

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 194

Date of Decision: 2022-09-29

IN THE MATTER OF AN OPPOSITION

Blaze Pizza, LLC

Opponent

and

Carbone Restaurant Group Ltd.

Applicant

**1,866,711 for
FAST FIRED BY CARBONE
& Design**

Application

[1] Blaze Pizza, LLC (the Opponent) opposes application no. 1,866,711 (the Application) for registration of the trademark FAST FIRED BY CARBONE & Design (the Mark), filed by Carbone Coal Fired Pizza Inc. and currently standing in the name of Carbone Restaurant Group Ltd. (collectively and interchangeably, the Applicant). The Mark consists of a flame design (the Carbone Flame Design) followed by the words “FAST FIRED” in a tall, outline font, above the phrase “BY CARBONE” flush right in relatively small print of a darker shade, as reproduced below:



[2] The opposition is based primarily on the Opponent’s allegation that the Mark, for use in association with restaurant services, is confusing with the Opponent’s registered trademark

FAST-FIRE'D BLAZE PIZZA & Design (the Opponent's Trademark) and variations thereof, used in association with similar restaurant services. The Opponent's Trademark consists of the words "BLAZE PIZZA" on a solid rectangle, with a flame design in a circle (the Blaze Flame Design) between those two words, and the phrase "FAST-FIRE'D" in relatively small print right-aligned above the rectangle, as reproduced below:



[3] The opposition is rejected. For the reasons that follow, I find that the Mark is not confusing with the Opponent's Trademark. Furthermore, the Opponent has not established its use of any variations of the Opponent's Trademark in Canada in a manner and to an extent sufficient to support a reasonable likelihood of confusion. The opposition also includes a ground pleading that the Applicant could not have been satisfied it was entitled to use the Mark in Canada because it appropriates numerous elements of the Opponent's Trademark and trade dress for the purpose of creating consumer confusion; however, the Opponent has not met its evidential burden with respect to that ground of opposition.

THE RECORD

[4] The Application was filed on November 7, 2017, by Carbone Coal Fired Pizza Inc. (Carbone Pizza), based on proposed use of the Mark in Canada in association with the services "restaurant services, take-out and delivery services and catering services" (the Services). The Application was subsequently assigned from Carbone Pizza to Carbone Restaurant Group Ltd. on May 12, 2021, as recorded by the Registrar on June 25, 2021.

[5] The Application was advertised for opposition in the *Trademarks Journal* on August 29, 2018, and opposed on January 28, 2019, when the Opponent filed a statement of opposition pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The statement of opposition was amended on March 12, 2019, in response to the Applicant's request for an interlocutory ruling striking part of the pleadings for insufficiency, and further amended on July 8, 2021, to reflect the assignment of the Application, update the identification of the Applicant's agent, and correct minor typographical errors. The request for an interlocutory ruling

was refused on April 10, 2019. A counter statement denying all of the allegations contained in the statement of opposition was filed on April 23, 2019, and it is broad enough to cover all of the allegations in the statement of opposition as last amended.

[6] The grounds of opposition allege that the Application does not comply with the requirements of section 30(i) of the Act; that the Mark is not registrable under section 12(1)(d) of the Act; that the Applicant is not entitled to registration under section 16(3)(a) of the Act; and that the Mark is not distinctive as defined in section 2 of the Act. Each ground of opposition relies on one or more of the following trademarks and trade names, particularized in the introductory paragraphs of the statement of opposition, which may be summarized as follows [boldface in original]:

- The Opponent’s Trademark, identified as “the **FAST-FIRE’D BLAZE PIZZA & Design** trademark” [para 12].
- The trademark FAST-FIRE’D, which is shown in the image below, and is used in Canada both as part of Opponent’s Trademark and standing alone [para 10]:



[I note that the above image depicts two signs. The first is an overhead sign displaying a logo that consists of three elements in sequence: the words BLAZE PIZZA in tall lettering, the Blaze Flame Design, and the phrase FAST-FIRE’D in smaller lettering with the word “FAST-” above the word “FIRE’D”(the Long Logo). The second sign is a

windowpane displaying a logo that consists of the word BLAZE in tall lettering above the word PIZZA in small lettering, all on a solid, rimmed, roughly pizza-shaped circle (the Round Logo). Although the bottom of the windowpane is obscured, I note that the Opponent's evidence frequently shows the phrase FAST-FIRE'D below the Round Logo.]

- The “trademark **BLAZE PIZZA**”, registered in Canada under no. TMA 922,448, as well as the “BLAZE PIZZA trade name” [para 11].
- The trademark FAST-FIRE'D registered in the United States, whose use in states bordering Canada and via the Internet and social media platforms has reached Canada [para 12]. This trademark is not registered in Canada.

[7] Numerous amendments to the Act came into force on June 17, 2019. Pursuant to the transitional provisions in section 70 of the Act for applications advertised before June 17, 2019, the grounds of opposition will be assessed based on the Act as it read immediately before amendment, an exception being that the definition of confusion in sections 6(2) to 6(4) of the Act as it currently reads will be applied.

[8] In support of its opposition, the Opponent relies on the following evidence:

- An affidavit sworn by its co-founder and Chairman, Richard Wetzel, on August 21, 2019. Mr. Wetzel describes the Opponent's restaurant business and trademark use, and also comments on the Applicant's use of the Mark and associated trade dress. Mr. Wetzel was cross-examined on his affidavit and the transcript and answers to undertakings are of record.
- An affidavit sworn on August 16, 2019, by Dane Penney, a trademark searcher with the Opponent's agent. On August 1, 2019, Mr. Penney conducted a search of a LexisNexis database covering Canadian newspaper and magazine articles for references to the phrase “BLAZE PIZZA”. The automatically generated list of hits, as well as the articles themselves, are attached as Exhibit A to his affidavit.

[9] In support of the Application, the Applicant relies on the affidavit of Carbone Pizza's President and CEO, Benjamin Nasberg, which was sworn on December 18, 2019. Mr. Nasberg describes the Applicant's restaurant business, its use and promotion of the Mark, and an earlier CARBONE COAL FIRED PIZZA logo that incorporates the Carbone Flame Design. He also comments on his understanding of the phrase "fast fired" and its use in the marketplace. Mr. Nasberg was cross-examined on his affidavit; the transcript and answers to undertakings are of record.

