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C I P O

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 280
Date of Decision: 2021-12-14

IN THE MATTER OF AN OPPOSITION

I. Quint Group Inc.

Opponent

and

Quintcap Inc.

Applicant

1,715,419 for QUINTCAP Design

Application

INTRODUCTION

[1] The parties to this opposition proceeding are not strangers to one another. As will be more fully explained below, they are two real estate management and development companies that, in recent years, have been involved in a few legal disputes against one and their respective principals, who are part of the same family and share the surname Quint.

[2] In the present case, I. Quint Group Inc. (I. Quint or the Opponent) opposes application No. 1,715,419 (the Application) for registration of the trademark QUINTCAP Design (the Mark), reproduced below, filed by Quintcap Inc. (Quintcap or the Applicant) on the basis of use of the Mark in Canada since at least as early as September 2013 in association with the services described below (the Services):



Services:

Services of land acquisition, construction, real-estate asset management, leasing and selling services of building for industrial, commercial and residential use.

[3] The Opponent has opposed the Application on various grounds, including non-compliance of the Application with the requirements set out in section 30 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), non-registrability of the Mark under section 12 of the Act, and non-distinctiveness of the Mark under section 2 of the Act.

[4] For the reasons that follow, the opposition is rejected.

THE RECORD

[5] The Application was filed on February 16, 2015, and advertised for opposition purposes in the *Trademarks Journal* on January 6, 2016.

[6] On May 25, 2016, the Opponent filed a statement of opposition under section 38 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 grounds of opposition can be summarized as follows:

- The Application does not conform to the requirements of section 30(a) of the Act in that the Services in association with which the Mark has been used are not defined in ordinary commercial terms.
- The Application does not conform to the requirements of section 30(b) of the Act in that the Applicant has not used the Mark in association with the Services since the date of first use claimed in the Application. Moreover, the Mark has not been used as a trademark, but instead has functioned as a trade name.

- The Application does not conform to the requirements of section 30(i) of the Act in that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Services, in that the Mark is not registrable and not distinctive and the Applicant is not the person entitled to registration. The principal of the Applicant had a business relationship with the principal of the Opponent during which the principal of the Opponent created, designed and implemented the term QUINTCAP and the logo QUINTCAP & Design based on their respective surname QUINT for use in association with the management by the principal of the Opponent of a multitude of third-party properties. The Applicant and the Opponent are parties to a case instituted in Superior Court with respect to this matter.
- The Mark is not registrable pursuant to section 12(1)(a) of the Act, which prohibits the registration of a word that is primarily merely the name or the surname of an individual who is living or has died within the preceding thirty years. The Applicant is not entitled to the exclusive use of the word QUINT which is in fact the surname of the principals of the Applicant and the Opponent, as well as at least 39 people throughout Canada. Moreover, the principals of the Applicant and the Opponent had a relationship during which the principal of the Opponent created, designed and implemented the term QUINTCAP and the logo QUINTCAP & Design based on their respective surname for use in association with the management by the principal of the Opponent of a multitude of third-party properties, and this matter is now before the Superior Court.
- The Mark is not distinctive pursuant to section 2 of the Act in light of the inclusion of the surname QUINT. More specifically, the Mark does not actually distinguish nor is it adapted to distinguish the Services rendered or sold by the Applicant from the services rendered or sold by the Opponent or others with the same surname.

[8] On July 8, 2016, the Applicant filed and served a counter statement denying each ground of opposition pleaded in the statement of opposition.

[9] In support of its opposition, the Opponent filed, as its evidence in chief, a solemn declaration of its president, Ian Quint (Ian), dated November 7, 2016 (the First Quint Declaration), and a solemn declaration of Janet Dell'Orto, a trademark agent and translator employed by the Opponent's agent, dated November 8, 2016 (the Dell'Orto Declaration). They

were both cross-examined on their declarations, and the transcripts, exhibits and answers to undertakings form part of the evidence of record, as will be discussed further below.

[10] In support of its Application, the Applicant filed a solemn declaration of its Chief Financial Officer, John Waxlax, dated April 16, 2008 (the Waxlax Declaration), and the solemn declaration of Marylène Gendron, a secretary employed by the Applicant's agent, dated April 20, 2018 (the Gendron Declaration). They were both cross-examined on their declarations, and the transcripts, exhibits and answers to undertakings form part of the evidence of record, as will be discussed further below.

[11] As reply evidence, the Opponent filed a second solemn declaration of Ian, dated April 29, 2019 (the Second Quint Declaration). Ian was cross-examined on this evidence, albeit under the reserve of the general objection made by the Applicant that it did not qualify as evidence in reply. The transcript of the cross-examination and answers to undertakings were filed with the Registrar. However, there is an issue with respect to the exhibits produced, under objection, during the cross-examination. Below, I will return to this point as well as to the admissibility of the Second Quint Declaration generally.

[12] Both parties submitted written representations and were represented at a hearing. The case was heard together two other opposition proceedings, for application Nos. 1,715,193 and 1,770,015 for the word mark QUINTCAP and the trademark QUINT HOTELS & Design, respectively. Separate decisions will issue with respect to those two oppositions.

ANALYSIS

Preliminary remarks — Previous legal disputes between the parties

[13] As indicated above, in recent years, the parties to the present proceeding have been involved in a few legal disputes.

[14] Without getting into too much detail, I note that a judgment of the Superior Court of Quebec rendered on March 15, 2021 in favor of Quintcap and its president Theodore Quint (Theodore) – who is the uncle of Ian – is presently under appeal before the Court of Appeal of

Quebec [see *Quintcap inc v I. Quint Group Inc*, 2021 QCCS 1932 and *I. Quint Group Inc v Quintcap inc*, 2021 QCCA 774].

[15] The Superior Court's judgment is in respect of two files that had been heard together, namely: i) a statement of claim filed by Quintcap and Theodore against I. Quint, its president Ian, and three other companies related, directly or indirectly, to Ian (one of them named Devraker Real Estate Inc. (Devraker)), alleging, among other things, passing-off and unfair competition and seeking various orders and the revocation of a gift of shares for ingratitude; and ii) an oppression remedy claim instituted by Ian and Devraker against Theodore and Quintcap and several other persons or entities related to them.

[16] Not surprisingly, reference was made to the Superior Court's judgment at the hearing. However, this judgment is not necessarily determinative of the issues in the present case. Suffice it to say that this judgment is under appeal to the Court of Appeal of Quebec and, in any event, each case must be decided on its own facts. That being said, I will refer to some of the findings made by the Superior Court where I consider it appropriate to do so.

The parties' respective burden or onus

[17] The Opponent has the initial evidential burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once that burden is met, the Applicant bears the legal onus of establishing, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155].

Overview of the evidence

The Opponent's evidence in chief

The First Quint Declaration

[18] As it will become apparent from my review below, the First Quint Declaration essentially focuses on three things: i) Ian's former business relationship with his uncle Theodore, including

through the Applicant during the years 2005 to 2015; ii) the circumstances surrounding the creation of the brand QUINTCAP; and iii) the Opponent's reputation and Ian's personal reputation in the real estate industry. As transpires from the transcript of Ian's cross-examination, and as was the case in the matter before the Superior Court, there is a debate between the parties on the characterization of that relationship, hence my added emphasis in some of the quotations reproduced below. On the one hand, the Opponent submits that they were business partners. On the other hand, the Applicant submits that Ian was an employee of the Applicant. I will return later to this issue.

[19] With this background in mind, the First Quint Declaration can be summarized as follows.

[20] In the introductory paragraphs, Ian describes himself as the President of I. Quint since its inception on February 13, 2015 and as "a businessman with a law degree and considerable expertise in the fields of real estate management and development" [paras 1 and 2, see also para 20].

[21] In the following paragraphs, Ian also describes himself as "the former *business partner* of [his] uncle, [Theodore], the President of the Applicant" [my emphasis] [para 3]. More specifically, he asserts that:

4. [...] from 2005 to 2015, I worked with [Theodore] and was solely responsible for the management and development of a family real estate portfolio that [Theodore] had started decades before [...].

5. During such time, I was involved in various real estate projects in Brossard and La Prairie.

6. I was engaged in an "*incorporated partnership*" with [Theodore] and other partners *through a number of companies carrying on business in the field of real estate management and development.*

7. After completing my law degree and being called to the bar of the State of New York in 2005, I decided, *at the behest of my uncle [Theodore], the President of the Applicant, following the resignation of the previous property manager,* to pursue a career in real estate and join *the family business.*

[My emphases]

[22] Ian thereafter further describes the context of his beginnings as a real estate manager, including how:

10. [He] updated the management office that had grown stale and was technologically far behind industry standards, particularly by investing in computers and software as none of the employees were provided computers and most paperwork was done by hand, and also by building an office website.

11. The Quint family real estate portfolio flourished under [his] stewardship as [he] developed a reputation for being a project manager who was pleasant to work with and could deliver construction projects on time and on budget with 100% occupation rate usually before construction was completed.

[23] I also note paragraph 12, where Ian lists the most important projects for which he was responsible. In this regard, I note that all of these projects are included in the QUINTCAP brochure attached as Exhibit P-7 to the Waxlax Declaration. I will return to this point below.

[24] Ian goes on to assert that, “[b]y the end of 2014, [he] had an important personal stake in the Quint family real estate business and in other real estate ventures with investors outside the Quint family” [para 13]. He asserts that he “was responsible for identifying real estate opportunities and then supervising their conception, planning, construction, leasing and overall business operations, as well as managing existing real estate holdings held by the Quint family” [para 15, see also paras 14 and 17 where Ian further reiterates that he had gained a reputation in the real estate industry].

[25] Ian asserts that it is also at this time that his “disagreement with [Theodore] with regard to the future of the Quint family real estate portfolio was coming to a head” [para 18]. More particularly, he asserts that when Theodore “made it clear to [him] that he had no intention of further expanding our real estate holdings, [Ian] *was forced to create [his] own real estate management and development enterprise*” [my emphasis] [para 19]. As such, he incorporated I. Quint [para 20].

