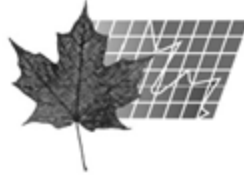


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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 216

Date of Decision: 2021-09-29

IN THE MATTER OF OPPOSITIONS

La Pointique International Ltd.

Opponent

and

L&P Vêtements Inc.

Applicant

1,829,392 for L&P

Applications

1,829,875 for L&P et dessin script

OVERVIEW OF APPLICATION NO. 1,829,392

[1] On March 27, 2017, L&P Vêtements Inc. (the Applicant) filed application No. 1,829,392 (the Application) to register the trademark L&P (the Mark). The Application is based on use of the Mark in Canada since June 15, 2015 in association with the following goods (the Goods):

Goods:

- (1) Clothing for babies, toddlers and children, namely rainproof jackets, wind resistant jackets, sleeved jackets, caps, knitted caps, baseball caps, rain hats, beanies, head scarves, shoulder scarves, gloves, baseball jerseys, sweatshirts, t-shirts.

[2] La Pointique International Ltd. (the Opponent) alleges, *inter alia*, that the Mark is confusing with its family of LP trademarks, including LP & Design and LP SUPPORT, used in association with goods including clothing and related accessories.

[3] As discussed below, I find that the Applicant has met its legal onus of proving that there is no reasonable likelihood of confusion. Accordingly, the opposition is rejected.

BACKGROUND

[4] The Application was advertised for opposition purposes in the *Trademarks Journal* on April 18, 2018, and on June 12, 2018, the Opponent filed a statement of opposition pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) (see section 70 of the Act which states that the provisions of the Act as they existed prior to June 19, 2019 govern this case).

[5] The Opponent raises grounds of opposition based on registrability under section 12(1)(d), entitlement under section 16(1)(a), distinctiveness under section 2, and non-compliance with sections 30(b) and 30(i) of the Act. With respect to the registrability, entitlement and distinctiveness grounds, the Opponent relies on its use and registration of an alleged family of trademarks set out in Schedule A to this decision, all of which contain or are comprised of the element LP (collectively, the LP Trademarks).

[6] The Applicant filed a counter statement on August 1, 2018, denying the allegations set out in the statement of opposition.

[7] Both parties filed evidence. Neither party filed written representations or attended a hearing.

EVIDENCE

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

[9] The evidence of record is briefly summarized below. Pertinent portions of the evidence are discussed further in the analysis of the grounds of opposition. 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.

Opponent's evidence

[10] The Opponent filed the affidavit of Chiang Pang Ching, sworn November 22, 2018, along with certified copies of registrations for the LP Trademarks.

The Ching affidavit

[11] Mr. Ching is the Director of the Opponent and has held this position since 2014 (para 1). Mr. Ching provides the particulars of the registrations for the LP Trademarks owned by the Opponent in Canada (para 2, Exhibit A), as well as other jurisdictions (para 9, Exhibit F). Mr. Ching attests to the following:

- The Opponent displays the LP Trademarks on the Opponent's goods and attaches as Exhibit B copies of photographs that depict samples of athletic clothing, compression tops, headwear (caps) and short sleeve tops or packaging for these items "bearing a selection" of the LP Trademarks (para 4, Exhibit B)
- The Opponent's LP Trademarks can be found in the Opponent's print advertising for the Opponent's goods sold in Canada. Exhibit C is described as containing "sample pages from catalogues in 2002 and 2013 showing the manner of use of the Opponent's LP Trademarks on shorts in Class 25 and on a selection of goods in Class 28" (para 5).
- The Opponent's goods are distributed and sold in Canada to Canadian consumers by Dardo Orthopedics, a store located in Saint-Laurent, Quebec (para 6). The Opponent's goods are also sold to Canadians on *amazon.ca*. Copies of screenshots are provided showing goods offered for sale on *amazon.ca* in response to a search for "lp supports" (Exhibit D).
- The Opponent participated in the NATA AT Expo, described as the world's largest annual sports medicine exhibition held by the National Athletic Trainers Association, in 2013 (Las Vegas, USA), 2014 (Indianapolis, USA) and 2016 (Baltimore, USA) to

promote its brand in the North American market. Exhibit E contains photographs taken by employees of the Opponent at the exhibition showing its participation, and displaying various of the Opponent's trademarks (para 8).

