. Gowan.

The Opponent’s reply evidence

[15] The Opponent filed the second affidavit of Dulce Campos (sworn February 26, 2018). Ms. Campos submits copies of the domain name particulars for *hardhathunter.com* and *hardhathunter.ca*. She also visited both websites, and printed out pages from the *hardhathunter.com* website.

[16] In reaching my decision, I have considered all the evidence in the file. However, only those portions of the evidence that are directly relevant to my findings are discussed.

ONUS AND MATERIAL DATES

[17] 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].

[18] The material dates that apply to the grounds of opposition are as follows:

- Sections 38(2)(a)/30 – 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 Trademarks* (1991), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c)/16(1) – the date of first use claimed in the application [section 16(1) 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 at 324 (FC)].

PRELIMINARY REMARKS

Applicant's request for leave to file additional evidence – Request denied

[19] On the day of the hearing, the Applicant submitted a request for leave to file, as additional evidence, a second affidavit of Teresa Alison Gowan. The affidavit at issue (sworn June 12, 2020) seeks to introduce information relating to the domain name and website *www.hardhats.com* (which appears on a brochure at Exhibit 1 to the Bourree affidavit), in particular that the Opponent is not the owner of this website. The affidavit also seeks to introduce results of various searches of CIPO's Goods and Services Manual which, as alleged by the Applicant, should have appeared in the first Campos affidavit. Contrary to the practice notice *Practice in Trademarks Opposition Proceedings* (Practice Notice), I note that the Applicant's request was not accompanied by an indication that Ms. Gowan would be made available for cross-examination at the request of the Opponent.

[20] At the hearing, I indicated that my ruling on the leave request would issue alongside the decision on the merits of the opposition. Following the hearing, the Opponent was invited to file comments on the Applicant's request. In a letter dated July 20, 2020, the Opponent filed a letter objecting to the Applicant's request.

[21] The Practice Notice provides that leave to file additional evidence will only be granted if the Registrar is satisfied that it is in the interests of justice to do so having regard to all the surrounding circumstances including: (1) the stage the opposition proceeding has reached; (2) why the evidence was not submitted earlier; (3) the importance of the evidence; and (4) the prejudice which will be suffered by either party.

[22] In this case, the Applicant's request for leave was submitted on June 12, 2020, the day of the hearing, which is at a very late stage in the proceeding. Indeed, the evidentiary stage closed in February 2018, and the parties filed written arguments in September 2018. The Applicant submits that the evidence was first discovered on June 11, 2020. However, there is nothing to

indicate that this evidence did not exist or was not available at an earlier date. Indeed, the Applicant has noted that at least some of the search results from the CIPO Goods and Services Manual included in its proposed evidence show approved terms dating back to 2011.

[23] With respect to the importance of the evidence, the Applicant takes the position that the evidence is determinative of many issues, in that it discredits the affidavit of Frank Bourree. The Applicant submits that as the Bourree affidavit is then discredited, no acceptable use of the Opponent's registered trademark in association with the registered services has been provided, with the result that the Opponent has "not met its evidential burden in the matter of abandonment". Notwithstanding that the proposed evidence appears to be comprised at least in part of hearsay (insofar as it includes copies of third party webpages), I note that the proposed evidence is not determinative of all of the issues in this proceeding, most notably the ground of opposition pleaded under section 12(1)(d) of the Act.

[24] Regarding the prejudice which will be suffered by either party, the Applicant submits that "there is no prejudice; all the evidence is already known to Opposing Party and was either carelessly or intentionally withheld". In contrast, the Opponent submits that it would suffer considerable prejudice given that it has no mechanism or ability to cross-examine the affiant, file evidence in reply, or to address this new evidence in its written submissions. The Opponent emphasizes that if the Applicant's agents wanted to discredit the Opponent's affiants they should have done so by cross-examining Mr. Bourree and Ms. Campos on their evidence.

[25] In view of the above, and in particular, considering the very late stage of the proceeding, and the prejudice to the Opponent insofar as it would have no opportunity to address this new evidence, I find that it is not in the interests of justice to grant leave to file the second Gowan affidavit. I consider that the importance of the proposed evidence – which appears to be limited – does not outweigh the prejudice that would be occasioned by the Opponent if the Applicant was granted leave. Accordingly, the Applicant's request for leave to file the second affidavit of Ms. Gowan is denied.

[26] I would note that even if I had accepted the proposed evidence, it would not have affected the outcome of my final decision in this case.