[10] I note that both Mr. Wetzel and Mr. Nasberg, in their respective affidavits, express opinions on matters such as the degree of resemblance between the parties' trademarks, the trademarks' distinctiveness, and the likelihood of confusion. However, neither affiant has established himself as an expert in trademark law and neither is independent of the parties. I have therefore disregarded their opinions on the questions of fact and law to be decided in this proceeding.

[11] Both parties filed written representations; no oral hearing was held.

EVIDENTIAL BURDEN AND LEGAL ONUS

[12] In an opposition proceeding, the legal onus is on the applicant to show that its application complies with the provisions of the Act. However, for each ground of opposition, there is an initial evidential burden on the opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist. If this initial burden is met, then the applicant must satisfy the Registrar, on a balance of probabilities, that the ground of opposition should not prevent registration of the trademark at issue [*Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB); *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)].

GROUND OF OPPOSITION BASED ON REGISTRABILITY UNDER SECTION 12(1)(D)

[13] The Opponent pleads that the Mark is not registrable pursuant to section 12(1)(d) of the Act, because it is confusing with the Opponent's Trademark, registered under no. TMA1,013,451 (the Opponent's Registration) for use in association with the goods "pizza" and the services "restaurant services".

[14] The material date for this ground of opposition is the date of the Registrar's decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)]. An opponent's initial burden is met if the registration relied upon is in good standing on the material date and the Registrar has discretion to check the Register in this respect [per *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Having exercised this discretion, I confirm that the Opponent's Registration remains in good standing.

[15] The Opponent having met its evidential burden, the onus is now on the Applicant to satisfy the Registrar, on a balance of probabilities, that the Mark is not likely to cause confusion with the Opponent's Trademark.

The test for confusion

[16] The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person [section 6(2) of the Act]. Thus, the test for confusion does not concern confusion of the trademarks themselves but rather confusion as to whether the goods and services associated with each party's trademark come from the same source. Where it is likely to be assumed that the applicant's goods or services either come from the opponent or are approved, licensed, or sponsored by the opponent, it follows that the trademarks are confusing [see *Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD)].

[17] The test is to be applied as a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applicant's trademark at a time when he or she has no more than an imperfect recollection of the opponent's trademark and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the trademarks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23]. In applying the test, regard must be had to all the surrounding circumstances, including those set out in sections 6(5)(a) to (e) of the Act, but these criteria are not exhaustive and the weight given to each factor will vary in a context-specific analysis [*Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22].

Section 6(5)(e): Degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them

[18] The degree of resemblance between the trademarks at issue is often the factor likely to have the greatest effect on the confusion analysis and thus is an appropriate starting point [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27]. In assessing resemblance, each trademark must be considered as a whole and assessed for its effect on the average consumer as a matter of first impression; it is not the proper approach to set the trademarks side by side and carefully examine them to tease out similarities and differences. However, considering a trademark as a whole does not mean that a dominant component that would affect an average consumer's overall impression of the trademark should be ignored. The preferable approach is to begin by determining whether there is an aspect of each trademark that is "particularly striking or unique" [*ibid.* at para 64].

[19] I consider the most striking and unique aspect of the Opponent's trademark to be the word BLAZE. I find that the remaining elements, including the flame design, refer more directly to the nature of the Opponent's goods, namely pizzas cooked fast with fire, and services, namely restaurants serving such pizzas. I also find the portion of the trademark combining the words BLAZE PIZZA with a flame design, highlighted by a rectangular background, to be visually dominant over the considerably smaller phrase FAST-FIRE'D added outside the rectangle.

[20] I acknowledge that the first portion of a trademark is often considered to be the most important for the purpose of distinction [see *Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)]. However, it is also well established that, when the first portion of a trademark is descriptive or suggestive of a character or quality of the goods or services, its importance diminishes [see *Merial LLC v Novartis Animal Health Canada Inc.* (2001), 11 CPR (4th) 191 (FCTD); and *Phantom Industries Inc v Sara Lee Corp* (2000), 8 CPR (4th) 109 (TMOB)]. In the present case, I do not consider the suggestive qualifier FAST-FIRE'D in relatively small print to detract from the impact of the portion of the trademark within the rectangle, and *its* first element, BLAZE.

[21] The Mark, in my view, consists of two major portions: (i) the combination of the words FAST FIRED with a flame design, all in a lighter shade, and (ii) the phrase BY CARBONE in a

darker shade. By virtue of its relative size and position, the first portion dominates the Mark visually. However, the phrase “BY CARBONE” stands out as the more unique and inherently distinctive element, given that the phrase “FAST FIRED” and the image of flames are suggestive of the nature of the Services.

[22] The Applicant submits that the word FAST in the Mark is intended to be an acronym for “Fresh, Authentic, Sustainable and Tailored”, as described on the Applicant’s website and on wall art at each of the restaurants [paras 15–16, Exhibits H, I]. The Applicant further submits that CARBONE is an Italian word meaning “charcoal”. However, there is no evidence that the average consumer would understand either meaning as a matter of immediate impression.

[23] On balance, although there is necessarily some degree of resemblance between the trademarks by virtue of the shared expression FAST FIRED (or phonetic equivalent) and the somewhat similar flame designs, I find that the trademarks differ as a whole visually, phonetically, and in ideas suggested, given the differences in the presentation of the shared elements and the additional differences created by the more unique elements. I find the idea conveyed by the Opponent’s Trademark as a whole is that of pizza cooked fast in a fiery blaze, provided by an entity aptly named “Blaze Pizza”. I find the idea conveyed by the Mark as a whole is that of cooking fast with fire, done by an entity named “Carbone”.

[24] The Opponent submits that the Mark suggests an entity providing FAST FIRED-brand goods and services while its own trademark similarly suggests an entity affiliated with the FAST FIRED brand. However, I consider it more likely that the diminutive element FAST-FIRE’D in the Opponent’s Trademark would be perceived as a descriptive qualifier, or at least a highly suggestive slogan, for BLAZE PIZZA-brand goods and services.

[25] I also note the Opponent’s submissions regarding the similarity in lettering styles between the two trademarks and the similarity in proportions of the elements. In this last respect, each trademark consists of a large, central, generally rectangular portion and a small, thin, right-aligned portion. However, I do not find the lettering style and layout features to be particularly striking or unique elements that would contribute significantly to the likelihood of confusion as a matter of first impression and imperfect recollection.

[26] Overall, I agree with the Applicant that the differences between the parties' trademarks dominate the common portions and I find the trademarks to be more different than they are alike. Consequently, the degree of resemblance factor favours the Applicant.