Applicant's evidence

[12] The Applicant filed the affidavit of Audrey Robert (sworn March 22, 2019), the President of the Applicant since May 1, 2016. Ms. Robert states that she is also the owner of Léo and Pirouette Enr., which she identifies as the predecessor in title of the Applicant. Ms. Robert is also the exclusive designer of the Goods. Ms. Robert attests to the following:

- The Applicant is a Canadian company that specializes in baby and young children's fashion (para 11, Exhibit F). The Goods designed and sold by the Applicant consist of everyday fashion clothes for babies, toddlers and children. Ms. Robert does not design sportswear, nor does she design athletic clothing (para 3, Exhibit B). I note that Exhibit B consists of screenshots from the Applicant's website displaying various of the Goods (including baseball jerseys, sweatshirts, t-shirts, jackets, scarves and hats) bearing the Mark.
- The Applicant's Goods are sold in baby shops like *Kidz on Main* (Revelstoke, BC), *Buttercups Childress Boutique* (Ladner, BC), *Baby B Home* (Paris, ON), *Baby Laurel+Co Ltd* (Lethbridge, AB), *Boutique Bebe Tout Neuf* (Tracadie-Sheila, NB), *Catz N'Jammers for Kids* (Melfort, SK), *Little Thingz Clothing Ltd* (Reinfeld, MB), *Owls Hollow* (Charlottetown, PEI), *Sauterelles et Coccinelles* (St-Jerome, QC), *Boutique Planete Bebe* (Gatineau, QC) and on the "transactional website of the Applicant". Various invoices issued by the Applicant to these stores are attached (Exhibit C). No sales of the Goods are made by the *amazon.ca* website in general (para 4).
- The Goods are not designed to be used as sporting or athletic clothing, nor are they designed or suitable as orthopedic clothing or orthopedic equipment and will never be sold by companies like Dardo Orthopedic Inc. (the seller cited in the Ching affidavit) (paras 5, 6).

- According to the Applicant’s business records, the Goods have been sold since June 15, 2015. Exhibit E is an invoice dated June 15, 2015, issued by “Léo & Pirouette Enr. (L&P)” to a customer in Quebec.
- The Applicant has participated at the “Parents and Kids Fair – 0-6 years old” in Montreal in 2016 - 2018, and will participate again in 2019 (para 11). Exhibit G includes a screenshot of the welcome page of the fair website, which describes the event as “Canada’s biggest consumer fair for families in Canada”. Also included is an excerpt of the 2019 Exhibitors List, which includes the Applicant.
- The Applicant participated in the FUTURE FOR BABY SHOW in Toronto in January 2019. Exhibit H is a screenshot of the welcome page for the fair, a photograph of the Applicant’s booth, and a copy of the invoice for the booth rental.
- The Applicant has never been alerted of any actual confusion with the Opponent’s Goods or with the Opponent’s trademarks (para 13).

EVIDENTIAL BURDEN AND LEGAL ONUS

[13] 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].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Ground of opposition under section 12(1)(d)

[14] The Opponent has pleaded that the Mark is not registrable pursuant to sections 38(2)(b) and 12(1)(d) of the Act as the Mark is confusing with the Opponent’s “Family of LP Trademarks, which had been previously registered, used and made known in Canada by the Opponent in association with a variety of goods, including clothing”.

[15] An opponent's initial evidential burden is met with respect to a section 12(1)(d) ground of opposition if the registration(s) relied upon in the statement of opposition is in good standing as of the date of the decision. The Registrar has discretion to check the register in order to confirm the existence of a registration relied upon by an opponent [*Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I have exercised the Registrar's discretion and note that the Opponent's registration No. TMA866,088 for the trademark LP & Design in association with a variety of clothing and related items, including sports jackets, sport shirts, sports caps and hats, scarves and gloves, was expunged for non-use on January 9, 2020. However, the remainder of the registrations cited by the Opponent (and listed in Schedule A) are extant. On this basis, the Opponent has met its initial evidential burden in respect of this ground. As a result, the Applicant bears the legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and the Opponent's existing registrations.

[16] In considering the issue of confusion, I will first focus my analysis on the Opponent's registration for the trademark LP SUPPORT & Device under No. TMA966,206, which is depicted below, and for the trademark LP SUPPORT (TMA970,436) (collectively the LP Support trademarks):



[17] Following my finding on the issue of confusion with respect to these marks of the Opponent, I will consider the issue of confusion with respect to the Opponent's registrations for the trademark LP & Design (TMA745,807 and TMA707,663) (collectively the LP and Design trademark), which are depicted below. I have chosen to focus on these marks as in my view these represent the Opponent's best case:



Test for confusion

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

[19] 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. These criteria 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, 92 CPR (4th) 361 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.

[20] 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 Ponsardin v Boutiques Cliquot Ltee*, 2006 SCC 23 at para 20].

Section 12(1)(d) confusion analysis - LP Support trademarks

Inherent distinctiveness

[21] The Mark consists of the letters "L" and "P" joined by an ampersand. I find the Mark to be inherently weak as trademarks consisting of a simple combination of letters or initials are generally considered to be weak marks with a low degree of inherent distinctiveness [*GSW Ltd v*

Great West Steel Industries Ltd (1975), 22 CPR (2d) 154 (FCTD) at 163-164; *Alfred Grass Gesellschaft mbH Metallwarenfabrik v Grant Industries Inc.* (1991), 47 FTR 231 (FCTD)].

[22] The Opponent's LP Support trademarks essentially consist of the letters LP and the word SUPPORT, which is suggestive of the character of some of the Opponent's goods, most notably tight fitted and compression clothing items. The Opponent's LP SUPPORT & Device trademark (TMA966,206) features LP SUPPORT in a slightly stylized font within a slanted rectangular border with horizontal striping at the base. The design aspect of this mark increases its overall inherent distinctiveness, though not to a significant extent.