Bourree affidavit – Exhibit page refers to another opposition

[27] The affidavit of Frank Bourree includes a single exhibit identified as Exhibit 1. While the exhibit page is properly notarized, it does not refer to the subject opposition proceeding but instead refers to another opposition by the Opponent to an application by an unrelated third party.

[28] As I can readily identify the exhibit based on its description in the body of Mr. Bourree’s affidavit, I consider this reference to be an inadvertent error that does not impact the weight to be accorded to the exhibit. I would also add that this discrepancy has not been raised by the Applicant.

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 30(a) ground

[29] The Opponent has pleaded that contrary to section 30(a), “the application is not described in normal commercial terms or sufficient detail”. The Opponent alleges that the description is ambiguous and the use of the term “that includes” is not clearly defined completely. In addition, the terms “profile postings”, “tender and proposal requests”, “educational resources”, “industry news” and “social networking” are not acceptable nor are they defined in sufficient detail to provide a clear understanding of the applied-for services. For ease of reference, the Applicant’s Services, with the allegedly problematic terms underlined, are shown below:

- (1) Operating and providing a website, computer database and online bulletin board that includes employment opportunities and job wanted postings for employers and job seekers, profile postings for employers and job seekers, tender and proposal requests, educational resources, industry news and social networking.
- (2) Employment counselling and recruiting

[30] The initial burden on an opponent under a section 30(a) ground is a light one and an opponent may only need to present sufficient argument in order to meet its initial burden [*McDonald’s Corporation and McDonald’s Restaurants of Canada Ltd v MA Camacho-Saldana International Trading Ltd carrying on business as Macs International* (1984), 1 CPR (3d) 101 at 104 (TMOB)]. In this case, the Opponent has filed printouts (dated March 9, 2017) from

CIPO's Goods and Services Manual of the results of searches conducted by Ms. Campos for the terms "tender", "proposal", "educational", and "industry news" (First Campos affidavit, Exhibit 7), as well as an excerpt from the Examination Manual. The Opponent refers to these materials in its written submissions, as discussed below.

[31] With respect to the words "that includes", the Opponent cites Section II.5.4.3 (Indefinite Terms) of the Examination Manual and submits that they are indefinite and cannot be used to specify goods or services without further specification. For the descriptions "profile postings", "tender and proposal requests", "educational resources" and "industry news", the Opponent takes the position that these neither appear in nor comply with the Goods and Services Manual. In particular, the Opponent submits that the "description does not indicate any specific field or area of use, nor does it indicate the specific types of profile, proposal, resources or news that are provided on the website, computer database or online bulletin board". The Opponent submits that the evidence establishes that the Applicant's services are for use in the field of skilled trades, mining and construction (Robillard affidavit, para 3; and Second Campos affidavit, paras 3, 4), but as recited, these services are insufficiently specific as the descriptions would provide the Applicant with an unreasonably wide ambit of protection. The Opponent has made no specific submissions relating to the term "social networking".

[32] Although some degree of specificity is required, it has been recognized that statements of services may be more difficult to specifically define in comparison to statements of goods [*Sentinel Aluminium Products Co Ltd v Sentinel Pacific Equities Ltd* (1983), 80 CPR (2d) 201]. Further, the Examination Manual states that in reading the entire statement of services, "context may serve to specify an otherwise unacceptable identification of services". With this in mind, when considered in context as a whole, I am satisfied that the services, when read their entirety are set out in sufficient detail and are not ambiguous. As an aside, as pointed out by the Applicant, the Opponent describes its own services using similar language, *i.e.*, "training and placement in jobs of unemployment individuals including those on income assistance or employment/unemployment insurance". It also appears that the Opponent's own description of services does not indicate any specific field or area of use, though from the evidence provided it appears that its services are for use in the field of construction.

[33] In view of the above, I find the Services to be stated in sufficiently specific and ordinary terms. Accordingly, this ground of opposition is rejected.

Section 30(b) ground

[34] The Opponent has pleaded that the application does not conform to the requirements of section 30(b) of the Act because the Mark had not been used in Canada in association with the Services since the alleged date of first use, namely November 27, 2015.

[35] With respect to section 30(b) of the Act, an opponent's initial burden has been characterized as light due to an opponent's limited access to information regarding use relative to the applicant [*Tune Master v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB)]. If an opponent succeeds in discharging its initial evidential burden, the applicant must then, in response, substantiate its claim of use. However, while an opponent is entitled to rely on the applicant's evidence to meet its evidential burden, the applicant is under no obligation to evidence its claimed date of first use if this date is not first put into issue by an opponent meeting its evidential burden [*Kingsley v Ironclad Games Corporation*, 2016 TMOB 19].