Section 6(5)(a): Inherent distinctiveness of the trademarks and extent to which they have become known

[27] Each of the parties' trademarks possesses a certain measure of inherent distinctiveness owing to the elements BLAZE and CARBONE.

[28] Conversely, I consider the phrases FAST FIRED and FAST-FIRE'D to be highly suggestive, if not descriptive, of the parties' goods and services. Indeed, the Opponent's own marketing materials demonstrate use of the phrase FAST-FIRE'D in descriptive contexts; for example, the Opponent's 2013 *www.blazepizza.com* homepage, as archived by the Internet Archive Wayback Machine, indicates that "Every gourmet pizza is fast fire'd over a blazing open flame", and an archived 2015 homepage advertises, "CUSTOM BUILT", "FAST FIRE'D", "ANY TOPPINGS • ALL ONE PRICE • 180 SECONDS" [Witzel, Exhibit H]. Similarly, articles in the press use the phrase "fast-fired" or "fast-fire'd" to describe the Opponent's concept, style of cooking, or oven [Penney, Exhibit A, pages 21, 58, 105, 107, 113].

[29] It is well established that a greater degree of discrimination may fairly be expected from the public in respect of trademark elements that are descriptive or suggestive of the goods or services to be provided, and that such elements are accordingly entitled to only a narrow ambit of protection [see *General Motors Corp v Bellows*, [1949] SCR 678, citing *Office Cleaning Services Ltd v Westminster Window & General Cleaners, Ltd* (1946), 63 RPC 39 at 41 (HL)].

[30] Distinctiveness can be enhanced through use and promotion [see *Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD)]. Both parties filed evidence in this respect.

Extent to which the Opponent's trademark has become known

[31] In his affidavit, Mr. Wetzel explains that the Opponent, since 2015, operates a chain of Blaze Pizza restaurants in Canada offering a counter service through which customers can customize a pizza that is assembled and baked while they stand in line [paras 2, 5, 7, U/T #5-7].

As of the date of Mr. Wetzel's affidavit, the Opponent had 20 such restaurant locations, notably in Alberta and Ontario, and franchise agreements for development in Manitoba [para 8].

[32] The restaurants are operated through licensed franchisees and the Opponent, through its wholly owned affiliate Blaze Pizza International LLC, controls the character and quality of the franchisees' operations, including through franchise agreements, operational standards, internal reporting structures, collection of consumer feedback, and inspection by representatives of the Opponent and its master franchisees [para 9, U/T #8]. In view of the foregoing, I am satisfied that any use of the Opponent's Trademark by the Opponent's licensed franchisees in Canada enures to the Opponent's benefit pursuant to section 50(1) of the Act.

[33] Mr. Wetzel states that each of the Opponent's Blaze Pizza restaurants, including those in Canada, is operated and marketed in association with the Opponent's Trademark and related trademarks, as well as trade dress consisting of a number of elements, including the Blaze Flame Design, the phrase FAST-FIRE'D, and a white-on-orange colour scheme [para 13]. He further states that these trademarks have been continuously used in Canada in the promotion of the Opponent's restaurants and pizza business since as early as 2015, while spill-over advertising from the United states and promotions in social media have reached Canadians since the first Blaze Pizza opened there in 2012 [para 14].

[34] By way of example, the following are some of the images of restaurant signage from specific Canadian restaurant locations, dating from 2016 to 2020, provided as answers to undertakings given during Mr. Wetzel's cross-examination [U/T #5-7, #35-36]:



[35] In applying the principles set out in *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA), I find that, in the first variation, namely the one incorporating the Round Logo, one of the dominant features, namely the flame design, has not been preserved, and a new, integral feature, namely the pizza-shaped background, has been added. However, I agree with the Opponent that the remaining variations, in which the dominant features of the Opponent's Trademark have been preserved but rearranged (including the different versions of the Long Logo), constitute acceptable variations of the registered trademark.

[36] With respect to the Long Logo, I would also note that, although the increase in size and prominence of placement of the FAST FIRE'D element, as well as its positioning to the right of the flame design, may increase the degree of resemblance between the parties' trademarks to a certain extent, my overall conclusion with respect to the degree of resemblance factor remains essentially unchanged when these variations are considered. The FAST-FIRE'D element remains highly suggestive, if not descriptive. Moreover, BLAZA PIZZA remains the larger and more prominent element and, in these variations, constitutes the important first portion of the trademark.

[37] Mr. Wetzel states that sales at the Opponent's restaurants in Canada since 2015 have generated in excess of \$45 million [para 17]. He further states that more than half a million dollars has been spent advertising and promoting the Opponent's brand in Canada and that, in addition, U.S. advertising and promotion has regularly spilled over into Canada, including Manitoba, since 2012 [paras 15, 18]. Such advertising and promotion includes a website at *blazepizza.com* launched in 2012, with "thousands" of unique monthly visits from Canada [para 21, Exhibits G–H]; social media accounts, including a Twitter account that has "many" followers located in Canada, [paras 22–24, Exhibits I–K]; and regular social media postings by basketball superstar LeBron James, who has followers in Canada [para 6, 14]. Although the sales and advertising figures are not broken down between the Opponent's Trademark and the Round Logo, I am prepared to accept, based on the images of advertising online and on the exterior signage depicted in the answers to undertakings, that a substantial portion of such revenues and expenditures may be attributed to the Opponent's Trademark.

[38] The website and social media pages employ the Opponent's orange and white colour scheme; feature the Blaze Flame Design as a recurring motif; and also depict various restaurant items such as menus, pizza boxes, and napkins featuring the Opponent's Trademark. On the website, the Opponent's Trademark is generally displayed as registered, in white-on-orange, with FAST-FIRE'D and the flame design in black, and it is displayed in the same manner on a sample menu and napkin furnished by Mr. Wetzel [Exhibits E and F]. The menu indicates that it is for a Detroit location, but Mr. Wetzel confirms that it was also used by each Blaze Pizza Restaurant in Canada [transcript page 23].

[39] Mr. Wetzel further notes that many Blaze Pizza restaurants are located in U.S. tourist venues visited by Canadians and that Canadians have ordered gift cards that can only be used at the Blaze Pizza restaurants in the United States [para 19]. However, in the absence of evidence of the extent of the reach and spill-over of U.S. advertising into Canada, the evidence in that regard is of limited assistance.