[26] In this regard, Ian further asserts that “[Theodore’s] business has remained in Brossard, whereas the business of the Opponent has expanded throughout the Province of Quebec and is moving into Ontario. In fact, the Opponent is managing over four times as much square footage of properties as the Applicant” [para 22].

[27] Ian thereafter relates that the Opponent attempted to register the trademark Q GROUPE QUINT & Design (being the subject of abandoned application No. 1,715,600, a copy of which is

attached as Exhibit IQ-4 to the cross-examination transcript of the First Quint Declaration). That application was objected to by the Examiner based on the Applicant's prior applications for the Mark and the above-mentioned word mark QUINTCAP. Ian asserts that:

24. QUINTCAP is a name that I created. The family real estate portfolio was being held by various companies. I decided to centralize everything and therefore created *one company* to manage the entire portfolio. I created the concept, the brand and the logo, and I saw to the marketing of it all. [My emphasis]

[28] I note that during his cross-examination in the concurrent opposition file relating to the Applicant's above-mentioned application for the trademark QUINT HOTELS & Design, Ian amended the corresponding paragraph of his solemn declaration in that file so that it reads: "...I decided to centralize everything and therefore created one *brand* to manage the entire portfolio..." However, no amendment was made in the present file.

[29] Finally, I note that Ian also provides his personal opinion with respect to the distinctiveness of the Mark, arguing among other things that:

25. [...] the name Quint is known in the greater real estate industry as a result of [Ian's] work and involvement. As such, the Applicant [...] should not be entitled to exclusive use of QUINT with respect to services offered in the real estate industry. It is equally [Ian's and Theodore's] family name and for that reason, as well as the fact that the Opponent and [Ian] personally have taken an important place in the real estate industry, it is not distinctive of the Applicant.

[30] I will come back to this statement in my interpretation of the section 2 ground of opposition.

[31] As indicated above, Ian was cross-examined on his declaration. A substantial part of his cross-examination revolved around the nature of Ian's remuneration during the years of his alleged partnership with his uncle. Notably, under objection, counsel for the Applicant produced, as Exhibit IQ-1 to the cross-examination, some T-4 forms identifying Ian as an employee of the Applicant from 2006 until January 2015 (except 2008). The Opponent further maintained its objection in refusing to confirm, as Undertaking U-4, that those were the tax returns filed with the government. However, it is clear that Ian did examine Exhibit IQ-1 during his cross-examination, as transpired from the following passage at pages 32 and 33 of the transcript:

Q. [...]. So, paragraph 4. So from two thousand five (2005) to two thousand fifteen (2015), you work with Ted... Read it.

A. Um-hum.

Q. Okay. So at that point, from that ten (10) year period, you were paid a salary, correct?

A. *I was paid through companies and I was paid personally.*

Q. Okay. *Personally, you were receiving T4, correct?*

A. I... 'cause of the other proceeding went back and verified and sent T4s.

Q. So the answer is yes?

A. *The answer is...yes.*

Q. I'm going to show you T4s from two thousand and six (2006) to two thousand and fifteen (2015). This is your name?

A. Yes.

Q. So these are T4 that were issued to you, correct?

A. These were, again, you know, my uncle had a bookkeeper in his office and an accountant, and they were responsible for... for these documents.

Q. Okay. But these are documents that you filed with the government of Canada, correct?

A. The accountant that we shared, I guess, filed them. I didn't personally filed them.

[My emphases]

[32] In the same vein, for the purpose of clarifying and identifying what amounts, if any, were billed by Ian's companies for the alleged management of the projects referred to at paragraph 12 of his declaration, counsel for the Applicant also asked, as undertakings U-2 and U-3, to be provided with copies of invoices. In this regard, I note that counsel for the Applicant agreed to first verify if invoices for management fees could be found within the Applicant's records and, if so, the Opponent was to confirm that they were the ones referred to at paragraph 12 of Ian's declaration. As indicated in the Applicant's letter to the Registrar dated December 20, 2017, this verification revealed that the Applicant had returned all such documents to Ian when he left the Applicant. As the opposing party had the documentation in their possession, it was for the Opponent to submit them in reply to undertakings U-2 and U-3. However, the Opponent simply indicated the following in its responses to both undertakings:

- U-2: "Yes, the documents provided in the other case are the documents to which the witness was referring to."

- U-3: “No additional invoice for management fee was retrieved in response to this undertaking regarding the projects mentioned at paragraph 12. As mentioned, the relevant documentation was sent as an undertaking in the other court file.”

[33] In view of the foregoing, I confirm that no invoices or proof of any sort of payments were filed by the Opponent as part of its evidence in chief or following Ian’s first cross-examination *in the present file*. It is my understanding that “the other case” or “court file” referred to by the Opponent is the litigation having led to the Superior Court’s judgment. I also accept that Exhibit IQ-1 be considered as part of the cross-examination transcript. In this regard, I disagree with the Opponent’s objection. I find the line of questioning concerning Ian’s status as an employee of Quintcap to be relevant, as it seems to contradict his statements that he started “an incorporated partnership” with his uncle back in 2005. I will return to this point below.

The Dell’Orto Declaration

[34] Ms. Dell’Orto’s declaration has been submitted for the sole purpose of providing the results of a search she carried out for the name QUINT on the Canada 411 website, listing 40 hits [Exhibit A]. In cross-examination, Ms. Dell’Orto confirmed that she did not search for “QUINTCAP” as a person’s name in Canada [cross-examination transcript, pp 7 and 8].

The Applicant’s evidence

The Waxlax Declaration

[35] Mr. Waxlax has held the position of Chief Financial Officer of Quintcap since 2008.

[36] In the first part of his declaration, Mr. Waxlax provides some background information about the history and business of the Applicant. He describes Quintcap’s business as consisting of “building acquisition and development, construction, property management, leasing, and sales for industrial, commercial, office, flex, and residential buildings, as well as the building and managing of hotel properties” [para 3]. He explains that Quintcap was incorporated on November 4, 1994, under the name 3084388 Canada Inc. and has been carrying on business under its current name Quintcap Inc. (as well as the trade names Gestion Quintcap and

Investissements Quintcap), since at least as early as August 13, 2013, especially on the South Shore of Montreal, Quebec [paras 4 and 5].

[37] Mr. Waxlax also refers to the trademark applications filed by the Applicant for the Mark and the word mark QUINTCAP. He collectively refers to these two applications and trademarks as “the Applications” and “the QUINTCAP Marks”, respectively [para 6]. I will do the same while reviewing his declaration.

[38] In the second part of his declaration, Mr. Waxlax provides some information on the Opponent’s business. In this regard, he describes Ian as the President and sole shareholder of the Opponent as well as a former employee of the Applicant. More particularly, he asserts that on or around May 2005, Ian “was hired at Quintcap by his uncle, [...] as an employee, with the title of Director of Real Estate Development, Construction and Leasing, despite no previous experience in construction or real estate” [para 11]. As Exhibit P-2 to his declaration, he attaches redacted T-4 statements of remuneration that Quintcap (named 3084388 Canada Inc. prior to 2013) had issued to Ian for the years 2006 to 2015 (except 2008). He also asserts that Ian “resigned as an employee of Quintcap” on January 30, 2015 [para 13].

[39] Mr. Waxlax thereafter turns to the issue of use of the QUINTCAP Marks by the Applicant. He further explains the Applicant’s business and asserts, among other things, that Quintcap is the largest industrial developer in Brossard and the largest residential developer in La Prairie, Quebec. He adds that Quintcap also manages many important buildings and has many prestigious tenants, such as Uniprix, Desjardins, and BMO Nesbitt Burns [paras 15 to 18, and 22].

[40] In support of his assertions of use of the QUINTCAP Marks, Mr. Waxlax attaches to his declaration various exhibits [paras 19 to 21 and 23 to 36, Exhibits P-3 to P-15]. As I will further discuss these exhibits below, suffice it to note at this juncture that:

- Some of these exhibits display another version (or a variant) of the Mark, as reproduced below:



Notwithstanding the Opponent's submissions, I find that all use of this variant of the Mark amounts to use of the Mark as the dominant features of the Mark, namely the word QUINTCAP and the stylized letter "Q", have been retained in the variant of the Mark as used, albeit with the stylised letter "Q" above the word QUINTCAP [see *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA); *Registrar of Trade-marks v Cie internationale pour l'informatique CII Honeywell Bull*, (1985), 4 CPR (3d) 523 (FCA); and *Nightingale Interloc Ltd v Prodesign Ltd*, (1984) 2 CPR (3d) 535 (TMOB), for a thorough discussion of the general principles that govern the test for deviation].

- Mr. Waxlax asserts that part of the Applicant's Services would have been provided by duly authorized licensees, namely the following entities: Quint Hotels Inc. (Quint Hotels), Entreprises Gordon Quint Inc. (Entreprises Gordon) (named The House of Gordon (La Maison de Gordon) prior to September 28, 2016, and 3952827 Canada Inc. prior to June 10, 2003), and Les Investissements T & G Ltée (Investissements T & G).

[41] In the last part of his declaration, Mr. Waxlax turns to the genesis of the legal dispute between the parties. He discusses the cease and desist letter dated March 11, 2015 that was sent to the Opponent and to Ian personally and also refers to the legal recourse instituted by the Applicant against the Opponent [paras 37 to 42, Exhibit P-16].

