



# Canadian Intellectual Property Office

## THE REGISTRAR OF TRADEMARKS

**Citation:** 2023 TMOB 050

**Date of Decision:** 2023-03-15

## IN THE MATTER OF AN OPPOSITION

**Opponent:** Bridgestone Corporation

**Applicant:** Xingyuan Tire Group Co., Ltd

**Application:** 1900186 for AMBERSTONE

### INTRODUCTION

[1] Bridgestone Corporation (the Opponent) opposes registration of the design trademark AMBERSTONE (the Mark), which is the subject of application No. 1900186 by Xingyuan Tire Group Co., Ltd (the Applicant). The Mark is shown below:

***AMBERSTONE***

[2] The Mark is applied for on the basis of proposed use in association with the following goods in Nice class 12:

Tires for vehicle wheels; pneumatic tires; inner tubes for pneumatic tires; treads for retreading tires; spikes for tires; automobile tires; inner tubes for bicycle tires; tubeless tyres for bicycles; solid tyres for vehicle wheels; casings for pneumatic tires [tyres].

[3] The opposition is primarily based on grounds that the Mark is confusing with the Opponent's BRIDGESTONE trademarks, previously used and registered in association with identical or similar goods and related services.

[4] All references are to the *Trademarks Act*, RSC 1985, c T-13 as amended June 17, 2019 (the Act), unless otherwise noted.

### **THE RECORD**

[5] The application for the Mark was filed on May 22, 2018. The application was advertised for opposition purposes on February 19, 2020.

[6] On February 28, 2020, the Opponent opposed the application by filing a statement of opposition under section 38 of the Act. The grounds of opposition are based on non-conformance with sections 30(2) of the Act; non-registrability under section 12(1)(d) of the Act; non-entitlement to register the Mark under section 16(1) of the Act; non-distinctiveness under section 2 of the Act; and non-entitlement to use the Mark pursuant to section 38(2)(f) of the Act.

[7] The Applicant filed a counter statement on April 29, 2020.

[8] In support of its opposition, the Opponent filed and served the following evidence:



- Affidavit of Lynn Hsu, sworn August 27, 2019 in Connecticut (the Hsu Affidavit);  
and
- Certified copies of five of the Opponent's trademark registrations.

[9] In support of its application, the Applicant filed and served the affidavit of Eric Devenny, sworn December 28, 2020 in Ottawa (the Devenny Affidavit).

[10] Neither affiant was cross-examined. Both parties submitted written representations; only the Opponent was represented at a hearing.

**OVERVIEW OF THE OPPONENT’S EVIDENCE**

[11] The Opponent is the owner of the following five BRIDGESTONE-formative trademark registrations (the Bridgestone Trademarks). As the registrations cover a wide variety of goods and services, reproduced below are only the tire-related registered goods and services most relevant to this proceeding.

| Trademark  | Goods and Services   |
|--|--|
| BRIDGESTONE<br><br>TMA114978<br>1959-08-14   | (1) Hard and pneumatic vehicular tires.<br><br>...   |
| <br><br>TMA315459<br>1986-06-20   | (1) Tires, tubes, vehicle wheels ...   |
| IT'S BRIDGESTONE<br>OR NOTHING<br><br>TMA730607<br>2008-12-10  | (1) Vehicle tires.   |
| <br><br>TMA875223<br>2014-04-08 | (1) ... tires; inner tubes for tires; tires for scrapers; tires for motor graders; tires for shovel loaders; tires for tire rollers; tires for wheel cranes; tires for cranes; tires for snow plows; tires for pavers; tires for off-the-road vehicles; tires for mining vehicles; ... tires for passenger cars; tires for trucks; tires for buses; tires for racing cars; tires for automobiles; retreaded tires for passenger cars; retreaded tires for trucks; retreaded tires for buses; retreaded tires for racing cars; retreaded tires; retreaded tires for automobiles; ... tires for two-wheeled motor vehicles; ... tires for bicycles; ...<br><br>(2) Retail services and wholesale services for automobiles, tires and parts and fittings for automobiles; ... repair and maintenance of automobiles and their parts; repair and |