[40] Under cross-examination, Mr. Wetzel could not recall having either personal knowledge or information regarding various particulars of the Opponent's operations in Canada, including where restaurants are located, when they first opened, and what signage is used. However, despite his inability to answer the more specific questions posed to him, he appears to have had personal knowledge of the Opponent's business in general and access to its business records at the time his affidavit was sworn; indeed, he indicated that the particulars in his affidavit would have come from the Opponent's marketing or construction departments, but that after leaving the company he no longer has access to those records [transcript pages 21, 34, 41, 100]. Overall, I am satisfied that Mr. Wetzel, by virtue of his position and experience with the Opponent at the time he swore his affidavit, had knowledge of the matters to which he deposed.

[41] The Opponent also relies on Mr. Penney's search of newspapers, magazines, and periodicals, which located 46 articles from Canadian sources referencing "Blaze Pizza" over the years, including from major local papers such as the *Toronto Star*. An additional three press releases are provided as answers to undertakings from the cross-examination of Mr. Wetzel. However, few of these publications contain the phrase FAST-FIRE'D, and some of those that do

treat it not as a trademark but as a description of the Opponent's cooking concept or style, as noted above.

[42] In view of the foregoing, it appears that the Opponent's Trademark has become known to some extent in Ontario and Alberta starting in 2015.

Extent to which the Applicant's trademark has become known

[43] Mr. Nasberg explains that the Applicant opened its first restaurant under the Mark in Manitoba, on March 29, 2018, with the intention of building on the goodwill and reputation of its Carbone Coal Fired Pizza Italian-style family restaurants, the first of which had opened on July 12, 2011 [paras 6, 10, 13]. The logo used by the Applicant in association with the earlier restaurants (CARBONE COAL FIRED Logo) features the word CARBONE in large stylized lettering above a small Carbone Flame Design in a circle, all superimposed on a ring containing the words AUTHENTIC ITALIAN EST. 2010 in the upper half and the words COAL FIRED PIZZA in the lower half, as shown below [para 8]:



[44] At the time of Mr. Nasberg's affidavit, the Applicant operated four Carbone Coal Fired Pizza restaurants and had used the CARBONE COAL FIRED Logo on the restaurants' website, menus, and pizza boxes, as well as on its Facebook and Instagram pages [paras 6, 8]. I note that in the examples attached as Exhibit D to Mr. Nasberg's affidavit, the logo is displayed on the website and menu with the word CARBONE and flame in shades of red and orange while the remaining elements are in black or white. The logo is displayed in black on the pizza boxes and in white on an orange circle on the social media pages. Although the materials are undated, Mr. Nasberg confirmed under cross-examination that the menu in the exhibit is from 2011 [Q106–113] and I note that one of the Facebook posts is dated October 24, 2018.

[45] In June 2017, the Applicant decided to expand into the fast casual marketplace—which combines casual dining with the convenience of fast food—under the name FAST FIRED BY CARBONE [paras 9–10]. At the time of Mr. Nasberg’s affidavit the Applicant was operating three such restaurant locations in Manitoba, which had by then generated nearly \$1 million in sales [para 14, 17]. The Mark is displayed on these restaurants’ exterior signage [Exhibits G, J, K]; on the restaurants’ website at *www.fastfired.ca*, which went live on June 4, 2018 [para 18, Exhibit H], and on the restaurants’ Facebook and Instagram pages, which included Facebook advertising for the grand opening [Exhibits F, J, K]. On the exterior signage depicted in the exhibits, the flame and “FAST FIRED” are displayed in red while “BY CARBONE” is displayed in black or white; on the website and social media pages, the Mark is displayed entirely in red.

[46] I note that the social media pages include depictions of advertisements, menus, pizza boxes, and paper plates that display the Mark without the BY CARBONE element, and on the menus and some of the advertising the flame design is positioned above FAST FIRED. Additionally, the words “FAST FIRED” in an outline font are displayed as part of the wall art described above, which incorporates the encircled flame design with other, similar symbols [Exhibit I]. The flame design is displayed on its own on the employee uniforms depicted on the social media pages, as well as in certain advertising, with or without the circle.

[47] Finally, Mr. Nasberg notes that the FAST FIRED BY CARBONE brand has received local media coverage online, some of which predates the opening of the first FAST FIRED BY CARBONE restaurant [paras 19, 22]. He attaches as Exhibit L to his affidavit seven articles or advertisements “available on the Internet from January 27, 2018 to July 31, 2019” relating to the Applicant’s FAST FIRED BY CARBONE restaurants [para 19]. These publications include a July 31, 2019 article that mentions “Carbone’s Fast Fired fast dining concept franchise” and growth of the “Fast Fired brand”, with two locations being slated to open in Toronto in 2020; a July 18, 2019 press release that mentions the Applicant’s “fast-casual pizza brand, ‘FAST FIRED by Carbone’” and its “Fast Fired brand”; and other articles or advertisements that include the name “Fast Fired by Carbone” in their title, including one that also mentions requiring a “Fast Fired app” to receive restaurant promotions. Two of the publications depict the Mark on exterior restaurant signage, and one displays the encircled flame design next to the name “Fast Fired by Carbone”. However, there is no indication of the extent to which any of these online

publications have been accessed by consumers, and Mr. Nasberg was unable to state under cross-examination whether the press release resulted in any further publication [Q125-128].

[48] In view of the foregoing, it appears that the Mark has become known to some extent in Manitoba as of 2018. I am also prepared to accept that the CARBONE element has been known to at least some degree in Manitoba since 2011 and, as discussed above, I consider the word CARBONE to be an important feature of the Mark. That said, in the absence of sales figures for the CARBONE COAL FIRED Logo, the extent to which the name CARBONE has become known as a result of this earlier trademark's use is uncertain. Furthermore, I am not satisfied that the smaller "COAL FIRED" and encircled flame elements in the CARBONE COAL FIRED Logo would contribute in a significant way to the acquired distinctiveness of the Mark.

Conclusion with respect to inherent and acquired distinctiveness

[49] On balance, I find that the Opponent's Trademark as a whole has become known to a greater extent than the Mark. However, the evidence does not allow me to conclude that the FAST FIRE'D element has become known outside the context of the Opponent's Trademark to an extent that would significantly enhance the degree of protection to which this element is entitled.

Section 6(5)(b): Length of time the trademarks have been in use

[50] As noted above, the Opponent's Trademark has been in use in Canada since 2015, and images have been provided demonstrating acceptable variations of the Opponent's Trademark on signage dating from 2016, which is prior to the Applicant's first use of the Mark in 2018. Accordingly, this factor favours the Opponent.