[23] Overall, I find that this factor does not significantly favour either party.

Extent known and length of time in use

[24] The strength of a trademark may be increased by means of it becoming known through promotion or use. As discussed below, neither party has provided evidence that speaks persuasively to this point.

[25] With respect to the Opponent's trademarks, the Opponent's evidence indicates that the LP Support trademarks appear either on its goods or their product packaging (Exhibit B, Ching affidavit). The Opponent's evidence also identifies where its goods are sold in Canada, namely via *amazon.ca* and at Dardo Orthopedics, a store located in Quebec. However, I note that no sales figures or information on units sold in Canada are provided. In addition, while the Opponent has included copies of photographs showing the Opponent's participation at the NATA AT Expo (with a booth prominently displaying the LP Support marks), and describes it as the "world's largest sports medicine exhibition held by the National Athletic Trainers Association", there is no attendance data (for any of the three years of attendance) related to those displays of the marks. Similarly, while the Opponent refers to catalogues showing the manner of use of its trademarks, no distribution data/details for the catalogues are provided. Further, no advertising expenditures are provided. In my view, I do not have sufficient evidence to conclude that the Opponent's LP Support trademarks are known in Canada to any meaningful extent.

[26] The Applicant has provided very limited information on sales figures, namely an invoice dated June 15, 2015, and a sampling of approximately ten invoices dated between February 2017 and February 2019. While the Applicant provides an excerpt from its website, there is no indication of the number of visitors to the site. In addition, while the Applicant refers to its attendance at the “Parents and Kids Fair” and “Future for Baby Show”, no attendance data (such as the number of attendees) is provided. However, the Applicant does provide some information, albeit limited, on the advertising expenditures related to its participation at the Future for Baby Show from January 13-15, 2019 in the amount of \$14,125 for a booth rental. A photograph of the booth shows that the Mark is featured in the display.

[27] With respect to the length of time in use, the Opponent’s registrations for the LP SUPPORT and LP SUPPORT & Design trademarks include declarations of use dated May 10, 2017 and March 20, 2017, respectively. The Application includes a claim of use of the Mark in Canada since June 15, 2015 and the Applicant’s evidence includes a sales invoice of this date.

[28] Overall, I find that this factor favours the Applicant, though only slightly.

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

[29] When considering the goods and services of the parties, it is the statement of goods and services in the parties’ trademark application and registrations 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)]. There is direct overlap insofar as both the Applicant’s Goods and some of the Opponent’s goods consist of clothing and related accessories. While the Application limits the Goods to clothing for babies, toddlers, and children, there are no such limitations in the Opponent’s registrations.

[30] With respect to the channels of trade, there is evidence of overlap to the extent that both parties sell their respective goods online. However, the evidence shows that the parties rely on different retailers – the Applicant sells its clothing through its own website and the Opponent’s clothing and accessories are sold through *amazon.ca*. The parties also sell their goods in different brick and mortar retail stores (with the Applicant selling through select baby stores, and the

Opponent selling through a specialty orthopedics store). That being said, there are no restrictions with respect to the channels of trade in the application for the Mark or in the Opponent's registrations.

Degree of resemblance

[31] When considering the degree of resemblance between trademarks, they must be considered in their totality; it is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the marks [*Veuve Clicquot, supra* at paragraph 20].

[32] There is necessarily a fair degree of resemblance between the parties' marks as they both include the letters L and P. However, the overall visual impressions created by the parties' marks are somewhat different. In the Applicant's Mark, L and P are joined by an ampersand, whereas in the Opponent's marks, the letters simply stand together, and are followed by the word SUPPORT. With respect to the Opponent's LP Support & Design mark, its design element also helps to distinguish between the parties' marks.

[33] The marks in issue would also be sounded somewhat differently. The Applicant's Mark would be sounded as "L and P" whereas the Opponent's marks would be sounded as "LP Support". With respect to the ideas suggested, the Opponent's trademarks suggest that the associated goods have supportive qualities (for instance, as compression or protective garments and accessories), whereas this connotation is absent from the Applicant's Mark.

Surrounding circumstance – weak marks

[34] I consider that the jurisprudence concerning weak trademarks favours the Applicant. It is well established that a weak trademark (i.e, a mark possessing a low degree of inherent distinctiveness) is not entitled to a wide ambit of protection [*General Motors Corp v Bellows* (1949), 10 CPR 101 at pp. 115-6 (SCC)], and that comparatively small differences will be sufficient to distinguish between them [*Prince Edward Island Mutual Insurance Co. v Insurance Co. of Prince Edward Island* (1999), 86 CPR (3d) 342 (FCTD) at paras 32-34].

In *Provigo Distribution Inc v Max Mara Fashion Group SRL* (2005), 46 CPR (4th) 112 at para 31 (FCTD), de Montigny J. explained:

The two marks being inherently weak, it is fair to say that even small differences will be sufficient to distinguish among them. Were it otherwise, first user of words in common use would be unfairly allowed to monopolize these words. A further justification given by courts in coming to this conclusion is that the public expected to be more on its guard when such weak trade names are used...