[36] In this case, the Opponent relies primarily on the Robillard affidavit filed by the Applicant to meet its evidential burden. However, as discussed below, I do not find this to be sufficient for the Opponent to meet its evidential burden. With this in mind, portions of the Robillard affidavit are summarized below.

Robillard affidavit

[37] Mr. Robillard identifies himself as the Vice President of the Applicant (para 1). In view of his position, he has access to the Applicant's administrative records (para 2).

[38] Mr. Robillard states that the Applicant has operated an online social network since 2015, and that the online network allows organizations and individuals to connect, communicate and collaborate on an industry-centric platform (para 3). In particular, Mr. Robillard states that the Applicant's social platform allows users to:

- (i) Develop a digital presence in the construction, skilled trades and mining industries;

- (ii) Self promote by highlighting projects and accomplishments;
- (iii) Highlight an individual's skill set and experience to prospective employers, contractors and collaborators;
- (iv) Raise awareness regarding career opportunities that exist in the skilled trades, mining and construction sectors;
- (v) Combat skills shortages by encouraging participation in the construction, skilled trades and mining sectors;
- (vi) Facilitate connections with other industry professionals within the construction, skilled trades and mining centric community;
- (vii) Improve the working conditions of the construction, skilled trades and mining industries by providing free resources to users;
- (viii) Access industry-related content, statistics, news and emerging industry-related technology; and
- (ix) Access information, templates and documents to help make companies safer and regulation compliant.

[39] Mr. Robillard states that the Applicant's platform launched in North Bay, Ontario on November 27, 2015, and that during the launch event, 43 users signed up and joined the platform. Mr. Robillard describes Exhibit A as "copies of photographs of the launch event". I note that the Exhibit consists of two photographs. The first photograph shows a person on a stage presenting to an audience. The photograph appears to have been taken from behind and above center stage, making it difficult to see whether the Mark appears anywhere on the stage. However, the Mark is prominently displayed on large overhead signs off the left side of the stage. The second photograph shows an open laptop positioned on a table at the same venue. The laptop screen is too small to see its contents, but the laptop itself is flanked by two hardhats prominently bearing the Mark. While the Mark appears as a word Mark, it is also presented in a design format (spaced to fit within a shaped border with a shaded background). I consider that such use also constitutes use of the word Mark as the marks do not differ substantially, and the use of a word mark can be supported by the use of a composite mark featuring the word mark and other elements [*Stikeman, Elliot v Wm Wrigley Jr Co* (2001), 14 CPR (4th) 393 (TMOB)].

[40] Mr. Robillard states that in 2016, the Applicant partnered with Canadore College, a college of applied arts and technology located in North Bay, Ontario, and that the Applicant's platform is now incorporated into the college's trades programs. The Applicant operates an office on-site at Canadore College's main campus. Mr. Robillard states that "that office actively displays the Hard Hat Hunter trademark and promotes the Hard Hat Hunter platform" (para 5).

[41] Mr. Robillard states that on November 9, 2016, the Applicant hosted an event located on the Canadore campus officially announcing its partnership with the College. Exhibit B is described as a copy of a press release promoting and announcing the partnership, and photographs of the Canadore campus event and a website screen shot from media coverage of the event by CTV news (para 6). I confirm that both the press release and event photographs display the Mark.

[42] Mr. Robillard states that as of June 28, 2017, 1,954 Canadian users had joined the HARD HAT HUNTER platform, and that seventy five percent of those users are located in Canada. Exhibit C is described as a redacted listing of Canadian users who have joined as of June 28, 2017 (para 7).

[43] Mr. Robillard states that the Applicant's social platform is located at *www.hardhathunter.com*, and that from November 25, 2015 to June 27, 2017, the website received 948,198 page views and generated 169,327 online sessions, 77.04% of which originated in Canada. Exhibit D consists of website analytics which include a breakdown of Canadian users during that period (para 8).