[42] As indicated above, Mr. Waxlax was cross-examined on his declaration. A substantial part of his cross-examination dealt with Exhibits P-3 and P-4 (which consist respectively of photographs of luminous pylons or pylon signs of various real estate and sketches of pylons that have been used for the preparation of the pylons bearing the QUINTCAP Marks) and the alleged licensing agreements entered into between the Applicant and the above-mentioned entities referred to in his declaration. In this regard, I note that in response to undertakings U-2 and U-3,

the Applicant provided a copy of the final order that was placed on “03/07/2013” by the Applicant to EnseignesPlus for the final production order of the pylons for the sites located at 3555 and 3755 Boul. Matte and 9005 du Quartier in Brossard. I also note that the Applicant ultimately maintained its objection to providing a copy of the alleged license agreements entered into between Quintcap and Quint Hotels and Entreprises Gordon respectively [see Applicant’s correspondence dated April 16, 2019 attached to Opponent’s letter to the Registrar dated April 29, 2019 concerning, among others, undertakings U-4 and U-6]. This objection was seemingly based on relevance [cross-examination transcript, p 46]. However, I find the objection ill-founded, as the existence of these two licenses was expressly alleged at paragraphs 28 and 29 of the Waxlax Declaration. I will return to this point below.

The Gendron Declaration

[43] Ms. Gendron’s declaration has been submitted for the sole purpose of providing a printout of the details of the above-mentioned abandoned application No. 1,715,600 for the trademark, Q GROUPE QUINT & Design [Exhibit MG-2].

[44] As indicated above, Ms. Gendron was cross-examined on her declaration. The questions asked dealt essentially with the nature of the instructions given by counsel for the Applicant to Ms. Gendron and led to undertaking E-1 (under reserve), which was ultimately rightly objected to by the Applicant on the basis of relevance and privilege [see Applicant’s correspondence dated April 16, 2019 attached to Opponent’s letter to the Registrar dated April 29, 2019].

The Opponent’s reply evidence

The Second Quint Declaration

[45] As indicated above, the Applicant has objected to the Second Quint Declaration on the basis that it is not proper reply.

[46] Reply evidence must be confined to matters in reply [see section 54 of the *Trademarks Regulations*, SOR/2018-227 and former section 43]. In *Halford v Seed Hawk Inc*, 2003 FCT 141, 24 CPR (4th) 220 (FCTD) at paragraphs 14-15, the Federal Court provides the following guidelines as to what constitutes proper reply evidence:

1. Evidence which is simply confirmatory of evidence already before the court is not to be allowed.
2. Evidence which is directed to a matter raised for the first time in cross-examination and which ought to have been part of the plaintiff's case in chief is not to be allowed. Any other new matter relevant to a matter in issue, and not simply for the purpose of contradicting a defence witness, may be allowed.
3. Evidence which is simply a rebuttal of evidence led as part of the defence case and which could have been led in chief is not to be admitted.
4. Evidence which is excluded because it should have been led as part of the plaintiffs' case in chief will be examined to determine if it should be admitted.

[47] It is true that the mere fact that the evidence was available at the time of filing the evidence in chief does not preclude the admissibility as reply evidence. Still, a party is not entitled to split its case [see *Halford, supra*].

[48] In order to put the Applicant's objection in context, I will go over the Second Quint Declaration.

[49] In paragraphs 3 and 4 of this declaration, Ian states that, contrary to what is stated at paragraphs 11 to 13 of Mr. Waxlax's declaration and during his cross-examination, Ian was not a mere employee from 2005 to 2015 but was rather a business partner of his uncle Theodore, the President of the Applicant. Ian further states that he was also offering, through his company Devraker, management services to the family real estate portfolio that Theodore was a partner in. In support, he attaches the following exhibits:

- Exhibit A: "copies of management contracts that were submitted to [Ian] in 2009 and 2011 by T & G Investments, 93877 Canada Inc. and 150460 Canada Inc."
- Exhibit B: "a document showing fees paid by T & G Investments, 93877 Canada Inc., 150460 Canada Inc. (Hotel Quint), 4328175 Canada Inc., 3316424 Canada Inc. and 3084388 Canada Inc. to [Ian's] company [Devraker] from 2009 to 2014 in exchange for some of the management services rendered by [Ian's] company during this period."

[50] Upon review of Exhibit A, I note that i) it refers to management contracts only signed by one party but not the other (Devraker); ii) that the head office of each contracting party identified therein (including Devraker) is located at the same address of that of the Applicant; and iii) these alleged contracts concern periods starting in 2009 and 2011, that is before the Applicant's claimed date of first use of the Mark – in fact, there is no reference to any trademark whatsoever in these documents. As for Exhibit B, it merely consists of a table listing “fees paid to Devraker” by the entities referred to therein, without any more information.

[51] I agree with the Applicant that paragraphs 3 and 4 and Exhibits A and B are improper reply evidence. They are simply a rebuttal of evidence led as part of the Applicant's case that could have been led in the Opponent's evidence in chief. These statements and exhibits merely purport to give more detail regarding how Ian allegedly provided real estate management and development services to the Quint family real estate portfolio that his uncle Theodore was a partner in. Moreover, as mentioned above, during the cross-examination held on the First Quint Declaration, Ian was asked to provide, as undertakings U-2 and U-3, invoices with regard to the payment of fees for the management of the properties referred to at paragraph 12 of that declaration. As explained above, these invoices were never provided by the Opponent.

[52] In any event, even if I was to accept this evidence as proper reply evidence, I find that it would still fail to contradict and/or clarify Ian's status as an employee of the Applicant as evidenced by the T-4 forms [attached both as Exhibit IQ-1 to the cross-examination transcript of the First Quint Declaration and as Exhibit P-2 to the Waxlax Declaration]. In so finding, I do not mean to say that part of Ian's remuneration when he was working for the Applicant may not *also* have come from various service contracts entered into between his company Devraker and Quintcap or other real estate holdings/companies held by Theodore or the Quint family. However, the evidence of record confirms that from 2005 until January 2015 (except 2008, for which no T-4 form was provided), Ian worked at Quintcap as an employee in return for a salary. Indeed, it was on this basis that the T-4 forms were issued for tax purposes. As an aside, I note that the same conclusion was reached in the Superior Court's judgment [see paras 231 to 239]. I would note again that, when the Opponent was given an opportunity to comment on Exhibit IQ-1 and to confirm whether those were the tax returns filed with the government, the Opponent, instead of clarifying Ian's status, elected not to respond and maintained its objection to the whole

line of questioning concerning Ian's status as an employee of Quintcap. Finally, it is also unclear how this evidence could assist the Opponent's case, as it fails to provide any information whatsoever with respect to the trademark(s), if any, in association with which Devraker's management services would have been rendered.

[53] In paragraph 5 of his second declaration, Ian simply reiterates that he created the brand QUINTCAP as well as the QUINTCAP logo (the Mark) to help facilitate the management services provided to his uncle. Again, I agree with the Applicant that this is improper reply evidence. It is simply confirmatory of his previous statement made at paragraph 24 of the First Quint Declaration.

[54] That said, I note that during Ian's cross-examination on this paragraph, counsel for the Applicant asked him whether it would be fair to say that Frank Lee of Lee Graphics is the one who created the logo for the Mark when he was hired to redesign the Applicant's website at *quintcap.com*. Ian answered that he "created the concept and Frank Lee put it on paper" [cross-examination transcript of the Second Quint Declaration, pp 10 and 11]. In this regard, counsel for the Applicant produced, under objection, as Exhibit IQ-1 an excerpt of undertaking U-14 that had been produced in of the files before the Superior Court (that is the litigation having led to the Superior Court's judgment). As I could not locate the said exhibit in the record, nor Exhibit IQ-2 (discussed below) that was also produced, under objection, during Ian's cross-examination on his second declaration, at the hearing I asked the parties to verify if the said exhibits had been filed with the Registrar and to clarify what was part of the record and what was not. By detailed letter dated July 26, 2021, the Applicant responded that it is implausible that the Applicant would not have submitted these exhibits to the Registrar along with the cross-examination transcript of the Second Quint Declaration when it did so for the Opponent. I note that in its letter dated August 12, 2021, the Opponent confirms that it was provided with a copy of Exhibits IQ-1 and IQ-2 along with its copy of the transcript. However, the Opponent maintains its objection to the filing of these exhibits with the Registrar. Given the very particular circumstances of the present case, including the fact that both Exhibits IQ-1 and IQ-2 do not come as a surprise to the Opponent (having both been referred to during the cross-examination of the Second Quint Declaration and provided to the Opponent along with its copy of the transcript), I accept to

put on file the copies of Exhibits IQ-1 and IQ-2 enclosed with the Applicant's aforementioned letter of July 26 so that they be considered to be part of the transcript.

[55] In paragraphs 6 to 15 of his second declaration, Ian puts into issue Mr. Waxlax's assertions of use of the QUINTCAP Marks in association with the performance or advertising of the Services, including on the pylons depicted in Exhibits P-3 and P-4 to the Waxlax Declaration. Specifically, Ian states that, in September 2013, there were no luminous pylons displaying the Mark in place at the locations identified in Exhibits P-3 and P-4. He asserts that the Mark was, rather, first displayed on such pylons "much later than September 2013". In this regard, Ian provides detailed explanation as to the steps taken by him to have the said pylons designed, manufactured and installed at these locations, and he further attaches as Exhibit C, copies of the permits that were issued by the city of Brossard for the installation of the pylons at these locations, showing that these permits were granted on October 13 and December 10, 2013.

[56] To the extent that paragraphs 6 to 15 purport to contradict Exhibits P-3 and P-4 attached to the Waxlax Declaration, I am prepared to accept them as proper reply evidence. Having said that, I note that in paragraphs 9 and 15 of his second declaration, Ian apparently relies on his detailed explanation concerning the design, manufacture and installation of these particular pylons to assert that, contrary to what is asserted in the Waxlax Declaration, "there was no use of the Mark in association with any services as of September 13, 2013". Not surprisingly, counsel for the Applicant questioned Ian on this particular statement during his cross-examination:

Q. 34 [...] When you say that there'd been no use of the mark in September two thousand thirteen (2013), do you mean no use of the [Mark] with respect to the pylons mentioned at this paragraph or no use at all?