[35] While it is possible for the degree of distinctiveness attributable to a weak mark to be enhanced through extensive use [*Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 at para 6 (FCTD)], I do not find this to be the case for the Opponent's LP SUPPORT trademarks.

Surrounding circumstance – state of the register

[36] The Applicant has introduced state of the register evidence consisting of five trademark registrations standing in the name of third parties (Robert affidavit at para 7, Exhibit D) in an effort to establish that trademarks containing or consisting of the initials “L” and “P” are common in association with clothing.

[37] The Federal Court has ruled that, unless a large number of trademarks is identified in the state of the register evidence, use of the trademarks cited must be established [*Maximum Nutrition, supra; McDowell v Laverana GmbH & Co. KG*, 2017 FC 327; *Canada Bread Company, Limited v Dr. Smood APS*, 2019 FC 306]. Where a large number of registered trademarks is identified, the Registrar can infer that the element they all have in common is used in the marketplace; where the number of trademarks identified is not large, evidence of such use needs to be furnished. The small number of relevant registrations cited by Ms. Robert is insufficient to enable me to draw any meaningful conclusions with respect to the state of the marketplace. Accordingly, I do not consider the state of the register to be a relevant surrounding circumstance assisting the Applicant.

Surrounding circumstance – alleged family of marks

[38] In its statement of opposition, the Opponent alleges that it owns a family of LP trademarks. There can be no presumption of the existence of a family of trademarks in

opposition proceedings; the party seeking to establish a family of marks must show that it has used the trademarks comprising the series to a sufficient extent as to constitute a family of marks [*Industries Lassonde Inc v Olivia's Oasis Inc.*, 2010 TMOB 107]. In this case, and as discussed above, the Opponent has provided no quantifiable information (such as sales figures or advertising expenditures) in Canada making it difficult to assess the extent to which a “family of marks” would be recognized by the consumer. Accordingly, I do not consider the existence of a family of marks to be a relevant surrounding circumstance assisting the Opponent.

Surrounding circumstance – foreign registrations

[39] The Opponent’s evidence includes true copies of certificates of registration for various of its LP trademarks, including LP SUPPORT, LP SUPPORT & DEVICE, and LP & DEVICE, in Classes 10, 25 and 28 (Ching affidavit, para 9, Exhibit F). However, it has been established that in assessing the issue of confusion, foreign registrations are irrelevant and evidence thereof should be disregarded [*Ex Hacienda Los Camichines, SA v Centenario Internacional, SA*, 2010 TMOB 215; *Pitman-Moore Ltd v Cyanamid of Canada Ltd* (1977), 38 CPR (2d) 140 (TMOB)]. Accordingly, I do not consider this to be a relevant surrounding circumstance assisting the Opponent.

Surrounding circumstance – no evidence of actual confusion

[40] The Applicant’s evidence includes a statement by Ms. Robert that the Applicant has never been alerted of any actual confusion with the Opponent’s goods nor with the Opponent’s trademarks (para 13). However, in this case, I am not satisfied that a lack of evidence of actual confusion favours the Applicant in view of evidence indicating that the parties’ goods travel through different channels of trade.

Conclusion on the likelihood of confusion

[41] Having regard to section 6(5), I find the Applicant has met the legal onus on it to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the Mark and the Opponent’s LP Support trademarks. In so finding, I have had particular regard to the fact that the Opponent’s marks possess limited inherent distinctiveness, that the Opponent

has not established a significant reputation for its trademarks, and that there are differences aurally, visually, and in ideas suggested by the parties' marks which mitigate their resemblance. Accordingly, this ground of opposition is rejected.

Section 12(1)(d) confusion analysis – LP and Design trademark

[42] The consideration of the factors in this section 6(5) analysis are similar to the above with some exceptions. First, there is a greater degree of resemblance between the applied for Mark and the Opponent's LP and Design trademark owing to the absence of the word SUPPORT. Second, there is no direct overlap in the goods of the parties (see Schedule A for a full listing of the goods associated with the Opponent's LP and Design trademark, which does not include clothing). In this regard, I note that while registration No. TMA707,663 covers "orthopaedic footwear", I do not consider this to be closely related to the Goods given the specialized nature of the footwear, particularly when read in the context of the Opponent's statement of goods, which consists largely of goods for medical use. Third, the Opponent's LP and Design registrations include a claim of use in Canada since at least as early as May 18, 1998 (for TMA745,807) and April 15, 1995 (for TMA707,663), in association with the Opponent's goods.

[43] I find that the first changed circumstance (degree of resemblance) favours the Opponent to some extent while the second (nature of the goods) favours the Applicant. With respect to the third changed circumstance (extent known and length of time in use), while the Opponent's claimed dates of first use in Canada for these registrations is much earlier, this on its own does not support a conclusion that these marks have become known to any significant extent, nor that these trademarks have been used continuously since the claimed dates. The Ching affidavit (as discussed above in paragraph 25) falls short of establishing use in Canada as of these dates or that the LP and Design mark has become known in Canada to any meaningful extent.