[44] Mr. Robillard advises that to date, the Applicant has spent in excess of \$380,000 in the marketing and promotion of its services and the Mark. Marketing and promotional activities have included online contests, frequent advertisements on social media channels and attendance at international tradeshows, including the 2016 MinExpo located in Las Vegas, USA (para 9). Mr. Robillard attaches "representative samples of some of the HARD HAT HUNTER promotional and marketing materials that have been publicly circulated that demonstrate some of the ways in which the HARD HAT HUNTER trademark has been used" (Exhibit E). The materials provided include: a website screen shot of the Applicant's YouTube channel dated July 5, 2017; promotional online graphics and advertisements which are stated as being displayed on the Applicant's website; a "representative sample of TAILGATE, the Applicant's weekly blog-style newsletter"; and instructions to online users regarding the customization of a user's email preferences to tailor their use and benefit from the platform (para 9). These materials all display the Mark.

Analysis

[45] The Opponent takes the position that the Applicant has not provided one example to support its claimed date of first use of November 27, 2015. With respect to the launch photographs at Exhibit A of the Robillard affidavit, the Opponent submits that they are undated and do not make any indication as to what the photographs are about, and further, that the photographs do not show use of the Mark as a trademark in the relevant field in Canada during the relevant period. The Opponent points out that at no time does the Applicant evidence show how the Mark appears on the Applicant's website/online platform, and that the evidence does not show that the promotional and marketing materials provided by Mr. Robillard were distributed to promote the services during the relevant period. The Opponent submits that considering the vague and ambiguous information and evidence provided by the Applicant, the Opponent has raised sufficient doubt concerning the veracity of the Applicant's claimed date of first use to meet its light initial burden. Put another way, I understand that the Opponent is essentially relying on what it alleges is an absence of complete evidence supporting the assertions of use by Mr. Robillard.

[46] I do not find that anything in the Applicant's evidence puts the Applicant's claimed date of first use into issue. Rather, I find the Robillard affidavit shows use of the Mark in association with the Services on November 27, 2015 pursuant to section 4(2) of the Act, as I find the photographs of the platform launch show the display of the Mark in the advertising of the Services. In reaching this finding, I consider it reasonable to infer from a fair reading of Mr. Robillard's affidavit (in particular, paragraph 4) that the photographs show the launch event that occurred on November 27, 2015. The evidence also indicates that people signed up for the Applicant's online platform on November 27, 2015 (and several of the customer listings provided by Mr. Robillard identify Nov. 27, 2015 as their sign up date). I further note that in the absence of cross-examination and/or additional evidence from the Opponent, I have no reason to doubt the veracity of Mr. Robillard's statements or to draw negative inferences from his evidence.

[47] Based on the foregoing, I find that the Opponent has not discharged its relatively light burden under section 30(b) of the Act. Accordingly, this ground of opposition is rejected.

Section 30(i) ground

[48] The Opponent has pleaded that contrary to section 30(i) of the Act, the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Services. In particular, the Opponent pleads that the Applicant was aware of the Opponent's earlier use and registration of the Opponent's registered trademark, with which the Mark was and is confusing.

[49] Where an applicant has provided the statement required by section 30(i), this ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. The application for the Mark contains the requisite statement and there is no evidence that this is an exceptional case. Accordingly, this ground of opposition is summarily rejected.

Section 12(1)(d) ground of opposition

[50] The Opponent has pleaded that the Mark is not registrable pursuant to section 12(1)(d) of the Act in view of the Opponent's registration No. TMA625,476 for the trademark HARDHATS in association with the services "training and placement in jobs of unemployed individuals including those on income assistance or employment/unemployment insurance". I have exercised my discretion and checked the Register to confirm that this registration is extant [*Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Therefore, the Opponent has met its initial burden with respect to this ground.

Test to determine confusion

[51] The Opponent having met its initial burden of proof, I must now determine, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's registered trademark HARDHATS.

[52] 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 or leased by the same person, whether

or not the goods or services are of the same general class or appear in the same Nice Class. In making such an assessment, I must consider all the relevant surrounding circumstances, including those listed in section 6(5): 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.

[53] In *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23, [2006] 1 SCR 824 at paragraph 20, the Supreme Court of Canada set out how the test is to be applied:

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] at a time when he or she has no more than an imperfect recollection of the [prior] trade-marks and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[54] The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context specific assessment [*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 at paragraph 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.

[55] Importantly, section 6(2) does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source. In the instant case, the question posed by section 6(2) is whether purchasers of the Applicant's Services, provided under the trademark HARD HAT HUNTER, would believe that those Services were being provided by the Opponent, or that the Applicant was authorized or licensed by the Opponent who offers services under the trademark HARDHATS.