A. I mean with respect to the pylons and I'm not aware of any use prior to that.

Q. 35 So if I were to tell you that the [Mark] had been used on the quintcap.com website would you be aware of this?

[57] "To help [Ian] remember", counsel for the Applicant produced, under objection, printouts of the *quintcap.com* website obtained from the *Wayback Machine*, all from around June 2013. There was a lengthy discussion between counsels as to the admissibility of that exhibit (Exhibit IQ-2) and the Opponent's objection to the Applicant's line of questioning concerning the Applicant's website back in June 2013, which ended as follows:

Q. 39 I would ask for an undertaking for you to verify, to the best of your knowledge, whether or not the Quintcap design logo, which you allege to have designed, was ever used prior to September two thousand and thirteen (2013), for example, on the quintcap.com website. If you are to allege that the use of the [Mark] on, for example, on the quintcap.com website happened after June 2013, I would ask you to provide supporting documentation of this, and in order to respond to this undertaking, you may review U-14 [which had been produced in the litigation having led to the Superior Court's judgment] either the excerpt which I provided you [Exhibit IQ-1] or the copy which we provided you in the Superior Court file, and you may also review the document IQ-2 which I provided you, or you may review the Wayback Machine yourself in answering this undertaking.

Me ANDRÉ-ANNE JEANSONNE:

Again I object, I object to any reference to the website in the context of his affidavit. We're in the context of reply evidence, the website was not the subject of his affidavit, his affidavit was limited to the pylons, so I will not agree to this undertaking.

Me JAMES DUFFY:

I would just like to note, respectfully, that your client made a general statement that he created the mark in question here and, and then he also made a general statement that there was no use of the [Mark] in September 2013. I think I'm allowed to ask questions that have to do with uses other than those on the pylon because it is a very general statement, and per your own client, he alleges that he created the logo.

Me ANDRÉ-ANNE JEANSONNE:

Well, in any case, I agree to the wording of your, of your undertaking, asking the witness to look at U-14 which we already objected to, so I can take under advisement to verify the use of the [Mark] to the best of his knowledge, but this is not, we're not in the context of a... we're in the context of reply evidence, it's not exploratory evidence stage, so I will not, I will not undertake to ask my witness to do any verifications that go beyond this specific, his specific affidavit, he shouldn't have to make verifications that go beyond, not in the reply evidence stage.

Me JAMES DUFFY:

I take note of your objection, and, again, it will be dealt with by the board, and I would just like to note that, you know, you have these documents I provided you, so...

Me ANDRÉE-ANNE JEANSONNE

Under objection, and, as I said, I object to the fact that they will be included as an exhibit to this cross examination, so.

UNDERTAKING No. 1:

To verify whether or not the Quintcap design logo was ever used prior to September 2013 for example on the quintcap.com website, and if it was used after June 2013, to provide supporting documentation objection (OBJECTION)

[58] In response to undertaking U-1, the Opponent indicated that it “will not be submitted [...] given the existing objection [...]”. As indicated above, I accept that Exhibit IQ-2 be considered to form part of the cross-examination transcript of the Second Quint Declaration. Furthermore, as I accept that paragraphs 6 to 15 thereof are admissible as evidence in reply, I agree with the Applicant that it was open to it to challenge Ian’s credibility on the particular issue of use of the Mark, including his sworn statement as to the absence of any use of the Mark as of September 2013. I will return later to this point.

[59] Paragraphs 16 and 17 of Ian’s second declaration purport to contradict Mr. Waxlax’s testimony as to the licensed use of the Mark between the Applicant and any other company. Ian states that:

17. Specifically, contrary to what was stated by Mr. Waxlax during his cross-examination (see p. 46 of the transcript starting at line 2, p. 51 of the transcript starting at line 11 and p. 54 of the transcript starting at line 13) from 2005 to 2015, there was never any license agreement, whether explicit or implicit, in writing or orally, between the Applicant and any of its alleged licensees.

[60] The above-mentioned passages of Mr. Waxlax’s cross-examination relate respectively to the alleged Licence Agreement between Quint Hotels and Quintcap, the management services rendered by Entreprises Gordon under licence from Quintcap, and the real estate management and construction services rendered by Investissements T & G under licence from Quintcap. I am prepared to accept the above-reproduced statement of Ian as proper reply evidence in view of the Opponent’s argument that it did not know, at the time of filing its evidence in chief, that the Applicant would be alleging use of the Mark by licensees. That said, I will return later to the weight and credibility to be afforded to this statement.

[61] Finally, paragraphs 18 to 21 of Ian’s second declaration, purport to contradict Mr. Waxlax’s testimony (at page 25 of the transcript, starting at line 19) according to which the Applicant renders services under the Mark. First, regarding the services of land acquisition and construction, Ian asserts that “these are not services offered to third parties as the Applicant and its alleged licensees only purchase land for their own use and benefit. In addition, the Applicant (nor any of its alleged licensees) has never purchased any land nor offered services of land acquisition under the Mark” [para 19]. Ian asserts that the same can be said of the “construction

services” as “the Applicant and its alleged licensees have only ever built their own buildings for their own use and benefit. In addition, the Applicant (nor any of its alleged licensees) has never offered construction services under the Mark and the Applicant does not, nor has it ever had, a construction licence” [para 20]. Lastly, Ian asserts that “no real estate management services have ever been rendered to third parties by the Applicant or by any of its alleged licensees under the Mark. In addition, the Applicant (nor any of its alleged licensees) has never offered leasing services under the Mark and the Applicant does not, nor has it ever had, a brokerage licence” [para 21].

[62] While Ian indicates that these paragraphs purport to contradict Mr. Waxlax’s testimony, I agree with the Applicant that the Opponent could have made these allegations concerning the nature of the Applicant’s business in its evidence in chief. In this regard, the Opponent has known what the applied-for Services were since the beginning of this proceeding. As per my review above of the First Quint Declaration, no mention of the Mark not being used by the Applicant in association with the applied-for Services is made in Ian’s first declaration. In fact, while Ian makes certain allegations about the creation of the Mark, he fails to provide any indication whatsoever as to the ownership of it and how and by whom it has been used. It is not clear why this issue was not raised in the Opponent’s evidence in chief, especially in view of the Opponent’s pleading based on section 30(b) of the Act.

[63] In view of the above, I agree with the Applicant that paragraphs 18 to 21 of Ian’s second declaration are improper reply evidence. In any event, the admissibility of these paragraphs has no impact on the outcome of this proceeding as I will still address the issue of use of the Mark in association with the Services for the benefit of third parties in my analysis of the section 30(b) ground, in light of the Applicant’s evidence.

Analysis of the grounds of opposition

Section 30(a) ground of opposition (Services not defined in ordinary commercial terms)

[64] This ground of opposition is not properly pleaded. It appears to be a “boilerplate” pleading in that it merely reproduces the wording of the Act without providing any allegation of facts to support it. Furthermore, as stressed by the Applicant in its written representations, the

Opponent has submitted no evidence regarding this ground of opposition. Stated differently, the deficiency in the pleading has not been cured by the evidence [*Novopharm Ltd v Astrazeneca AB*, 2002 FCA 387].

[65] Although my finding with respect to the deficiency of the pleading is sufficient to reject the present ground of opposition, I will nonetheless address the Opponent's argument submitted in its written representations. Specifically, the Opponent submits that:

24. The specific nature of the services cannot be determined. Indeed, "construction services" is very broad and may encompass a variety of services, conferring to the Applicant a monopoly of undue scope.

[...]

27. "Construction services" cannot be found in the CIPO Goods and Services Manual (the "Manual"). The Manual lists "Construction of buildings" and "Building construction services" as acceptable services. [...]

28. "Construction services" is not as specific as "Construction of buildings" and "Building construction services".

[66] However, as noted by the Registrar in *GT Hiring Solutions (2005) Inc v Hard Hat Hunter Incorporated*, 2020 TMOB 124:

[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".

[67] With this in mind, and considering the context of the Services as a whole, I am satisfied that the "construction services" of the Applicant are set out in sufficient detail and are not ambiguous.

[68] Accordingly, the section 30(a) ground of opposition is rejected.

Section 30(b) ground of opposition (Mark not used since the claimed date and trade name use)

[69] The section 30(b) ground of opposition pleaded by the Opponent has two prongs, namely that the Mark has not been used since the claimed date of first use (that is, since at least as early

as September, 2013); and that the Mark has not been used as a trademark, but instead has functioned as a trade name.

[70] The relevant date for considering the circumstances concerning this ground of opposition is the filing date of the Application [*Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475]. In this regard, section 30(b) of the Act requires that there be continuous use of the Mark since the date claimed [*Labatt Brewing Co v Benson & Hedges (Canada) Ltd* (1996), 67 CPR (3d) 258 (FCTD) at 262]. To the extent that the relevant facts pertaining to a ground of opposition based on section 30(b) of the Act are more readily available to the applicant, the evidential burden on an opponent with respect to such a ground of opposition is less onerous [*Tune Master v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB) at 89]. Furthermore, this burden can be met by reliance on the applicant's evidence [*Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD) at 230]. However, an opponent may only successfully rely upon the applicant's evidence to meet its initial burden if the opponent shows that this evidence is clearly inconsistent or 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 to 38]. In this regard, 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].

[71] In this case, the Opponent relies on paragraph 24 of the First Quint Declaration, where Ian asserts that "QUINTCAP is a name that [he] created [...]" and the Second Quint Declaration, as well as on Mr. Waxlax's declaration and cross-examination which, the Opponent submits, does not show use of the Mark at the date of first use indicated in the Application.

[72] Considering first the Opponent's evidence in chief, I agree with the Applicant that Ian's declaration and subsequent cross-examination fail to establish i) that he did in fact create the Mark for his own benefit (or that of another entity distinct from the Applicant) and ii) that he would be the rightful owner thereof. Moreover, this evidence does not support the Opponent's

pleading that there would have been no use of the Mark *by the Applicant* as of the date of first use claimed in the Application. Suffice it to say that:

- During his cross-examination, Ian could not identify the alleged “incorporated partnership” he was referring to at paragraph 6 of his first declaration [cross-examination transcript of the First Quint Declaration, pp 10 and 11].
- Regardless of whether part of Ian’s remuneration when he was working for the Applicant may *also* have come from various service contracts entered into between one or more companies belonging to Ian (*e.g.*, Devraker) and Quintcap or other real estate holdings/companies held by Theodore or the Quint family, the evidence of record confirms that, from 2005 until January 2015 (except 2008 for which no T-4 form was provided), Ian worked at Quintcap as an employee in return for a salary.
- Even if Ian had created the Mark (be it as an employee of the Applicant or otherwise), the mere creation of a word or design that becomes a trademark does not in itself provide trademark rights.