Sections 6(5)(c) & (d): Nature of the parties' goods, businesses, and trades

[51] When considering the nature of the goods, services, businesses, and trades under the registrability ground of opposition, it is the statement of goods and services in the applicant's application and in the opponent's registration that must be assessed, having regard to the channels of trade that would normally be associated with such goods and services [*Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); *Henkel*

Kommanditgesellschaft auf Aktien v Super Dragon Import Export (1986), 12 CPR (3d) 110 (FCA)]. Each statement must be read with a view to determining the probable type of business or trade intended rather than all possible trades that might be encompassed by the wording; evidence of the parties' actual trades is useful in this respect [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA)].

[52] It appears that the parties' services in this case are largely of the same nature. Although both parties operate pizza restaurants, the Application is broad enough to cover use of the Mark in association with various restaurant services in general. Similarly, although the Opponent's Registration includes the goods "pizza", the description of services is broad enough to cover the services of any style of restaurant. I consider take-out, delivery, and catering services to be related or to overlap with restaurant services.

[53] The Opponent submits that the manner in which both parties make and serve pizza to customers at their restaurants is nearly identical. However, the Applicant submits that its services are different in that they are fast casual, have an Italian flair, use fresh, local ingredients or sometimes ingredients imported from Italy, and cook the pizzas in 180 seconds (three minutes) [see Nazberg paras 9, 15]. In the Applicant's submission, Mr. Wetzel admitted during cross-examination that the Opponent does not in fact provide such services. In particular, he admitted that sometimes the Opponent does not use fresh ingredients and that the cooking time is not in fact 180 seconds [pages 48–50].

[54] However, on a fair reading of the cross-examination transcript, I find that Mr. Wetzel was simply careful not to overstate, and indeed confirmed a cooking time of *approximately three minutes*, agreeing that the pizzas are "done in about three minutes", with the caveat, "I emphasize the word 'about'" [page 59]. He explained, "we don't pledge to cook your pizza in 180 seconds, with emphasis on 'pledge'" "Depends on how much toppings get put onto the pizza" "Some pizzas get cooked in three minutes" [pages 50, 56–57]. Overall, I do not consider the specific differences raised by the Applicant, such as sometimes not using fresh ingredients or only approximating a 180-second cooking time, to contribute to a meaningful distinction in the nature of the parties' goods and services.

[55] The parties also appear to operate through similar channels of trade, namely restaurants, with a potential for overlap in clientele.

[56] Accordingly, these factors favour the Opponent.

Additional surrounding circumstances

[57] The parties have raised several additional surrounding circumstances to consider.

State of the marketplace

[58] The common occurrence of a certain element in trademarks tends to cause purchasers to pay more attention to the other features of the trademarks and to distinguish between them by those other features, thereby decreasing the likelihood of confusion [see *Polo Ralph Lauren Corp v United States Polo Assn* (2000), 9 CPR (4th) 51 (FCA); and *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[59] In the present case, the Applicant submits that the words “FAST FIRED” are not unique to the Opponent but rather are in use by other pizza restaurants that were operating when Mr. Nasberg’s affidavit was sworn. In this respect, Mr. Nasberg states that, since prior to the start of these proceedings, he has been aware of a Seattle restaurant, Mod Pizza, that originated the “fast” pizza concept and, in 2008, was the first to describe this cooking method as “fast fire” [para 23]. Mr. Nasberg further states that, “[s]ince 2008, there have been a number of other restaurants, in both Canada and the U.S., that use ‘Fast Fired’ in the name of their restaurant” [para 24]. Mr. Nasberg confirms having “personally researched the use of the words FAST FIRED” and provides “a list of restaurants that are currently operating in Canada and/or the U.S.” [para 24, Exhibit N].

[60] To support the alleged first use date of 2008, Mr. Nasberg attaches to his affidavit an October 1, 2017 article from *backdropmagazine.com*, which states that, “‘Fast fired’ pizza restaurants have spread across the United States at an incredibly rapid pace, with Mod Pizza pioneering the concept out of Seattle in 2008” [Exhibit M, my emphasis]. However, under cross-examination, Mr. Nasberg could not confirm whether Mod Pizza had actually used the phrase

“fast fired” that year or simply pioneered the concept, and thus it may be that the article only demonstrates its author’s use of the phrase in 2017 [Q27-34].

[61] As for subsequent use of the phrase in restaurant names, the “list” of such restaurants referenced by Mr. Nasberg is actually a set of images of signage, uniforms, and menus relating to four restaurants [Exhibit N]. Under cross-examination, Mr. Nasberg advised that they are the results of research conducted prior to filing the Application in 2017 [Q43–44]. The set of images comprises the following:

- A collage of images of a ZA PIZZA BISTRO restaurant, featuring exterior signage with the tag line “custom • fast • fired”. This image was brought to Mr. Nasberg’s attention during cross-examination and, although he was not certain, he thought the image looked like this restaurant’s first location in Winnipeg [Q82]. I note that the image also shows employees behind an ingredient counter, wearing uniforms in orange & white and black & white colour schemes.
- A photograph of exterior signage displaying a CRUST & CRATE logo that includes the phrases “FAST FIRED” and “PIZZA PUB”. I note that the logo’s colour scheme is orange, white, and black.



- A menu for an URBANO PIZZA CO. restaurant featuring a text box that reads, “Our pizzas are fast fired in under 2 minutes so stick around!”. I note that colour scheme for the menu, including the restaurant logo, is red, white, and black.
- A webpage offering a menu for CRAVIN FIRED FAST PIZZA, featuring those words in an orange, red, white, and black logo that includes a flame design.



[62] I also note the aforementioned *backdropmagazine.com* article, which advertises a “Fast Fired Pizza Restaurant” in Athens, Ohio, named Lotsa Stone Fired Pizza [Exhibit M, Q20].

[63] The Opponent submits that the results of Internet searches Mr. Nasberg conducted to show use by third parties of the term “FAST FIRED” since 2008, being printouts from third party websites, are inadmissible hearsay [citing *Adidas AG v Globe International Nominees Pty Ltd.*, 2015 FC 443 at para 47]. The Opponent submits the criteria of necessity and reliability are not met because there is no evidence that another affiant could not have provided the information, the evidence does not relate to Canada, Mr. Nasberg did not personally visit the restaurants in question, the documents are undated, and their source (URL) is not disclosed.