[44] Considering all the surrounding circumstances, I find that the Applicant has met the legal onus on it to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the Mark and the Opponent's LP and Design trademark. In so finding, I have had particular regard to the fact that the Opponent's LP and Design mark possesses limited inherent distinctiveness and is a weak mark entitled to a narrow ambit of protection, and that the parties' goods do not overlap. Accordingly, this ground of opposition is rejected.

Section 16(1)(a) ground of opposition

[45] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark because the Mark is confusing with the Opponent's alleged family of LP Trademarks, which the Opponent states had been previously used and made known in Canada by the Opponent since at least as early as November 27, 2013 in association with clothing.

[46] An opponent meets its evidential burden under section 16(1)(a) of the Act if it shows that as of the applicant's claimed date of use of its trademark in Canada, the opponent's trademark(s) had been previously used or made known in Canada and had not been abandoned as of the date of advertisement of the applicant's application [section 16(5) of the Act]. In this case, when assessed in its entirety, the Opponent's evidence is not sufficient to establish prior use of any of the marks in the Opponent's alleged family of LP Trademarks listed in Schedule A as of June 15, 2015.

[47] While the Opponent has provided certified copies of its registrations, any reference to use in these registrations is not sufficient to satisfy the Opponent's evidential burden under section 16 of the Act [*Roos, Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB)]. Accordingly, the filing of a declaration of use on November 27, 2013 in respect of registration No. TMA866,088 for LP & Design (or for any other registration) does not enable the Opponent to meet its burden.

[48] The Ching affidavit provides undated images of various of the Opponent's goods sold in Canada (Exhibit B), without any indication whether these images are in fact representative of the relevant period, and no sales information as of the material date (or of any other time) from any channel (online or in-store) is provided. While sample catalogue pages are provided (identified as being from 2002 and 2013, though I note that the pages are undated and unaccompanied by catalogue cover pages), no evidence as to the distribution or availability of these catalogues to consumers in Canada is provided. Similarly, the fact that the Opponent attended the NATA AT Expo at various locations does not assist the Opponent in establishing prior use of its trademarks in Canada. Accordingly, this ground of opposition is rejected.

Section 2 ground of opposition

[49] The Opponent has pleaded that the Mark is not distinctive pursuant to section 38(2)(d) and 2 of the Act, in that it does not distinguish and is not adapted to distinguish the Goods of the Applicant from the goods of the Opponent in association with which the Opponent's alleged family of LP Trademarks has been used and made known by the Opponent.

[50] To meet its evidential burden with respect to this ground, the Opponent must show that as of the date of filing of the opposition (June 12, 2018), the Opponent's trademark(s) had become known in Canada sufficiently to negate the distinctiveness of the Mark [*Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD) at 58].

[51] In view of the Opponent's evidence summarized above, I am not satisfied that the Opponent has met its initial burden. In so finding, I have had regard to the fact that the Opponent has provided no sales information or advertising expenditures for its goods in association with the Opponent's trademarks, and has provided only very limited evidence of advertising, namely excerpts from catalogues without any information on the quantity or extent of their distribution, and photographs from the NATA AT Expo from 2013, 2014, and 2016 without any indication of Canadian attendance. Further, any reference to use claimed in the Opponent's registration is also not sufficient to satisfy the Opponent's evidential burden under section 2 of the Act [*Roos, supra*]. Accordingly, this ground of opposition is rejected.

Ground of opposition under section 30(i)

[52] The Opponent has pleaded that contrary to section 38(2)(a) and 30(i) of the Act, the Applicant could not have been satisfied of its entitlement use the Mark in Canada in association with the Goods because at the relevant date, the Applicant had known of the Opponent's alleged family of LP Trademarks (set out in Schedule A) used in Canada.

[53] Section 30(i) 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) 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

[*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155; *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 [*Woot Inc v Woot Restaurants Inc*, 2012 TMOB 197].

[54] In this 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, this ground of opposition is summarily rejected.

Ground of opposition under section 30(b)

[55] The Opponent has pleaded that the Application does not comply with sections 38(2)(a) and 30(b) of the Act because the Applicant or the Applicant's predecessor in title has not used the Mark in Canada as at the date claimed in the Application, namely June 15, 2015.

[56] The relevant date for considering the circumstances with respect to this ground of opposition is the filing date of the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB)]. The initial burden on an opponent is light respecting the issue of non-conformity with section 30(b) of the Act, because the facts regarding an applicant's first use are particularly within the knowledge of an applicant [*Tune Masters v Mr P. 's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB)]. This burden can be met by reference not only to the opponent's evidence but also to the applicant's evidence [*Labatt Brewing Co Ltd v Molson Breweries, A Partnership* (1996), 68 CPR (3d) 216 (FCTD)]. However, an opponent may only successfully rely on the applicant's evidence to meet its initial burden if the opponent shows that the applicant's evidence puts into issue the claims set forth in the applicant's application [*Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 at paras 30-38].

[57] If an opponent succeeds in discharging its initial burden, then the applicant must, in response, substantiate its use claim. However, an applicant is under no obligation to do so if its use claim is not first put into issue by the opponent meeting its initial burden [*Masterfile Corporation v Mohib S Ebrahim*, 2011 TMOB 85].