[73] In fact, I find that there are shortcomings in the First Quint Declaration in that it lacks transparency and clarity concerning Ian’s role within the Applicant. For example, Ian asserts at paragraphs 11 and 24 of the First Quint Declaration that “the Quint family real estate portfolio flourished under [his] stewardship” and that he “created the name QUINTCAP” and “decided to centralize everything” and “to manage the entire portfolio”. However, he remains silent as to the ownership and use of the Mark during his “stewardship”, except for broadly asserting that he “saw to the marketing of it all” [First Quint Declaration, para 24].

[74] This brings me to take a closer look at Exhibits P-3 to P-15 attached to the Waxlax Declaration in light of the Opponent’s admissible reply evidence. In so doing, I will refer to some of the Opponent’s submissions that I find to be the most relevant in assessing whether the Applicant’s own evidence assists the Opponent in meeting its initial evidential burden under this ground.

Exhibits P-3 and P-4 of the Waxlax Declaration

[75] Mr. Waxlax describes these exhibits respectively as “pictures of the QUINTCAP Marks on project pylons of various real estate” from Google Maps, and “some sketches of pylons that have been used for the preparation of the pylons bearing the QUINTCAP Marks”. As noted by the Opponent, all of the images of the pylon signs submitted in Exhibit P-3 are dated after the relevant date, with the earliest images dated from October 2014. Likewise, the sketches for the pylon signs included in Exhibit P-4 are dated September 16, 2013-and described as “preliminary”. In fact, as confirmed by the Second Quint Declaration and its accompanying Exhibit C, the pylons included in Exhibits P-3 and P-4 were not in place as early as September 2013.

Exhibit P-5 of the Waxlax Declaration

[76] Mr. Waxlax describes this exhibit as a collection of articles attesting to the significant exposure received by Quintcap in the press. The Opponent submits that none of these articles show use of the Mark in September 2013 or prior to this date. This is true. However, none of these articles puts into issue the claimed date of first use of the Mark.

[77] On the contrary, issues of possible hearsay aside, many of the exhibited magazine and newspaper excerpts relate to real estate projects featured in the Applicant’s brochure dated May 2013 attached as Exhibit P-7 (discussed below), as per the following examples:

- Excerpt from an article dated October 2013 published in the journal *L’information d’Affaires Rive-Sud*, describing the “Place St-Roch” residential project of 12.6 million dollars in St-Constant (which is also described in the Applicant’s brochure attached as Exhibit P-7 (discussed below)):

C'est du promoteur QuintCap que le Groupe Beaumont Élite a fait l'acquisition des terrains destinés au projet. QuintCap s'était d'abord porté acquéreur des 120 000 pi² de terrains industriels avant de les développer, en faisant changer le zonage pour du résidentiel.

[FREE TRANSLATION]:

It is from the developer QuintCap that the Beaumont Elite Group acquired the land for the project. QuintCap first acquired the 120,000 ft² of industrial land before developing it, changing the zoning to residential.

- Article in the same journal, reporting a 4 million dollars project of Quintcap in Brossard, including a quote from Ian, speaking for the Applicant:

« Il s'agit de la première bâtisse multi locative à Brossard offrant 29 pi en hauteur libre avec possibilité d'ajouter un deuxième étage de mezzanines », annonce Ian Quint, copropriétaire et chargé du développement et de la construction de la société Quintcap.

[...]

Établie depuis 60 ans, l'entreprise familiale QuintCap se distingue dans le domaine de l'immobilier par sa vaste expérience. Acquisition de terrains et de propriétés, location et vente d'édifices des secteurs commercial, industriel ou résidentiel et bureaux professionnels comptent parmi les activités de cette société qui agit également comme entrepreneur général. Une expertise en construction et gestion de projet hôtelière a aussi été développée avec les années.

[FREE TRANSLATION]:

“This is the first multi-rental building in Brossard offering 29 ft in free height with the possibility of adding a second floor of mezzanines”, says Ian Quint, co-owner and in charge of the development and construction of the company Quintcap. [...]

Established 60 years ago, the family business QuintCap stands out in the field of real estate for its extensive experience. Acquisition of land and properties, rental and sale of buildings in the commercial, industrial or residential sectors and professional offices are among the activities of this company, which also acts as a general contractor. Expertise in construction and hotel project management has also been developed over the years.

- Issue dated April 2015 of *L'Information d'Affaires Rive-Sud* describing the “Symbiocité” project of 3 million pi² in La Prairie:

C'est à La Prairie [...] qu'un projet de près de 1 400 unités résidentielles prend forme depuis novembre 2014. « Six constructeurs vont y construire les différents types d'habitations » indique Ted Quint, président de QuintCap. Depuis 2012, le promoteur œuvre de concert avec la ville de La Prairie en vue du développement du projet Symbiocité dont les premières unités seront livrées dès juin 2015.

[FREE TRANSLATION]:

It is in La Prairie [...] that a project of nearly 1,400 residential units has been taking shape since November 2014. "Six builders will build the different types of homes there," said Ted Quint, president of QuintCap. Since 2012, the developer has been working with the City of La Prairie to develop the Symbiocité project, the first units of which will be delivered in June 2015. [...]

[78] Furthermore, I note that the October 2013 issue of the journal *L'Information d'Affaires Rive-Sud* also features an advertisement of office building space for rent in Brossard, which displays the above-reproduced variant of the Mark along with a telephone number (that matches the one found in the Applicant's brochure) and the Applicant's domain name "*quintcap.com*".

Exhibits P-6 and P-15 of the Waxlax Declaration

[79] Mr. Waxlax describes these exhibits respectively as "extracts of the QUINTCAP website showing use of the QUINTCAP Marks in association with the Services" and "a Whois extract showing the details regarding the domain name *quintcap.com*". In its written representations, the Opponent submits that "given the changing nature of websites, extracts of a website in place on April 16, 2018 [that is the date on which the Waxlax Declaration was executed] cannot attest to its content in September 2013." At the hearing, the Opponent further pointed out that Quintcap is identified in these website extracts as the name of the "client" in respect of all the commercial, industrial, and residential projects featured therein and that this indicates that none of the Opponent's services are provided to third parties, but rather to related corporate entities comprised within the Quint family real estate portfolio.

[80] Notwithstanding the Opponent's submissions, I do not consider these website extracts to put into issue the claimed date of first use of the Mark or the provision of services to third parties.

[81] First, I note that the footer of various sections of the website prominently displays the Mark accompanied by the following portfolio description and copyright notice:

Quintcap's commercial portfolio consists of over 15 buildings, for the most part located on the South Shore of Montreal on or near Taschereau Boulevard in Brossard and on chemin St-Jean in La Prairie.

All rights reserved 2013, Quintcap. – Solution by Lee Graphics.

[82] The same copyright notice is also displayed below the description of the Applicant's services under the heading "Our Services", in both the website extracts dated October 3, 2015 attached to the Applicant's cease and desist letter to the Opponent [Exhibit P-16] and those from the *Wayback Machine* from around June 2013 [Exhibit IQ-2 to the cross-examination transcript of the Second Quint Declaration], which description is identical to the one found in the website extracts at Exhibit P-6.

[83] Second, I note that this description of the Applicant's services is in line with the statement of Services covered by the Application. More particularly, I note that this description provides that:

Quintcap's primary business is the development, construction and management of industrial, commercial and residential properties. All of our properties whether purchased or built are managed to the highest standards in the industry.

We act as our own General Contractor and have the expertise and the experience to deliver quality build to suit multi-tenant buildings.

Quintcap also has significant expertise in the building and managing of hotel properties with its 700 hotel rooms located on 5 properties belonging to 4 internationally renowned chains.

[84] This services description is followed by further descriptions of the Applicant's services under the subheadings "Acquisition", "Constructions" (including "Conversions", "Renovations" and "Ecofriendly"), "Development" and "Management". They provide, among other things:

Acquisitions:

Quintcap excels in land and building acquisition and is able to recognize undervalued assets which rapidly increase in value [...]. We own 7,000,000 sq. ft. of land pending development [...]. Do not hesitate to contact us if you are selling or want to work in partnership with us for property development.

Constructions:

One of Quintcap's specialties is delivering quality build-to-suit buildings and multi-tenants developments. Acting as general contractor in construction, Quincap builds commercial, industrial, residential and hospitality properties that are perfectly tailored to their tenants' needs. If you cannot find what you are looking for, do not hesitate to contact us. We will work with you to create the best space possible for your company [...].

Development:

Our experience ranges from master planning large scale residential developments to the detailed coordination of newly built hotels. We are well versed in working with municipalities and the appropriate governmental agencies to obtain permits and servicing for [...].

When developing real estate projects, we have succeeded at meeting our tenants and partners most demanding requirements [...].

Management:

[...] we make sure our buildings are always immaculately maintained [...]. If you wish to benefit from our expertise in property and hotel management, do not hesitate to contact us [...].

[85] I note that the Mark is prominently displayed throughout the website extracts of Exhibit P-6, which further provide the names of Quintcap's contact persons, including the ones of its "Director of Construction" and "Property Manager & Leasing", as well as descriptions of various real estate projects carried out by Quintcap and a few testimonials from tenants satisfied with the services rendered by the "Quint Group" (*le Groupe Quint*) or the "Quint team" (*l'équipe Quint*). I note that many of these real estate projects are also featured in the Applicant's brochure [Exhibit P-7] and that some of these tenant testimonials also match the testimonials found in the brochure. I will return to this point below.