Inherent distinctiveness

[56] In considering the inherent distinctiveness of the respective parties' trademarks, I have exercised my discretion to refer to dictionary definitions [*Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29 which provides that the Registrar can take judicial notice of dictionary definitions].

[57] The Opponent’s trademark HARDHATS is a combination of two ordinary words, and the *Canadian Oxford Dictionary* (2ed) defines “hard hat” as follows:

hard hat

noun

1. protective headgear worn on construction sites, logging sites, etc.
2. *informal* a construction worker.
3. *informal* a conservative member of the working class.

[58] Further, the Opponent’s evidence indicates that the job training and placement services are in the field of construction. The client brochure attached as Exhibit 1 to the Bourree affidavit prominently includes the phrases “Trade Up. Take the training and find work in construction” and “Trade Up. Find qualified workers for your construction projects”. The brochure also includes pictures of construction workers wearing hardhats. Accordingly, I consider the Opponent’s trademark to be suggestive of the field or type of job training and placement services offered by the Opponent.

[59] The Applicant’s Mark consists of the words HARD HAT HUNTER. The *Canadian Oxford Dictionary* (2ed) defines “hunter” as follows:

hunter

noun

1. a person or animal that hunts.
 - a horse used in hunting.
2. a person who seeks something.

[60] Similar to the Opponent’s trademark, I consider the “hard hat” in the Applicant’s Mark to hold a suggestive connotation in respect of the Services, in that it suggests the field or type of employment opportunities on the Applicant’s online platform (para 3, Robillard affidavit), as well as the field or type of the Applicant’s employment counselling and recruiting services. I find that the word “hunter” has a very suggestive connotation (i.e. seeking employment) in association with the Services in the Application, with the result that it does not significantly increase the overall inherent distinctiveness of the Mark.

[61] Accordingly, this factor favours neither party.

Extent known and length of time in use

[62] The extent known and length of time in use favours the Applicant. As discussed below, while the Opponent's registration claims use of the HARDHATS trademark since June 2002, the Opponent's evidence falls short of establishing that the Opponent's trademark has been used or promoted in association with the Opponent's services to any meaningful extent. In contrast, the Applicant's evidence shows that the Mark has been used since November 27, 2015, and that it has become known to some extent in Canada.

Opponent's evidence

Bourree Affidavit

[63] Mr. Bourree is an originating officer and director of the Opponent. He was also an officer and director of the Opponent's predecessor in title, GT Hiring Solutions Inc. (para 1).

Mr. Bourree's evidence relating to the Opponent's and/or its predecessor in title's use of HARDHATS is reproduced below:

3. I confirm that since 2003 programs have been offered under the HARDHATS program namely "training and placement in jobs of unemployed individuals including those on income assistance or employment/unemployment insurance". On average annually approximately 850 applications were received, resulting in approximately 550 accepted individuals through the program and 335 successfully graduated and placed individuals. I confirm that the use of the HARD HATS [*sic*] mark has not been abandoned.

4. Attached to this my affidavit as Exhibit 1 are examples of the current brochure for the HARD HATS [*sic*] program offered.

[64] Exhibit 1 appears to be a mock-up of a brochure (labelled 4" x 9" Brochure: Client) that displays the Opponent's trademark and provides information regarding a job training program. The brochure, which is undated, prominently includes the phrases "Trade Up. Take the training and find work in construction", and "Trade Up. Find qualified workers for your construction projects". The brochure also includes pictures of construction workers wearing hardhats.

[65] In its written argument, the Applicant submits that Mr. Bourree does not provide any evidence of actually performing the registered services in Canada beyond bald assertions that the trademark was not abandoned, general unsubstantiated statistics and an undated brochure. I agree

that Mr. Bourree's statement (which does not even identify that the services have been offered under the trademark HARDHATS but rather simply refers to the HARDHATS program) itself does not constitute evidence of use of the Opponent's mark as it is unaccompanied by evidence of how the trademark actually appears, if at all, in the performance of the Opponent's services. The brochure (Exhibit 1) does show use of the Opponent's trademark in association with the advertising of the Opponent's services, pursuant to section 4(2) of the Act. However, it is described as "current", and there is no indication that it would have been used at any time prior to the swearing of the affidavit in March 2017. Further, there is no information on the extent, if any, of the brochure's distribution in Canada. At the hearing, the Applicant also pointed out that the brochure itself refers to Hardhats as being financed by the Ministry of Human Resources and involving a "partnership with the Canadian Home Builders Association of British Columbia, Grant Thornton Job Placements Inc., Kwantlen University College and Camosun College", with no reference to the Opponent as the owner of the trademark. The Applicant submits that this suggests ownership of the trademark by a different company.