[64] Indeed, the results of Internet searches are generally considered hearsay and cannot be relied upon for the truth of their contents. However, they may be admissible to show how certain webpages appeared at the time they were located [see *Candrug Health Solutions Inc v Thorkelson* (2007), 60 CPR (4th) 35 (FC) at para 21; rev’d on other grounds 2008 FCA 100; and *ITV Technologies Inc v WIC Television Ltd.*, 2003 FC 1056, aff’d 2005 FCA 96; see also *Cogan v EMusic.com Inc.*, 2011 TMOB 34 at para 18]. Thus, as examples of the appearance of third-party advertising, the results of Mr. Nasberg’s “personal research” might have been admitted. However, even if some of the images are accessible online from Canada, this fact in itself would not establish the extent to which Canadians other than Mr. Nasberg have accessed them or that any of the advertised or depicted services were actually offered in Canada at any relevant time.

[65] Thus, the evidence does not support a conclusion that Canadian consumers were, at any time, used to distinguishing between trademarks and/or trade names incorporating the phrase “FAST FIRED” or similar combinations of the words FAST and FIRED. Accordingly, the state of the marketplace is not a significant surrounding circumstance in the present case.

Trade dress

[66] The Opponent submits that the Applicant has appropriated elements of the trade dress used by the Opponent. In this respect, the Opponent notes that its trademarks used in association with Blaze Pizza restaurants are almost always displayed with the colours orange, white, and black, with orange being the primary and dominant colour [paras 13, 21–24, 27, Exhibit C–K;

U/T]. The Opponent submits that the same goes for the Mark. The Opponent further submits that its practice of varying the arrangement of the “FAST-FIRE’D”, “BLAZE PIZZA” and Flame Design elements supports an inference that an ordinary consumer seeing restaurant signage that employs a combination of the nearly identical term “FAST-FIRED” in combination with a nearly identical flame design, despite any additional textual element, is likely to believe such signage is that of, or associated with, the Opponent.

[67] Conversely, the Applicant submits that its colour scheme is not orange and white but rather red and white and therefore distinctive. The Applicant further submits that the Opponent’s evidence is insufficient to show use of the claimed variations of the Opponent’s Trademark in Canada to any meaningful extent.

[68] While factors such as the branding context in which a trademark is used may be relevant in a passing off action, when considering a section 12(1)(d) ground of opposition it is the effect of the opponent’s registered trademark *itself* that must be considered, and not the effect of any other indicia that may appear together with it [see *Reno-Dépôt Inc v Homer TLC Inc*, 2010 COMC 11; *Groupe Fruits & Passion Inc.*, 2007 CarswellNat 2319 (TMOB)]. However, actual use is not irrelevant, for example, if it shows a use within the scope of the registration that may be confusing with the applicant’s mark.

[69] In the present case, I would first note that it is difficult to assess the precise shade of red or orange used on signage and other articles when, as in this case, they only appear in images printed from the Internet. However, even if the parties’ respective shades of red or orange are similar, I would not consider use of a red-orange colour in a trademark referencing fire to be a particularly distinctive design feature. Nor would I consider the addition of a flame design to contribute significantly to the distinctiveness of a trademark containing the words FAST FIRED. I find the most distinctive feature of the Opponent’s Trademark to be the word BLAZE, and I do not consider the different arrangements of the flame design and phrase FAST-FIRE’D relative to the word BLAZE to increase the significance of these other features to any meaningful extent.

[70] I would also note that Mr. Wetzel provides, in the body of his affidavit, the following images as examples of the Opponent’s external signage and pizza boxes, respectively [para 27, Exhibit C]:



[71] With respect to the signage, it is difficult to discern from this image whether the insides of the letters are coloured white or contain neon light tubing; in either case, the overall effect appears to be that of an outline font not unlike the one featured in the Mark. However, under cross-examination, Mr. Wetzel clarified that such signage is from the Opponent's first, California restaurant and he did not know whether it is also used in Canada [transcript pages 19–22]. As for the pizza boxes, it seems one side of each box features the trademark BLAZE PIZZA flanking the Blaze Flame Design, while the other side of the box features the Blaze Flame Design followed by the trademark FAST-FIRE'D. As such, although the box might be considered to display a separate trademark on each side, and the trademarks on each side are of comparable size, I find that the overall impression created is that the box is also displaying a variation of the Opponent's Trademark, wherein the trademark's elements are arranged to fit around the periphery of the box. In any event, no information is provided with respect to the extent to which this particular box design has been distributed in Canada.

[72] Finally, I note that the Opponent's exhibited website and social media pages display the phrase FAST-FIRE'D in different contexts; however, they appear to be primarily descriptive. For example, the About Us page displays the equation "Blazing hot oven + dedicated pizzasmith + 180 seconds=fast-fire'd, perfectly crisp perfection", and the 2013 homepage referenced above contains the text "Every gourmet pizza is fast fire'd over a blazing open flame to perfectly crisp perfection in just 180 seconds", under the heading FAST-FIRE'D [Exhibits G, H]. The 2015 homepage has a banner featuring the phrases "CUSTOM BUILT" and "FAST FIRE'D" in larger lettering above "ANY TOPPINGS • ALL ONE PRICE • 180 SECONDS" [Exhibit H]. Furthermore, these displays are in proximity to either the Opponent's Trademark or the Round Logo. For these reasons, I consider any resulting increase in the strength of the FAST-FIRE'D element within the Opponent's Trademark to be minimal.

[73] In sum, I do not find the parties' trade dress—including the Opponent's use of variations of its registered trademark—to be a significant surrounding circumstance under this ground of opposition.

Applicant's prior registration

[74] Mr. Nasberg attaches as Exhibit C to his affidavit printouts of the Applicant's Canadian trademark registrations for CARBONE COAL FIRED PIZZA (TMA1,033,217) and CARBONE & Design (TMA1,033,187). However, prior registrations of different trademarks do not assist an applicant in demonstrating that there is no likelihood of confusion with the specific trademark it seeks to register. Furthermore, an applicant's ownership of one or more other trademarks does not give it the automatic right to obtain a further registration [*Coronet-Werke Heinrich Schlerf GmbH v Produits Ménagers Coronet Inc* (1984), 4 CPR (3d) 108 at 115 (TMOB); *Groupe Lavo Inc v Procter & Gamble Inc* (1990), 32 CPR (3d) 533 (TMOB)]. Accordingly, the Applicant's prior registrations are not a significant factor to consider.

No instances of actual confusion

[75] The Applicant submits that the Opponent has not shown any instances of actual confusion. However, an opponent is under no obligation to submit evidence of instances of actual confusion. The burden is on an applicant to demonstrate the absence of a likelihood of confusion.