[86] Finally, concerning the fact that Quintcap is identified as "client" in respect of all of the commercial, industrial, and residential projects featured in these website extracts, I find, based on the accompanying project descriptions and overall presentation of the website, that the notation "client" merely indicates that the projects are comprised within Quintcap's portfolio and/or the Quint family real estate portfolio, and that aspects of them are being or were carried out through Quintcap as an intermediary. I will return to this point below.

Exhibit P-7 of the Waxlax Declaration

[87] Mr. Waxlax describes this exhibit as "a brochure in English and in French providing details about the business of Quintcap under the QUINTCAP Marks". Mr. Waxlax asserts that this brochure was published in May 2013 and refers to the industrial, commercial, residential and hotel projects of the Applicant.

[88] The Opponent notes that there is no information on when (if ever), where or how this brochure was distributed to consumers or the public. The Opponent further points out that when asked to provide more information regarding this exhibited brochure during his cross examination, Mr. Waxlax stated that he was not personally involved in the development of the brochure and that he did not know when the brochure was first distributed to the public. In addition, he could not confirm where this brochure was distributed or how many copies of the brochure were distributed [cross-examination transcript, p 44, lines 1-16]. However, in my view, Mr. Waxlax's ignorance of the details surrounding the distribution of the brochure does not necessarily imply in itself that there has been no distribution at all of the brochure and does not put into issue the Applicant's claimed date of first use of the Mark.

[89] Commenting on the Applicant's brochure, I note that it prominently displays, on the front and back cover pages, the above-reproduced variant of the Mark. As mentioned above, the brochure provides brief descriptions of the projects carried out by Quintcap, among which are included all of "the most important projects for which [Ian] was responsible", as listed at paragraph 12 of the First Quint Declaration. The brochure further includes several testimonials from tenants and/or clients satisfied with the services rendered by the Quint Group (*le Groupe Quint*) or the Quint team (*l'équipe Quint*), some of which are addressed to "Ian". I am reproducing under Schedule A hereto (with my added emphasis) a few examples of the descriptions and tenant/client testimonials found in the brochure. In this regard, I do not find the references to the Quint Group or the Quint team to put into issue the Applicant's claimed date of first use of the Mark when the Applicant's evidence is considered as a whole, especially in view of Mr. Waxlax's statements of use of the Mark by the Applicant's licensees.

Exhibits P-8 of the Waxlax Declaration

[90] Mr. Waxlax describes this exhibit as "a copy of the management agreements signed between Quintcap and various entities." The Opponent points out that these agreements were all entered by "3084388 Canada Inc." and as such cannot be considered to demonstrate use of the Mark, as there is no reference to the Mark in these agreements.

[91] This is true. However, I note that the term of each of these management contracts is 20 years, which encompasses 3084388 Canada Inc.'s change of name to Quintcap Inc. in 2013.

Thus, I find these contracts are useful in explaining the relationship between the Applicant, identified therein as the “Provider”, and the other entities identified therein as the “Client”, which all have the same head office address as the Applicant and which I understand to be comprised within the Quint family real-estate portfolio. As a matter of fact, I note that most, if not all, of these contracts were signed by Theodore, acting for the Provider, and John Waxlax, acting for the Client.

[92] In particular, I note that these management contracts provide that the Applicant is responsible for providing i) “real-estate investment opportunities” (including for example to search for and identify real estate investment opportunities on behalf of the Client); ii) “development or real estate” services (including, for example, (a) to engage on behalf of the Client the appropriate professionals in regards to the acquisition of land to prepare plans for its development; (b) to act as liaison with the governmental authorities at the Municipal, Provincial and/or Federal levels; (c) to manage the construction of the project; and (d) to provide building management services for or on behalf of the Client); and iii) liaison with the Client’s tenants, negotiation of leases with potential tenants, etc.

Exhibit P-9 of the Waxlax Declaration

[93] Mr. Waxlax describes this exhibit as a “copy of the management contracts between [Quint Hotels], which manages under license from Quintcap various real estate owned by different clients”. Mr. Waxlax adds that, according to such licence, Quintcap controls the quality of the services rendered by its licensee under the QUINTCAP Marks.

[94] As pointed out by the Opponent, there is again no reference to the Mark in these agreements. However, I do not consider the absence of display of the Mark in these agreements to put into issue the claimed date of first use of the Mark, as this does not necessarily mean that it was not displayed elsewhere at the material time.

Exhibit P-10 of the Waxlax Declaration

[95] Mr. Waxlax describes this exhibit as a “copy of invoices from the licensee, [Entreprises Gordon], to the clients for the management services”. As pointed out by the Opponent, none of these invoices bear the Mark or refer to the Mark.

[96] However, I do not consider the absence of display of the Mark on these invoices to put into issue the claimed date of first use of the Mark, as this does not necessarily mean that it was not displayed elsewhere at the material time. Furthermore, I note that Mr. Waxlax explains at paragraphs 29 and 32 of his declaration that:

29. Since at least January 2015 the management services under the QUINTCAP Marks are rendered by [Entreprises Gordon] by way of a license agreement initially verbal and later signed between this entity and Quintcap. The licensee replaces Quintcap on various management contracts. According to such license agreement, Quintcap controls the quality of the services rendered by its licensee under the QUINTCAP Marks.

32. Between 2015 and 2017 inclusive, the real estate asset management services which consists [*sic*] of cultivating the market value of properties so ownership can increase its returns therefore maximizing the property value, under the QUINTCAP Mark, were also rendered by Les Investissements T & G Ltée by way of a verbal license agreement between this entity and Quintcap. The licensee replaces Quintcap on various management contracts. According to such license, Quintcap controlled the quality of the services rendered by its licensee under the QUINTCAP Mark.

[97] I further note that the clients identified in the invoices are all located at the same address as the Applicant and that the invoices cover management fees as well as construction work relating to buildings/projects identified in the Applicant’s brochure [Exhibit P-7].

Exhibit P-11 of the Waxlax Declaration

[98] Mr. Waxlax describes this exhibit as “the leasing contract [...] showing that leasing services have been rendered by Quintcap over the years”.

[99] As pointed out by the Opponent, there is again no reference to the Mark in these documents. However, I do not consider the absence of display of the Mark on the exhibited leasing contracts to put into issue the claimed date of first use of the Mark, as this does not necessarily mean that it was not displayed elsewhere at the material time.

Exhibit P-12 of the Waxlax Declaration

[100] Mr. Waxlax describes this exhibit as “some plans showing the real estate asset management services rendered by the licensees under the QUINTCAP Marks”. As noted by the Opponent, the Mark is not included anywhere on these architectural plans. However, I do not consider the absence of display of the Mark on these architectural plans to put into issue the claimed date of first use of the Mark. If anything, I find that these plans, which all apparently relate to construction/renovation work for one of the buildings mentioned in the exhibited invoices [Exhibit P-10], merely illustrate that Investissements T & G retained the services of architect firms for the preparation of these plans.

Exhibits P-13 and P-14 of the Waxlax Declaration

[101] Mr. Waxlax describes Exhibit P-13 as “the signatures that are used electronically whenever an employee of Quintcap communicates or has dealings by email with clients and prospective clients”. He asserts that these “signatures have been used since the adoption of the QUINTCAP Marks by Quintcap.” In the same vein, Mr. Waxlax describes Exhibit P-14 as “business cards that have been used and disseminated and are still in use and in distribution showing the QUINTCAP Marks”. The Opponent submits that as none of these exhibits are dated, they cannot be said to demonstrate use of the Mark since at least as early as the claimed date of first use. This is true. However, none of these exhibits put into issue the claimed date of first use of the Mark.

Conclusion on the section 30(b) ground of opposition

[102] While the Applicant’s evidence of use of the Mark is not perfect and many of the above-described exhibits do not display the Mark, I find that such evidence is not clearly inconsistent with and does not put into issue the Applicant’s claimed date of first use of the Mark in association with the Services. In this regard, I agree with the Applicant that I can take an “holistic” approach for the determination of the date of first use of the Mark.

[103] First, with respect to the Opponent’s pleading that the Mark has not been used as a trademark, but instead has functioned as a trade name, I acknowledge that the distinction

between a trade name and a service mark can be unclear. However, trade name use and trademark use are not mutually exclusive, especially in association with services [*Consumers Distributing Co/Cie Distribution aux Consommateurs v Toy World Ltd*, 1990 CasrwellNat 1398 (TMOB)]. The question is whether the Mark is identifiable as a trademark and not merely as a corporate name or corporate identifier. In this case, I find that the Mark (as displayed, for example, in the Applicant's website excerpts [Exhibit P-6] and brochure [Exhibit P-7]) stands out to create a distinct impression apart from the remaining wording, to the extent that the public would perceive such use as a trademark on its own and not merely identification of a legal entity.

[104] Second, with respect to the Opponent's argument that the Applicant's Services are not provided to third parties but rather to related corporate entities comprised within the Quint family real-estate portfolio and, as such, cannot be considered to be offered pursuant to section 4(2) of the Act, I note that it is well-established that services are generally granted a generous or broad interpretation under the Act [*Aird & Berlis v Virgin Enterprises Ltd* (2009), 78 CPR (4th) 306 (TMOB)] and that, as long as some members of the public, consumers, or purchasers, receive a benefit from the activity, it is a service [*Live! Holdings, LLC v Oyen Wiggs Green & Mutala LLP*, 2019 FC 1042, aff'd 2020 FCA 120].

[105] Putting aside for the moment the issue of use of the Mark *per se*, I find that the fact that the Applicant's Services have been rendered to related entities does not by itself undermine the Applicant's Services. Furthermore, contrary to the Opponent's position, I find that most, if not all, of the Applicant's Services cannot be considered as having been necessarily restricted only to related entities within the Quint family real-estate portfolio. Indeed, as per the various examples of descriptions of real estate projects found in the Applicant's brochure and press articles highlighted above, the Applicant has, for instance, i) been working with the municipality of La Prairie to develop the *Symbiocité* project; ii) been given the mandate to build a second FLEX building for Schneider's ALSTOM Group; and iii) been responding to tenant *Lou-tech Industriel's* needs.