[58] In the present case, no evidence has been filed nor submissions made by the Opponent, to support its allegation that the Applicant or the Applicant's predecessor in title has not used the Mark since the date of first use claimed in the Application. With respect to the Applicant's evidence, I find that nothing puts into issue the claimed date of first use "since June 15, 2015". Accordingly, as the Opponent has not met its burden, this ground of opposition is rejected.

APPLICATION NO. 1,829,875

[59] Application No. 1,829,875 for the trademark L&P et dessin script is set out below:

L & P

[60] The application was filed on March 28, 2017, and shares the same claimed date of first use and listed Goods as with application No. 1,829,392. The application was advertised for opposition purposes in the *Trademarks Journal* on April 4, 2018. On June 1, 2018, the Opponent filed a statement of opposition; the grounds of opposition are the same as those pleaded in respect of application No. 1,829,392. Notwithstanding the difference in the material dates in the grounds of opposition (with the exception of the section 16(1)(a) and 12(1)(d) grounds), the issues are analogous to those discussed with respect to Application No. 1,829,392. The evidence is also identical in both proceedings.

[61] For the ground of opposition based on confusion under section 12(1)(d) with the Opponent's LP Support trademarks, having regard to section 6(5), I find the Applicant has met the legal onus on it to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the applied-for trademark and the Opponent's LP Support trademarks. In so finding, I have had particular regard to the fact that the Opponent's marks possess limited inherent distinctiveness, that the Opponent has not established a significant reputation for its trademarks, and that there are differences aurally, visually, and in ideas suggested by the parties' marks which mitigate their resemblance. Accordingly, this ground of opposition is rejected.

[62] For the ground of opposition based on confusion under section 12(1)(d) with the Opponent's LP and Design trademark, having regard to section 6(5), I find the Applicant has met the legal onus it to show that, on a balance of probabilities, there is no reasonable likelihood of

confusion between the applied-for trademark and the Opponent's LP and Design trademark. In so finding, I have had particular regard to the fact that the Opponent's LP and Design mark possesses limited inherent distinctiveness and is a weak mark entitled to a narrow ambit of protection, that the parties' goods do not overlap, and that the design element in the subject application further assists in distinguishing the parties' marks from a visual standpoint. Accordingly, this ground of opposition is rejected.

[63] With respect to the remaining grounds of opposition, I make the same findings for each of the grounds of opposition as in application No. 1,829,392 for L&P. Accordingly, the remaining grounds of opposition under sections 16(1)(a), 2, 30(i) and 30(b) of the Act are rejected.



DISPOSITION

[64] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the oppositions to both applications pursuant to section 38(12) of the Act.




Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

List of the Opponent's alleged family of LP Trademarks

| Trademark | Registration No. | Goods and/or services |
|---|-------------------------------|--|
|  | TMA866,088 EXPUNGED | Clothing, namely, athletic tights, athletic uniforms, sports bras, sport coats, sports jackets, sports jerseys and breeches for sports, sports pants, sport shirts, sport stockings, sports vests, wristbands; boots; boots for sports; gloves; headbands; heels; hosiery; inner soles; insoles; leggings; scarves; shoes; slippers; socks; sports caps and hats; sports shoes; suspenders; swimsuits |
|  | TMA966,206 | (1) Incontinent pads. (2) Juke boxes; diving masks and swim masks. (3) Medical equipment, namely, therapeutic and physiotherapy ultrasound, medical, and physiotherapy tables, medical image processors, medical instruments for general examination, and medical slings, blood glucose meter, blood pressure meter, massage appliances, namely, therapy stools and bolsters, back rolls, back rests, medical stretchers, electric massage chair, electric massage bed, massage gloves, anti-insomnia pillow (medical pillow), medical support stockings, orthotic shoe insert, orthopedic belt, orthopedic braces, orthopedic shoes, orthotic arch supports, flat feet supports, orthotic shoe sole, support bandage, suspension bandage, medical earplugs, ice pillow, ice bag, hot water bag, instant cold packs, pregnancy belt, foot arch belt, orthopedic toe separator, toe band for correction of overlapping toes, foot protection pad, heel balance pad, orthopedic back supports, medical protective collar, medical chest support, medical waist support, medical ankle support, medical wrist support, medical finger support, medical foot support, medical knee support, medical elbow support, medical shoulder support, medical finger cots, hernia belt, abdominal support belt, surgical sterile sheets, medical compression stocking, surgical elastic stockings, elastic bandages, plaster bandage, triangular bandages, knee bandage (for cosmetic surgery), joint bandage (for surgery), orthopedic belts for cosmetic surgery, tourniquet, medical bed, hand grip for rehabilitation, rehabilitation standing equipment with wall bars, namely, braces, guards, splints, pads and stockings for knees, legs, ankles and shins, back rehabilitation equipment, namely, standing equipment with wall bars, medical corsets, weights, back rolls, back pulleys, back supports, tension bands, back braces, medical crutches, orthopedic shoes for polio survivor, skill rehabilitation assistive device for the disabled, namely, spinal braces, elastic binders, pads and guards, medical corset, collar bone support, surgical splint, adhesive medical patches (tapes) to be worn on the skin, prostheses, namely, limb prostheses, foot prostheses, knee-joint prostheses, facial prostheses, artificial joints. (4) Massage tables, neck pillows; cushions. (5) Clothes (Clothing), namely, athletic clothing, belts, casual clothing, sports clothing, fishing clothing; shoes and boots (footwear); hats and caps (headwear); sports clothes; tight fitted clothing, namely, tight fitted shirts, tight fitted pants, tight fitted girdle, socks, and stockings; shoe inserts; gloves as clothing accessories; cold-proof gloves; sleeping eye masks; puttees, underclothing, undergarments, shorts, tights, athletic support tops, tops, namely, tank tops, warm-up tops, woven tops, sweat tops, knit tops, fleece tops, crop tops, and halter tops, girdles, compression shirts, compression shorts, compression pants, sleeves, namely, long sleeve pullovers, leggings, wrist bands, eye mask, earmuffs. (6) Sports equipment and muscle workout machines, namely, treadmills, stationary bikes, pulleys, steppers, ellipticals, exercise balls, sports balls, shoulder pulleys, parallel bars, sports knee protection, sports wrist protection, sport chest protection, sports shoulder |