First Campos affidavit

[66] Ms. Campos is employed by the agent for the Opponent as a trademark researcher and assistant (para 1). On the instruction of Trisha A. Doré, senior registered trademark agent of the agent for the Opponent, Ms. Campos visited a number of websites including:

- The website *webnames.ca*. Ms. Campos then entered <*www.hardhats.ca*> into the WHOIS feature of the page. The Opponent is identified as the registrant for the domain name *www.hardhats.ca* (para 5, Exhibit 2).
- The 'current' website (printed March 8, 2017) for *www.hardhats.ca* (para 6, Exhibit 3). I note that the Opponent's trademark appears as a header at the top of the webpage.
- Online searches of the Internet Archive Wayback Machine for the web address *http:hardhats.ca* (para 7). Exhibits 4A through M consist of approximately 47 printouts of the *hardhats.ca* main page as archived at various dates from June 21, 2003 to January 10, 2016. The printouts are identical and display the Opponent's trademark on the page header.

[67] In my view, little weight may be given to this affidavit since Ms. Campos is employed by the agent for the Opponent and the evidence relates to a contentious issue in the proceeding, namely the Opponent's use of its trademark) [*Cross Canada Auto Body Supply (Windsor) Limited et al v Hyundai Auto Canada* (2006), 2006 FCA 133, 53 CPR (4th) 286 (FCA)]. In any event, this evidence fails to establish that any consumers in Canada visited this web page at any time. I would also add that in its written argument, the Applicant also raises the issue of ownership of the Opponent's mark by virtue of information contained on the website printout (circa March 2017) (Exhibit 3).

Certified copy of the Opponent's registration No. TMA625,476

[68] While a certified copy of the Opponent's registration has been filed, this does not support the conclusion that the Opponent's mark has become known to any significant extent, or that it has been continuously used.

Applicant's evidence of use

[69] The Applicant's evidence relating to the use of the Mark is set out in the Robillard affidavit. Mr. Robillard's affidavit (summarized above) establishes that the Applicant's online platform was launched on November 27, 2015 (para 4), and he provides a photograph of the launch event at which the Mark appeared in association with the promotion of the Services (Exhibit A). Mr. Robillard's evidence is that as of June 28, 2017, nearly 2000 Canadian users had joined the Applicant's platform, with 75% of those users located in Canada (para 7, Exhibit C). Mr. Robillard also states that the Applicant has spent over \$380,000 in marketing and promotion of its Services and the Mark, including online contests, frequent advertisements on social media channels and attendance at international tradeshows, including the 2016 MinExpo located in Las Vegas, USA. However, no information is provided on the Canadian attendance at this tradeshow. The Applicant provides some examples of the Mark in materials and media including the Applicant's YouTube channel (cited as having 25 videos with over 2,000 views). However, there is no clear indication of when and how long this channel has been in place, and how many Canadian consumers may have accessed it. Similarly, for the "representative" samples of promotional online graphics and advertisements displayed on the Applicant's website, there is no indication of how long they appeared on the Applicant's website.

The nature of the goods and services and trade and business

[70] When considering sections 6(5)(c) and 6(5)(d) of the Act, it is the statement of goods and services in the application and the statement of goods and services in an opponent's registration that govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*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)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties is useful [*McDonald's Corp v Coffee Hut Stores Ltd*, 1996 CanLII 3963 (FCA), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB); *American Optical Corp v Alcon Pharmaceuticals Ltd* (2000), 5 CPR (4th) 110 (TMOB)].

[71] The services listed in the Opponent's registration are "training and placement in jobs of unemployed individuals including those on income assistance or employment/unemployment insurance".

[72] For ease of reference, the Applicant's Services are set out below:

- (1) Operating and providing a website, computer database and online bulletin board that includes employment opportunities and job wanted postings for employers and job seekers, profile postings for employers and job seekers, tender and proposal requests, educational resources, industry news and social networking.
- (2) Employment counselling and recruiting.

[73] The Opponent takes the position that its registration and the Applicant's application contain similar services, namely the Opponent's "placement in jobs of unemployed individuals" and the Applicant's operation and provision of a website that includes "employment opportunities and job wanted postings" and "employment counselling and recruiting services". The Opponent further submits that the parties' evidence demonstrates that the Opponent and the Applicant provide the same or highly similar services in the same trade channels in Canada.