[106] Third, with respect to the issue of use of the Mark *per se* in association with the Applicant's Services, I note that both in his solemn declaration and during his cross-examination, Mr. Waxlax has made reference to part of the Applicant's Services having been rendered by the

Applicant's licensees Quint Hotels, Entreprises Gordon or Investissements T & G. More particularly, according to Mr. Waxlax's cross-examination, each of these licensees has "replaced Quintcap" on various management contracts. In view of my finding above with respect to the groundlessness of the Applicant's objection to providing a copy of the written license agreements (if any) between the Applicant and Quint Hotels and Entreprises Gordon, I am drawing a negative inference and conclude that no such written license was ever entered into between them with respect to the use of the Mark. However, and notwithstanding Ian's assertion that "there was never any license agreement, [...] between the Applicant and any of its alleged licensees" [para 17 of the Second Quint Declaration], I am not prepared to conclude that no verbal license agreement or implicit license agreement existed at the claimed date of first use of the Mark and thereafter between the Applicant and the entities Quint Hotels, Entreprises Gordon and Investissements T & G and that the Applicant did not or does not control the character or quality of the Services performed by its licensees for the following reasons.

[107] I am not prepared to afford weight to this particular assertion of Ian as I have some reservations with respect to Ian's credibility in this regard. More particularly, it is not clear to me that Ian had extensive knowledge of the Applicant's activities. Rather, it is my understanding that Ian would have been involved in a limited number of real estate projects, namely those listed in the First Quint Declaration, which did not include, for example, the *Symbiocité* project in La Prairie. Furthermore, for those projects for which Ian was allegedly responsible for, the Opponent's evidence fails to contradict the fact that they are listed in the Applicant's brochure [Waxlax, Exhibit P-7] as projects of the Applicant. Stated differently, I am not prepared to prefer Ian's testimony over Mr. Waxlax's testimony.

[108] In this regard, I note that throughout his cross-examination, Mr. Waxlax made numerous references to the fact that the controlling shareholder and the controlling manager of all of the above-mentioned licensees is Theodore and that to the extent that each of them would ever use the Mark, that would only be at the direction of Quintcap [see, for example, cross-examination transcript, pp 12, 37, 38 and 43].

[109] In fact, as explained by Mr. Waxlax during his cross-examination, "every aspect of, whether it was construction or ongoing repair or maintenance, leasing, acquisition of the land or

the building, the construction of the building, were all done by entities controlled by Quintcap” [cross-examination transcript, p 43], with every “specific companies [having] different functions within the Quintcap world” [cross-examination transcript, p 12].

[110] I find these assertions of Mr. Waxlax consistent with the general descriptions found in the Applicant’s website extracts and the various client testimonials reproduced in Schedule A, which often refer to the “Quint Group” or the “Quint team”. I also note that Mr. Waxlax’s assertions with respect to Theodore’s involvement, as President of the Applicant, are supported to some extent by a few of the press articles reporting news about the *Symbiocité* project [Exhibit P-5].

[111] Furthermore, while I acknowledge that the evidence of record does not show how the Mark would have been used by any of the Applicant’s licensees with any of the Services as of the material time to assess the present ground of opposition, the fact remains that the Mark has been displayed on the Applicant’s website along with a description of its services, as shown in the website extracts of Exhibits P-6, P-15 and IQ-2.

[112] In this regard, it is worth reminding that when given an opportunity to comment on the website extracts of Exhibit IQ-2 presented to Ian during his cross-examination on the Second Quint Declaration, the Opponent, instead of strengthening Ian’s credibility that was under attack with respect to his sworn statement that there had not been *any* use of the Mark as of September 2013, elected not to respond and maintained its objection. I find this is particularly puzzling given Ian’s assertions contained at paragraph 10 of the First Quint Declaration, according to which he updated the management office of the Applicant “that had grown stale and was technologically far behind industry standards [...] and also *by building an office website*” [my emphasis].

[113] Finally, while the Opponent’s reply evidence does contradict to some extent Mr. Waxlax’s assertions of use of the Mark on the pylons depicted in Exhibits P-3 and P-4 in that they had not yet been installed as of the claimed date of first use of the Mark, still Ian does not contradict that the Mark was displayed on the said pylons, albeit “much later than September 2013”. Moreover, the fact remains that the final production order of the pylon for 3555 boulevard Matte in Brossard was placed in July 2013 [undertaking U-2 to Mr. Waxlax’s

cross-examination transcript], which is consistent with the redesign of the Applicant's website in or around June 2013 [Exhibit IQ-2], and the Applicant's brochure dated May 2013 [Exhibit P-7].

[114] In view of all the foregoing, the section 30(b) ground of opposition is rejected.

Section 30(i) ground of opposition (Applicant could not be satisfied that it is entitled to use the Mark)

[115] The section 30(i) ground of opposition, as pleaded by the Opponent, seems to have four prongs, namely that the Applicant could not have been satisfied that it is entitled to use the Mark in Canada in association with the Services because (i) the Mark is not registrable; (ii) the Mark is not distinctive; (iii) the Applicant is not the person entitled to registration; and (iv) the principal of the Applicant had a business relationship with the principal of the Opponent during which the principal of the Opponent created, designed and implemented the term QUINTCAP, based on their respective surname QUINT, for use in association with the management by the principal of the Opponent of a multitude of third-party properties.

[116] I find that the first three prongs must be rejected as they are not valid grounds of opposition under section 30(i) of the Act and instead fall respectively under section 12 of the Act (non-registrability – discussed below), section 2 of the Act (non-distinctiveness – discussed below), and section 16 of the Act (person not entitled to registration – not pleaded by the Opponent).

[117] With respect to the fourth prong, it is not clear whether the Opponent is again pleading the Applicant's non-entitlement to registration (which, as indicated above, is not in itself a valid ground of opposition under section 30(i) of the Act) or bad faith of the Applicant. Regardless, I find this fourth prong must also be rejected.

[118] Section 30(i) of the Act requires that an applicant include a statement in its application that it is satisfied that it is entitled to use the trademark in Canada, as has been done by the Applicant in this case. It is well established in the jurisprudence that a ground of opposition based on section 30(i) should only succeed in exceptional circumstances such as where there is evidence of bad faith on the part of the applicant [*Sapodilla Co Ltd v Bristol-Myers*

Co (1974), 15 CPR (2d) 152 (TMOB)]. However, there is no evidence that the present case is an exceptional case or that the Applicant acted in bad faith at the filing date of the Application, or at any other time. The mere fact that Ian may have been involved in the creation of the Mark (be it as an employee of the Applicant or through his alleged partnership with Theodore) does not in and of itself support an allegation that the Applicant could not have been satisfied of its entitlement to use the Mark. As indicated above, the mere creation of a word or design that becomes a trademark does not in itself provide trademark rights.

Section 12(1)(a) of the Act (Mark not registrable as it is the name or surname of an individual)

[119] Section 12(1)(a) of the Act stipulates that a trademark is registrable if it is not a word that is primarily merely the name or the surname of an individual who is living or who has died within the preceding thirty years.

[120] The leading cases pertaining to section 12(1)(a) are *Canada (Registrar of Trademarks) v Coles Book Stores Ltd* (1972), 4 CPR (2d) 1 (SCC); *Gerhard Horn Investments Ltd v Registrar of Trademarks* (1983), 73 CPR (2d) 23 (FCTD); and *Standard Oil Co v Canada (Registrar of Trade Marks)* (1968), 55 CPR 49 (Ex CR), which have enunciated the test under section 12(1)(a) as two-fold:

- The first condition is whether the trademark is the name or surname of a living individual or an individual who has died in the preceding thirty years;
- If the answer to the first question is affirmative, then the Registrar must determine if, in the mind of the average Canadian consumer, the trademark is "primarily merely" a name or surname, rather than something else.

[121] The Opponent's initial burden is to satisfy the first condition of the test, that is to provide sufficient evidence that the trademark is the name or surname of a living individual or individual who has died in the preceding thirty years (*e.g.* telephone listings) [see *Image Intellectual Property Law Professional Corporation v Pinnacle Foods Group LLC*, 2013 TMOB 62

[122] In the present case, the Mark may be derived from the surname QUINT, but it has not been established that QUINTCAP is primarily merely the name or the surname of an individual.

As noted above in my review of the Dell'Orto Declaration, the Opponent adduced no evidence that would point to the existence of the unitary word "QUINTCAP" as a surname. Furthermore, the Mark comprises a significant and elaborate design element.

[123] Accordingly, the section 12(1)(a) ground of opposition is rejected.

Section 2 ground of opposition (Mark not distinctive of the Applicant)

[124] As a preliminary matter, I find the ground, as pleaded, to be ambiguous. That said, I have to read the pleading in conjunction with the evidence [*Novopharm Ltd v Astrazeneca AB*, 2002 FCA 387]. With this in mind, I find the ground can be construed as alleging that the Mark is not distinctive pursuant to section 2 of the Act in view of i) the Opponent's trade name Groupe Quint and/or trademark GROUPE QUINT & Design [as reproduced in Exhibits IQ-3 or IQ-4 to the cross-examination transcript of the First Quint Declaration], which would have become known in the real estate industry; and ii) the fact that QUINT is the surname of both Ian and Theodore (and other individuals), as well as the fact that Ian personally would have taken an important place in the real estate industry and rendered or sold services under his surname [per paragraph 25 of the First Quint Declaration].

[125] Section 2 of the Act, as it then was, defined "distinctive" as follows:

distinctive, in relation to a trademark, means a trademark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them.

[126] A trademark "actually distinguishes" by acquiring distinctiveness through use, resulting in distinctiveness in fact. On the other hand, a trademark that is "adapted so to distinguish" is one that does not depend upon use for its distinctiveness because it is inherently distinctive [see *Astrazeneca AB v Novopharm Ltd*, 2003 FCA 57, at para 16].