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| | | <p>protection, sports neck protection, sports hand protection, sports ear protection, sports elbow protection, sports arm protection, sports leg protection, sports shin protection, sports ankle protection, sports waist protection, sports abdominal protection, sports crotch guards, sports shin guards, dumbbells, hand grippers, chest expanders, card games, Christmas tree decorations, large powered entertainment equipment for amusement park, namely, roller coasters, electric trains, coin-operated entertainment equipment, namely, pinball machines, dart machines, video game machines, pool tables, slot machines, foosball machines, archery equipment, namely, bows, crossbows, arrows, targets, arrow rests, and bow cases, jumping beds, bat grip tapes, athletic protective tapes to be worn on the skin; masks (sports articles), namely, catchers' masks and fencing masks.</p> <p>Services:</p> <p>(1) Import and export agency services; acting as the agent for local and foreign suppliers to provide bidding, tender and distribution services of various goods, namely, sporting goods, sports protection, medical supports, sports equipment, medical equipment and sports clothes; supply of business information, namely, advice and information in the field of business management and marketing; purchase of goods and provision of services to businesses, namely, procuring of contracts for the purchase and sale of goods and services of others; business management consultation; business and commercial management support; auction; online auction; services of preparation for trade show, exhibition and expo for industrial and commercial enterprise in the field of sporting goods, sports protection, medical supports, sports equipment, medical equipment and sports clothes; supermarkets; shopping malls, namely, shopping centre administration services; mail order, namely, catalogue shopping services in the field of sporting goods, sports protection, medical supports, sports equipment, medical equipment and sports clothes; TV shopping, namely, providing home shopping services of sporting goods, sports protection, medical supports, sports equipment, medical equipment and sports clothes by means of television; online shopping (electronic shopping), namely, providing home shopping services of sporting goods, sports protection, medical supports, sports equipment, medical equipment and sports clothes via the Internet; retailing of sports protection, medical supports, sports equipment, medical equipment, and sports clothes.</p> <p>(2) Rental of shopping centre space.</p> |
| <p>LP SUPPORT</p> | <p>TMA970,436</p> | <p><u>Goods</u></p> <p>(1) Medical equipment, namely, therapeutic and physiotherapy ultrasound, medical and physiotherapy tables, medical image processors, medical instruments for general examination, medical slings, blood glucose meter, blood pressure meter, massage appliances, namely, massage tables, therapy stools and bolsters, back rolls, back rests, neck pillows, cushions, medical stretchers, electric massage chair, electric massage bed, massage gloves, anti-insomnia pillow (medical pillow), medical support stockings, orthotic shoe insert, orthopedic belt, orthopedic braces, orthopedic shoes, orthotic arch supports, flat feet supports, orthotic shoe sole, support bandage, suspension bandage, eye mask, earmuffs, medical earplugs, ice pillow, ice bag, hot water bag, instant cold packs, pregnancy belt, foot arch belt, orthopedic toe separator, toe band for correction of overlapping toes, foot protection pad, heel balance pad, orthopedic back supports, medical protective collar, medical chest support, medical waist support, medical ankle support, medical wrist support, medical finger support, medical foot support, medical knee support, medical elbow support, medical shoulder support, medical finger cots, hernia belt, abdominal support belt, surgical sterile sheets, medical compression stocking, surgical elastic stockings, elastic bandages, plaster bandage, triangular bandages, knee bandage (for cosmetic surgery), joint bandage (for surgery), orthopedic belts for cosmetic surgery, tourniquet, medical bed, hand grip for rehabilitation, rehabilitation standing support equipment with wall bars, namely, braces, guards, splints, pads and stockings for knees, legs, ankles and shins, back rehabilitation equipment, namely, standing equipment with wall bars, medical corsets, weights, back rolls, back pulleys, back supports, tension bands, back braces, medical crutches, orthopedic shoes for polio survivor, skill rehabilitation assistive device for the disabled,</p> |