[76] An adverse inference may nevertheless be drawn from a lack of evidence of actual confusion, where such evidence would readily be available if the allegation of likely confusion were justified [*Mattel, supra*]. Thus, although not a determining factor, if the evidence shows extensive concurrent use of both trademarks in the same area over many years, a lack of evidence of actual confusion *may* support a conclusion that confusion is not likely. However, in the present case, the evidence is that the Mark has only been used in the province of Manitoba, whereas the Opponent does not have any restaurant locations in that province [as of May 5, 2021, per U/T #2]. Nor has the Opponent provided any evidence of extensive promotion or advertising spill-over into Manitoba. In the circumstances, I am unable to draw any meaningful conclusions from an absence of actual confusion.

Conclusion with respect to confusion

[77] For the Applicant to meet its legal burden, the Registrar must be reasonably satisfied that, on a balance of probabilities, the registration sought is unlikely to create confusion; the Registrar need not be satisfied beyond doubt that confusion is unlikely [see *Christian Dior SA v Dion Neckwear Ltd*, 2002 FCA 29].

[78] Following my analysis of all the relevant factors, I am satisfied that, on a balance of probabilities, the Applicant has satisfied its legal burden with respect to the likelihood of confusion between the parties' trademarks. I find that the differences between the two trademarks are sufficient to avoid a likelihood of confusion as to the source of the parties' respective goods and services, as a matter of first impression and imperfect recollection, despite the similarity in the parties' goods, services, businesses, and trades.

[79] I reach this conclusion bearing in mind that the shared features of the parties' trademarks—namely the words FAST FIRED (or phonetic equivalent) and a flame design—are highly suggestive if not descriptive of the associated goods and services. As such, these elements of the Opponent's Trademark, alone or in combination, are not entitled to a particularly wide ambit of protection and small differences may suffice to distinguish other trademarks comprising similar elements. I am also mindful of the diminutive size and position of the FAST FIRE'D element in the Opponent's Trademark, particularly as registered. The inherent distinctiveness of the Opponent's Trademark is derived primarily from the word BLAZE and the suggestion that the associated goods and services are provided by an entity named BLAZE PIZZA—features absent from the Mark. In the circumstances, I find the idea conveyed by the Mark that the fast firing is "BY CARBONE" sufficient to militate against a likelihood of confusion.

[80] In view of the foregoing, the registrability ground of opposition is rejected.

GROUND OF OPPOSITION BASED ON COMPLIANCE WITH SECTION 30(1)

[81] The Opponent pleads that the Application does not comply with the requirements of section 30(i) of the Act in that the Applicant could not have been satisfied it was entitled to use the Mark in Canada in association with the Services, because the Applicant was aware of the

Opponent's prior right in the Opponent's Trademark and appropriated numerous elements of the Opponent's trade dress for the purpose of creating consumer confusion, as shown in Schedule "A" to the statement of opposition, which I am reproducing as a schedule hereto.

[82] I note that the Schedule "A" pages are omitted from the last amended statement of opposition filed with the Registrar. However, they are included in the previous amended statement of opposition, and I consider them to be incorporated into the subsequently amended statement of opposition by reference. In this regard, I note that the changes made in the last amended statement of opposition were indicated by blacklining and identified in a cover letter, neither of which discloses any changes to the schedule or pleaded trade dress. The reference to Schedule "A" in paragraph 13(c) of the statement of opposition remains unchanged.

[83] In any event, the key elements of the Opponent's trade dress are also identified at paragraph 13 of Mr. Wetzel's affidavit, and may be summarized as follows:

- a) External signage featuring the Opponent's Trademark;
- b) Use of "the Blaze FAST FIRE'D trademark" next to the Blaze Flame Design, for example, on pizza boxes;
- c) Use of the Opponent's Trademark's white capitalized font and white Blaze Flame Design against an orange background, for example, on signage and menus.
- d) Use of a white and orange Blaze Flame Design.

[84] At paragraph 27 of his affidavit, Mr. Wetzel also appears to claim the phrases "one price" (for any number of toppings) and "180 seconds" as elements of the Opponent's trade dress. Such promotional phrases are also reflected in Schedule "A", along with advertising for pizza at \$3.14 on Pi Day (March 14), and images of the parties' respective service counters.

[85] The Opponent submits that the visual similarities between the parties' trade dress suggests that the Applicant had the Opponent's Trademark in mind when it designed the Mark. The Opponent further submits that the timing of the Applicant's decision to move into the "fast-casual" restaurant space, and its departure in design, shape, font, justification, and colour from its previous CARBONE COAL FIRED PIZZA Design trademark, suggest bad faith.

[86] Conversely, the Applicant submits that a register search carried out on September 28, 2017 (U/T #1) located only two active trademarks incorporating the term “fast fired”—the Opponent’s Registration and a registration for CUSTOM FAST FIRED for use in association with “salads; pizza and desserts, namely dessert pizza” and “restaurant services, dine-in and take out”—neither of which was thought to give rise to a likelihood of confusion. The Applicant further notes the evidence explaining the Applicant’s intent to build on the goodwill and reputation it had developed under the CARBONE COAL FIRED Logo, which it had used since 2011 [Nasberg, para 10], whereas the Opponent did not use a flame graphic before at least May 2012 [Wetzel transcript, page 104].

[87] Section 30(i) of the Act merely requires that an applicant include a statement in its application that it is satisfied it is entitled to use the trademark in Canada in association with the goods or services described in the application. Awareness of an allegedly confusing trademark does not in itself preclude an applicant from being satisfied of its own entitlement to use the mark it is applying to register. Accordingly, where, as here, the required statement is included in the application, an opponent may only rely on section 30(i) in specific cases, such as where bad faith is alleged [see *Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB)].

[88] In the present case, I find that the timing of the Applicant’s entry into the fast-casual restaurant space, its consequent move from the phrase “COAL FIRED” to the phrase “FAST FIRED”, and its decision to emphasize “FAST FIRED” and its existing flame design when branding the new fast-casual restaurants, are insufficient in themselves to support an inference of bad faith. I do not consider the Mark’s colour scheme to be a significant departure from that of the CARBONE COAL FIRED Logo. Even if there are points of similarity in the parties’ restaurant concepts and marketing campaigns, this does not mean that the Applicant could not have been satisfied of its entitlement to use the particular FAST FIRED BY CARBONE logo it is applying to register.

[89] In view of the foregoing, the section 30(i) ground of opposition is dismissed, as the Opponent has failed to meet its evidential burden.