[127] I will start my analysis by considering the first prong of the ground, as construed.

First prong of the ground of opposition

[128] In order to meet its evidential burden with respect to this ground, the Opponent has to demonstrate that its trade name Groupe Quint and/or trademark GROUPE QUINT & Design in association with relevant goods or services, was sufficiently known at the date on which the statement of opposition was filed (i.e. May 25, 2016), to negate the distinctiveness of the Mark [*Motel 6, Inc v No. 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International, LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]. More particularly, the Opponent has to show that its trade name and/or trademark in association with relevant goods or services was known in Canada to some extent, having a “substantial, significant or sufficient” reputation to negate distinctiveness, or else “well known in a specific area of Canada” [*Bojangles, supra*, at para 33]. In this regard, an opponent’s evidence is not restricted to the sale of goods or services in Canada. It may also be based on evidence of knowledge or reputation of an opponent’s trademark or trade name including that spread by means of word of mouth or newspaper and magazine articles [*Motel 6, Inc v No 6 Motel Ltd, supra*, at 58-59].

[129] Based on the evidence of record, I am not satisfied that the Opponent has met its burden. More particularly, I note that none of Ian’s general allegations pertaining to the Opponent’s business and reputation have been supported by corroborative evidence. Furthermore, while Ian asserts that the Opponent would be “managing over four times as much square footage of properties as the Applicant” [para 22 of the First Quint Declaration], the Opponent’s evidence is much too vague to determine the extent to which the Opponent’s trade name and/or trademark would have become known in Canada, or in any specific area of Canada.

[130] Accordingly, the first prong of the section 2 ground of opposition, as construed, is rejected.

Second prong of the ground of opposition

[131] At the hearing, the Opponent relied on section 4.9 of the *Trademarks Examination Manual* relating to when an objection as to the inherent distinctiveness of a trademark shall be raised by the Examiner pursuant to section 32(1)(b) of the Act. More particularly, the Opponent drew a parallel between the Mark and the examples of trademarks that would be considered not

inherently distinctive listed in section 4.9.5.11 of the Manual. The listed examples lack inherent distinctiveness because they consist of a combination of unregistrable elements (e.g. ALFREDSON'S CARROTS (in association with the goods "carrots"), which consists of a word that is primarily merely a surname and a word that is the name of the goods). The Opponent further relied on the allegations contained in the Quint Declaration purporting to establish Ian's personal reputation in the real estate industry.

[132] For the reasons below, I am not satisfied that the Opponent has met its burden.

[133] First, as per my analysis above of the section 12(1)(a) ground of opposition, the Mark may be derived from the surname QUINT, but it is not primarily merely the name or the surname of an individual.

[134] Second, the Opponent's evidence fails to establish that Ian, personally or through the Opponent, would have offered or rendered any kind of services under the name QUINT so as to negate the distinctiveness of the Mark.

[135] Third, the evidence of record fails to show that the use of QUINT by any of the individuals in this case as a surname negates the distinctiveness of the Mark. In particular, while I am prepared to infer, based on the various testimonials found in the Applicant's brochure [Waxlax Exhibit P-7], that Ian may have acquired some reputation among the Applicant's clientele by reason of his role within the Applicant or other entities in the "Quint team" and/or "Quint Group", the evidence of record falls short of showing that Ian had such a significant reputation that the distinctiveness of the Mark was negated. In this regard, I shall add that I do not consider the references to the "Quint team" or the "Quint Group" found in these testimonials to refer to the Opponent, which did not exist at the time of the brochure's publication. In fact, based on the evidence of record, I am not prepared to conclude that any of the references to a "Quint team" or "Quint Group" mentioned in the testimonials (in either the Applicant's brochure or its website extracts [Exhibit P-6]) refer to a separate legal entity, rather than to the Applicant's licensees collectively. In the same vein, the evidence of record falls short of establishing that any other individual, including Theodore, personally or through other entities comprised within the Quint family real estate portfolio, had such a significant reputation that the distinctiveness of the Mark was negated.

[136] A trademark’s distinctiveness resides in its ability “to indicate the source of a particular product, process or service in a distinctive manner, so that, ideally, consumers know what they are buying and from whom” [*Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC at para 39]. Here, the Mark is still adapted to distinguish the Services despite the fact that QUINT is a surname due to the fact that the Mark is for the word QUINTCAP and the elaborate and significant design element made of the stylized letter “Q” comprising the Mark. In this way, this case is distinguishable from other cases in which the registration of a surname was expunged for lack of distinctiveness such as *CIBC World Markets Inc v Stenner*, 2010 FC 397 and *General Motors of Canada v Décarie Motors Inc*, [2001] 1 FC 665 (FCA).

[137] In making this finding, I make no comment on Ian’s right to use his personal name or surname as part of a trademark or trade name, as this is not before me.

[138] Accordingly, the second prong of the section 2 ground of opposition, as construed, is also rejected.

DISPOSITION

[139] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Annie Robitaille
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Excerpts from the Applicant's brochure

Examples of descriptions [emphasis added]:

- “Quintcap’s commercial portfolio consists of over 15 buildings located in the Greater Montreal Area [...].

Many properties were either built or renovated by Quintcap and are all currently managed by our company. Quintcap is proud to do business with companies on a local, national as well as international basis.

Our philosophy is to manage our properties to the highest standards in the industry. We take pride in our product and make sure our buildings are always immediately immaculately maintained by first tier staff and suppliers. Our relationships with our tenants are of the utmost importance [...].”

- “One of Quintcap’s specialties is delivering quality build-to-suit buildings for AAA tenants.”
- “Quintcap *has developed approximately 5,000 residential building lots and has built approximately 1,500 residential units* on the South Shore of Montreal [...]. Quintcap also renovates and manages several apartment buildings in the City of Montreal. We are also active in the condo development market in downtown Montreal as well as [...].”
- Symbiocity – La Prairie:

“Symbiocity is the latest phase of 25,000,000 sq. ft. residential land development by Quintcap in La Prairie. The project consists of approximately 2,000 residential units and a 5,000 square feet of commercial development anchored by Metro Plus. *Quintcap master planned the entire development including the servicing and all the negotiation with the Municipality and the Minister of the Environment as well as the Minister of Transport.*”

- Place Saint-Roch (188 rue Lasalle, Saint-Constant):

“Quintcap purchased 120,000 sq. ft. of industrially zoned land and has changed the zoning to residential use for a project consisting of over 30 units of townhouses and 9 triplexes.”

- Complexe Schneider Electric (4100 rue de Java, Brossard):

“In 2012, due to Schneider Electric’s overwhelming satisfaction with Quintcap’s management team, they have decided to relocate the operations of an independent division of theirs in order to bring the building under our management. *Quintcap was*

given the mandate to build a second 35,000 sq. ft. FLEX building for Schneider's ALSTOM Group."

- Hilton Hampton Inn & Suites (2156 Drummond, Montreal):

"Quintcap will expand its hotel portfolio by building a new 141 room Hilton Hampton Inn & Suites on a vacant parking located on Drummond Street [...]

Quintcap has worked in conjunction with the city of Montreal in order to preserve the façade of a small historic building [...]."

Examples of client testimonials [emphasis added]

- Location SMS - Édifice de location Komatsu (3350 boulevard Matte, Brossard):

"Cher Monsieur Ian Quint,

Nous tenons à vous remercier vous et toute votre équipe pour la réalisation de notre projet à Brossard.[...]

C'est de concert avec votre service d'architecte que nous avons établi les plans de l'immeuble dans lequel notre comptoir de location [...].

De plus, la construction s'est faite selon nos demandes et selon les délais [...].

C'est donc en tant que fier locataire de votre immeuble [...] que nous tenions à vous remercier d'avoir personnalisé vos locaux à notre image et d'avoir fait preuve d'autant de professionnalisme tout au long du projet."

[FREE TRANSLATION]:

"Dear Mr. Ian Quint,

We would like to thank you and your entire team for carrying out our project in Brossard. [...]

*It is in concert with *your architectural service* that we have drawn up the plans of the building in which our rental counter [...].*

*In addition, *the construction was done according to our requests* and according to the deadlines [...].*

It is therefore as a proud tenant of your building [...] that we wanted to thank you for having customized your premises in keeping with our image and for having shown so much professionalism throughout the project."

- Data Compagnies du Groupe Data, 9005 boulevard du Quartier, Brossard :

"To: Ian Quint,

I would like to take the time to personally thank everyone involved with Mr. Quint in preparing the new site for our print center. [...] I can say without hesitation that *the Quint team is the best*. The Quint team has excellent ethics *and listened to our needs to make this relocation project worry free*. [...] *I will definitely recommend your group to anyone looking for a great custom space*. We are looking forward to being your tenant in the future.”

- Lou-tec Industriel, Complexe Ignace, Brossard:

“Bonjour M. Quint,

Depuis le début de notre relation avec Quintcap en tant que locataire d’espaces industriels, je peux affirmer que nous sentons que l’équipe Quint est attentive à nos besoins [...].”

[FREE TRANSLATION]:

“Hello Mr. Quint,

Since the beginning of our relationship with Quintcap as a tenant of industrial spaces, I can say that we feel that the Quint team is attentive to our needs [...].”

- CFRST Franchise Operations

“The first Marriott with Quint Hotels is the Fairfield Inn & Suites at the Montreal Airport in 2008. [...]. Mr. Ted Quint and his organization went above and beyond the prototypical standards when they built this project. [...]

QuintCap / Quint Hotels is precisely the type of partner that Marriott International seeks [...].”

- Choice Hotels Canada:

“I am extremely proud of the 30-year old relationship between Choice Hotels and the Quality Inn & Suites. Since first opening its doors as a Quality property in June 1980, Mr. Ted Quint and his team have partnered with Choice Hotels [...]

All levels of hotel management continually display excellent operational distinction, and repeatedly leverage all sales, marketing and operations resources available to maximise performance. Quintcap is a shining example of a company that continually invests in management and product to gain a competitive advantage.”

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

HEARING DATE 2021-07-13

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