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| | | <p>namely, spinal braces, elastic binders, pads and guards, medical corset, collar bone support, surgical splint, adhesive medical patches (tapes) to be worn on the skin, mask (sports articles), namely, catchers' masks, diving masks, fencing masks, and swim masks; incontinent pads, prostheses, namely, limb prostheses, foot prostheses, knee-joint prostheses, facial prostheses, artificial joints.</p> <p>(2) Clothes (clothing), namely, athletic clothing, tops, namely, tank tops, warm-up tops, woven tops, sweat tops, knit tops, fleece tops, crop tops, and halter tops, belts, casual clothing, sports clothing, fishing clothing; shoes and boots (footwear); hats and caps (headwear); sports clothes; tight fitted clothing, namely, tight fitted shirts, tight fitted pants, tight fitted girdle, socks, and stockings; shoe inserts; gloves as clothing accessories; cold-proof gloves; sleeping eye masks; puttees, underclothing, undergarments, shorts, tights, athletic support tops, girdles, compression shirts, compression shorts, compression pants, sleeves, leggings, wrist bands.</p> <p>(3) Sports equipment and muscle workout machines, namely, treadmills, stationary bikes, pulleys, steppers, ellipticals, exercise balls, sports balls, shoulder pulleys, parallel bars, sports knee protection, sports wrist protection, sport chest protection, sports shoulder protection, sports neck protection, sports hand protection, sports ear protection, sports elbow protection, sports arm protection, sports leg protection, sports shin protection, sports ankle protection, sports waist protection, sports abdominal protection, sports crotch guards, sports shin guards, dumbbells, muscle workout machines, hand grippers, chest expanders, card games, Christmas tree decorations, large powered entertainment equipment for amusement park, namely, roller coasters, electric trains, coin-operated entertainment equipment, namely, juke boxes, pinball machines, dart machines, video game machines, pool tables, slot machines, foosball machines, sports balls, archery equipment, namely, bows, crossbows, arrows, targets, arrow rests, bow cases, jumping beds, bat grip tapes, athletic protective tapes to be worn on the skin.</p> |
|  | TMA977,029 | (1) Wallet, purse, travelling trunks, garment bags for travel, valises, hand bag, shopping bag, travelling bags, wheeled shopping bags, bags for sports, rucksacks, umbrella sticks, mountaineering sticks, walking sticks, imitation leather, knee-pads for horses, harness fittings, namely harness bits, straps, bridles, traces, and blinkers, baby carriers worn on the body, leather luggage tag |
|  | TMA745,807 | (1) Sporting equipment, namely, elastic and neoprene supports for the ankle, calf, elbow, hamstring, knee, shin, thigh, waist and wrist; athletic protector equipment, namely, protector for the ankle, arm, foot, knee, elbow, leg, shin, thigh, waist and wrist; athletic tapes. |
|  | TMA707,663 | (1) AEROSOL DISPENSERS FOR MEDICAL USE; AIR MATTRESSES FOR MEDICAL PURPOSES; AIR PILLOWS FOR MEDICAL PURPOSES; ARCH SUPPORT FOR BOOTS OR SHOES; BANDAGES FOR ANATOMICAL JOINTS; BLANKETS FOR MEDICAL PURPOSES; BRACES FOR LIMBS AND JOINTS FOR MEDICAL USE; BRACE, GUARDS, SUPPORTS AND PROTECTORS FOR HEAD, EARS, SHOULDERS, ARMS, ELBOWS, WRISTS, HANDS, CHEST, WAIST, BACK, THIGHS, KNEES, SHINS, ANKLES AND FEET; CANES FOR MEDICAL PURPOSES; COMPRESSION BANDAGES; CUSHIONS FOR MEDICAL PURPOSES; ELASTIC BANDAGES; HEATING PADS FOR MEDICAL PURPOSES; INVALID HOISTS; INVALID LIFTS; MEDICAL ICE PACKS; MOUTH GUARDS; NEOPRENE AND ELASTIC SUPPORTS FOR THE KNEES, ELBOW, WRIST, BACK, ANKLE, THIGH, FEET, SHIN AND WAIST; NON-MEDICATED COMPRESSES; ORTHOPEDIC BELTS; ORTHOPEDIC BRACES; ORTHOPEDIC FOOTWEAR; ORTHOPEDIC SOLES; ORTHOPEDIC SUPPORT BANDAGES; ORTHOPEDIC SUPPORTS; PROTECTORS FOR THE FACE, FOOT AND ANKLE; PADS FOR THE ANKLES, ARMS, BACK, CHEST, EARS, ELBOWS, HANDS, HEAD, KNEES, SHINS, SHOULDERS, THIGHS, WASIT AND WRISTS. |

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

HEARING DATE No Hearing Held

AGENT(S) OF RECORD (All of the Agents at)

Fillmore Riley LLP

FOR THE OPPONENT

No agent of record

FOR THE APPLICANT