[74] In contrast, the Applicant takes that position that the parties' services and businesses are very different since the Opponent provides training and job placement for unemployed

individuals, whereas the Applicant provides an “online social network allowing organizations and employed individuals to connect, communicate, and collaborate on an industry-centric platform”. The Applicant submits that while the Opponent offers employment services, this does not lessen the differences in the nature of the parties’ businesses as employment services is a broad category with limited overlap in the particular interests of the parties.

[75] I acknowledge that the Applicant offers as a service the operation and provision of a website/computer database/online bulletin board that is not in and of itself similar to job placement services. However, in assessing the nature of the Applicant’s service it is necessary to consider it in its entirety, which means recognizing that the website/computer database/online bulletin board *includes employment opportunities and job wanted postings for employers and job seekers*. It is in this regard that I find that there is similarity between the parties’ services, since job seekers (employed or unemployed) could potentially turn to both the Opponent’s and Applicant’s services to access employment opportunities. Moreover, the Applicant’s “employment counselling and recruiting services” overlap with the Opponent’s job training and placement services.

[76] The evidence of the parties also suggests that the job opportunities associated with the services of both parties are in the areas of construction and skilled trades. The Opponent’s brochure prominently advertises finding ‘work in construction’ and/or ‘workers for construction projects’ and depicts construction workers wearing hardhats (Bourree affidavit, Exhibit 1). The Applicant’s promotional and marketing materials refer to Hard Hat Hunter as a platform specifically geared to those who work within the trades and construction sectors (Robillard affidavit, Exhibit E), and Mr. Robillard expressly refers to the construction, skilled trades and mining industries when discussing the platform and its users (Robillard affidavit, para 3).

[77] Overall, I find that these factors favour the Opponent.

Degree of Resemblance

[78] The Mark resembles the Opponent’s trademark to a fair degree in appearance and sound since it effectively incorporates the entirety of the Opponent’s trademark. In this regard, I do not consider the addition of a space between the words HARD and HAT and the removal of the

letter S in the Mark to be of consequence. Indeed, I note that the Opponent's own evidence refers to HARD HATS and HARDHATS interchangeably. Underscoring the resemblance with the Opponent's mark is the fact that it is the first part of the Mark that is identical to the Opponent's trademark [*Conde Nast Publications v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)]. I find that there are also similarities in the ideas suggested by the parties' marks, though the Applicant's Mark also suggests that the Services relate to 'job hunting'.

[79] Accordingly, this factor favours the Opponent.

Surrounding circumstance – State of the register and state of the marketplace

[80] As part of its evidence, the Applicant filed the affidavit of Teresa Alison Gowan (sworn July 14, 2017) and Thomas James (sworn July 12, 2017). At the request of Ms. Gowan, Mr. James, a trademark research analyst at CompuMark, conducted a Full Dilution (How Common) Search and Web Common-Law Search for "HARDHAT or HARD HAT". A copy of the search results is attached to his affidavit. Ms. Gowan's affidavit also includes a copy of these search results, as well as the results of various internet website searches she conducted.

[81] Based on my review of this evidence (set out below), I find this to be a factor favouring the Applicant to the extent that it establishes that at least one other party has been active under trademarks and/or tradenames that incorporate the element HARDHAT/HARD HAT in a generally related field in Canada.

[82] Regarding the state of the register, the most relevant trademarks disclosed in the James search are HELMETS TO HARDHATS (TMA 688,696), HELMETS TO HARDHATS, DU REGIMENT AUX BATIMENTS & DESIGN (TMA858,653), and HIGH SCHOOLS TO HARDHATS (pending app No. 1,643,785), all of which are listed in association with employment services related to the construction industry. These three trademarks stand in the name of the Building and Constructions Trades Department of the American Federation of Labor/Congress of Industrial Organizations.

[83] The Gowan affidavit includes an archived printout of the webpage *helmetstohardhats.ca* (Exhibit H) which displays the HELMETS TO HARDHATS word and design marks and appears

to advertise the listed employment services. Ms. Gowan also visited the website *www.ca-urlm.com* (“URLmetrics site”) to conduct an online website statistics search of the internet website address *www.helmetstohardhats.ca* (Gowan affidavit, para 6, Exhibit E). However, without information as to the reliability of information provided on the URL metrics site, I give no weight to the statistics provided.