GROUND OF OPPOSITION BASED ON ENTITLEMENT TO REGISTRATION UNDER SECTION 16(3)(A)

[90] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because, at the Application's filing date, the Mark was confusing with the Opponent's Trademark, previously and continuously used and/or made known by the Opponent and its licensees in Canada in association with pizza and restaurant services since at least as early as October 2015.

[91] I note that the entitlement ground specifically pleads use and making known of "the **FAST-FIRE'D BLAZE PIZZA & Design** trademark", which is defined in the introductory paragraphs to the statement of opposition as the Opponent's Trademark. This ground of opposition specifically omits reference to any of the other trademarks identified in those introductory paragraphs, such as the trademark FAST-FIRE'D standing alone.

[92] To meet its initial burden under this grounds, an opponent must demonstrate (i) use or making known of its trademark prior to the Application's filing date, in accordance with section 16(3)(a) of the Act, and (ii) that its trademark had not been abandoned when the application was advertised, as stipulated in section 16(5). I note at the outset that the Opponent has not met the requirements for making known set out in section 5 of the Act, since it has not provided evidence that its trademark had become well known in Canada by reason of advertising in printed publications or radio broadcasting at the material date. Conversely, I am satisfied that the evidence of use of the Opponent's Trademark set out above is sufficient to meet the Opponent's evidential burden.

[93] However, the Opponent's position is no stronger at the material date to assess this ground of opposition—which is the filing date of the application, in accordance with section 16(3)(a) of the Act— than it is at today's date. Since the non-entitlement ground of opposition is based on the Opponent's actual use of its trademark, the manner and context in which the Opponent's Trademark is used is more relevant. In this respect, the parties' colour schemes, and the variations in the form of the trademarks in actual use, could gain importance. However, in this particular case, for the reasons discussed above, I do not find the parties' colour schemes, variations in form, or other elements of trade dress sufficient to tip the balance in the Opponent's favour. Having considered all the surrounding circumstances, and for essentially the

same reasons as discussed under the registrability ground, I find that the Applicant has discharged its legal onus to establish, on a balance of probabilities, that there was no reasonable likelihood of confusion.

[94] The ground of opposition based on non-entitlement to registration is therefore rejected.

GROUND OF OPPOSITION BASED ON DISTINCTIVENESS OF THE MARK UNDER SECTION 2

[95] The Opponent pleads that the Mark is not distinctive within the meaning of section 2 of the Act because it neither actually distinguishes nor is adapted to distinguish the Services from the goods, services, and business of the Opponent. In the absence of further particulars, this ground must be read in conjunction with the statement of opposition as a whole, and is thus limited to allegations of confusion with the trademarks, trade name, and trade dress pleaded in the statement of opposition. In this case the pleading includes the trademark FAST-FIRE'D as pleaded in the introductory paragraphs to the statement of opposition and as part of the Opponent's trade dress.

[96] The material date for this ground of opposition is January 28, 2019, the date the statement of opposition was filed [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185]. To succeed, an opponent relying on its own trademark or trade name must establish that, as of this date, its trademark was known in Canada to some extent at least, *i.e.* that its reputation was “substantial, significant or sufficient” to negate the established distinctiveness of another trademark, or else that it was well known in a specific area of Canada [*Motel 6 Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657; *1648074 Ontario Inc v Akbar Brothers (PVT) Ltd*, 2019 FC 1305]. In this respect, the opponent must demonstrate that its mark or name had acquired a reputation among consumers as an indicator of source [*Akbar Brothers, supra*; *Scott Paper Ltd v Georgia-Pacific Consumer Products LP*, 2010 FC 478].

[97] I am satisfied that the evidence of use of the Opponent's Trademark set out above is sufficient to meet the evidential burden. However, I find the evidence is insufficient to establish that the trademark FAST-FIRE'D standing alone has acquired a “substantial, significant or

sufficient” reputation as an indicator of source. Nevertheless, the trademark FAST-FIRE’D may be considered as part of the Opponent’s trade dress and thus a surrounding circumstance.

[98] That being said, I do not find that the later material date significantly alters the results of the analysis performed under the registrability and entitlement grounds of opposition. Accordingly, the distinctiveness ground of opposition is rejected as well, for essentially the same reasons as the registrability and entitlement grounds.

DISPOSITION

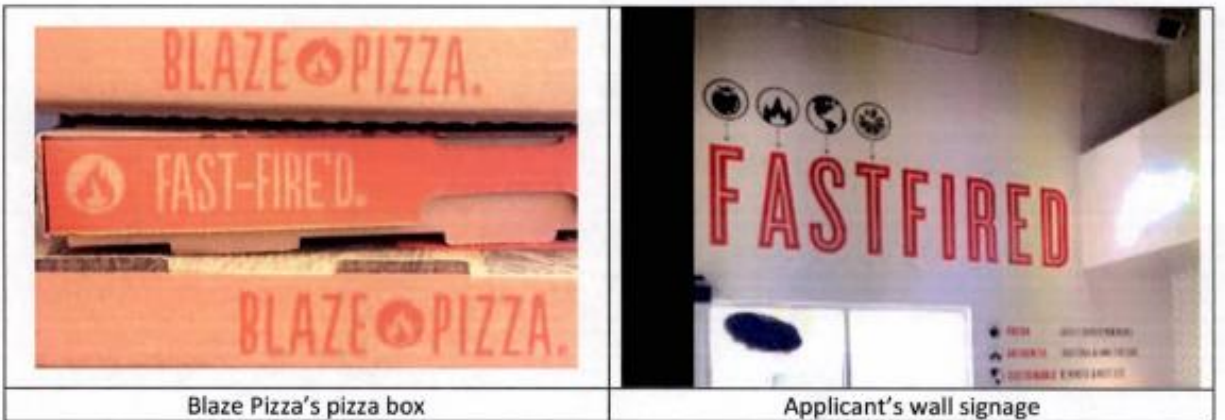
[99] In view of all the foregoing and pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Oksana Osadchuk
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE

REPRODUCTION OF SCHEDULE "A" TO THE STATEMENT OF OPPOSITION

SCHEDULE "A"





Blaze Pizza's marketing promotion



Applicant's marketing promotion



Blaze Pizza's pizza "make line"



Applicant's pizza "make line"



Blaze Pizza's flame logo



Applicant's flame logo

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Bereskin & Parr LLP/S.E.N.C.R.L., s.r.l.

For the Opponent

Lorraine Pinsent - MLT Aikins LLP

For the Applicant