[84] I also note the following with respect to portions of the Gowan/James evidence, which in my view is not relevant or of little impact:

- a) The James search lists three HARDHAT (or close variations thereof) trademarks of record standing in the name of third parties, namely: (i) HARD HAT DESIGN (TMA258,540) by Rust-oleum Corporation in association with “protective and decorative coating compositions for use in the prevention of surface deterioration or corrosion on metal, wood, masonry or other surfaces”; (ii) HardHat by Atlas Copco Airpower in association with “electric machine motors...” and “maintenance and repair of industrial installations...”; and (iii) HARD HAT by Levi Strauss & Co. (Canada) Inc. in association with “pants, shirts, jackets, overalls, coveralls”. Ms. Gowan conducted internet searches for the Rust-oleum and Atlas Copco products in Canada (Exhibits B and C). However, I do not consider these results to be relevant as the goods and services associated with these marks operate in different fields of interest. For the same reason, I do not consider printouts from *www.amazon.ca* for the kids video series ‘Hard Hat Harry’s’ or an archived webpage from the website *www.hardhatandheels.ca* (which appears to relate to a business offering home staging, interior design consulting, and renovation solutions) to be relevant (Gowan affidavit, paras 5, 9; Exhibits D, H).
- b) Ms. Gowan visited and attached printouts from the websites *www.hardhat.jobs* and *www.hardhattraining* (Exhibits F and I). I consider these sites to be of limited relevance as there is no indication of the extent that they have been accessed by Canadians. Further, they cannot be relied upon as proof of the truth of their contents.
- c) The domain name search results in the James search are not particularly helpful to the Applicant once those results that appear to be associated with unrelated goods/services

and/or non-Canadian results are removed. There is also no information regarding the extent to which these pages may have been accessed by Canadians.

- d) Likewise, the common law/NUANS search results provided in the James search are of limited assistance as it is not clear that the goods and services associated with any of the entities, with the exception of the entity Helmets to Hardhats, are generally related to those of the parties. There is also no information with respect to the extent of their operations or the length of time for which they have been in business in Canada.

Conclusion

[85] 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 Applicant’s trademark HARD HAT HUNTER in association with the Services at a time when he or she has no more than an imperfect recollection of the Opponent’s HARDHATS trademark and does not pause to give the matter any detailed consideration or scrutiny [see *Veuve Clicquot, supra* at para 20].

[86] Having considered all of the surrounding circumstances and applying the test of confusion as a matter of first impression and imperfect recollection, I conclude that the probabilities of confusion between the Mark and the Opponent’s trademark are evenly balanced between a finding of confusion and of no confusion. The Applicant has therefore not met the legal onus on it to show, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent’s trademark. In reaching this conclusion, I have had regard to those factors (discussed above) favouring the Applicant. However, the Applicant’s Mark has incorporated the Opponent’s mark in its entirety as the first portion of its Mark, and there is overlap in the services of the parties, both of which favor a likelihood of confusion.

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

Section 16(1)(a) ground of opposition

[88] The section 16(1)(a) ground of opposition also turns on the issue of confusion between the Mark and the Opponent’s HARDHATS trademark. While I have some doubt as to whether the Opponent meets its initial burden, I am prepared to find the evidence of the archived

printouts from the *www.hardhats.ca* website advertising the Opponent's services and displaying the mark, along with evidence of ownership of the domain name by the Opponent (thus establishing a connection between the Opponent and the website), the current (circa March 2017) site printout, and the Bourree evidence (particularly the brochure), when viewed together, to be sufficient to meet the Opponent's initial evidential burden.

[89] For the most part, my conclusions respecting the section 12(1)(d) ground of opposition also apply to this ground of opposition. Thus, I find that the Applicant has not met, at the material date of November 27, 2015, the legal onus to show, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's trademark. Accordingly, the section 16(1)(a) ground of opposition is successful.

Section 2 ground of opposition

[90] The ground of opposition based on section 2 of the Act is rejected on the basis that the Opponent has failed to meet its evidential burden. As per my comments above (paras 62 – 68), the Opponent's evidence is insufficient to establish that its trademark had become known sufficiently in Canada as of the material date of September 13, 2016 (the date of filing the statement of opposition), so as to negate the distinctiveness of the Mark [*Motel 6, Inc v No 6 Motel Ltd (1981)*, 1981 CanLII 2834 (FC), 56 CPR (2d) 44 (FCTD); *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd (2006)*, 2006 FC 657 (CanLII), 48 CPR (4th) 427 (FC)].

DISPOSITION

[91] 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.

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2020-06-12

APPEARANCES

No one appearing

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