|  |  |
|--|--|
|  | <p>maintenance of tires for automobiles; retreading of tires; repair and maintenance of two-wheeled motor vehicles and their parts; repair and maintenance of tires for two-wheeled motor vehicles; repair and maintenance of bicycles and their parts; repair and maintenance of tires for bicycles; repair and maintenance of tires for aircraft; tire repair and recapping services; ....</p>   |
| <p><b>BRIDGESTONE</b><br/>TMA876163<br/>2014-04-22</p> | <p>(1) ... tires; tires for scrapers; tires for motor graders; tires for shovel loaders; tires for tire rollers; tires for wheel cranes; tires for cranes; tires for snow plows; tires for pavers; tires for off-the-road vehicles; tires for mining vehicles; ...tires for passenger cars; tires for trucks; tires for buses; tires for racing cars; tires for automobiles; retreaded tires for passenger cars; retreaded tires for trucks; retreaded tires for buses; retreaded tires for racing cars; retreaded tires; retreaded tires for automobiles; inner tubes for passenger cars; inner tubes for trucks; inner tubes for buses; inner tubes for racing cars; inner tubes for automobiles; wheels and rims for passenger cars; wheels and rims for trucks; wheels and rims for buses; wheels and rims for racing cars; wheels and rims for automobiles; two-wheeled motor vehicles and their parts and fittings; tires for two-wheeled motor vehicles; inner tubes for two-wheeled motor vehicles; wheels and rims for two-wheeled motor vehicles; bicycles; tires for bicycles; inner tubes for bicycles; wheels and rims for bicycles; ...</p> <p>(1) Retail services and wholesale services for automobiles, tires and parts and fittings for automobiles; ... repair and maintenance of tires for automobiles; retreading of tires; repair and maintenance of two-wheeled motor vehicles and their parts; repair and maintenance of tires for two-wheeled motor vehicles; ... repair and maintenance of tires for bicycles; repair and maintenance of tires for aircraft; tire repair and recapping services; ...</p> |

**Hsu Affidavit**

[12] Ms. Hsu is the Senior Counsel of Bridgestone Americas, Inc., an affiliated company of the Opponent [para 1]. The Hsu Affidavit evidences the following:

- The history of the Opponent and its part in the Bridgestone group of corporations [paras 3 to 8];

- The ownership and licensing of the Bridgestone Trademarks in Canada [paras 9 to 12];
- The manufacture and sale of BRIDGESTONE-brand tires in Canada [paras 13 to 16];
- Use of the Bridgestone Trademarks in Canada since 1955 [paras 17 to 23, Exhibits 1 and 2], including sales to Canadian consumers in excess of one billion dollars from 2015 to 2020, representing “in excess of seven million ... tires” [para 23]; and
- Promotion of the BRIDGESTONE brand in Canada, including through store signage, magazine advertisements, brochures, television commercials, professional sports sponsorships, social media, and the *bridgestonetire.ca* website [paras 24 to 41, Exhibits 3 to 11].

[13] Ms. Hsu states that, from 2016 to the date of her affidavit, in excess of \$35 million dollars “has been spent on promoting BRIDGESTONE vehicle tires in Canada alone” [para 41].

#### **OVERVIEW OF THE APPLICANT’S EVIDENCE**

##### ***Devenny Affidavit***

[14] Mr. Devenny is a trademark agent with Devenny Trademark Consultants of Ottawa, Ontario [para 1]. Mr. Devenny explains that, in December 2020, he was asked by a lawyer employed by the Applicant’s agent of record to conduct certain Internet searches and searches of the Canadian Trademarks Database. Accordingly, the Devenny Affidavit evidences the following:

- Printouts of several applications and registrations from the Canadian Trademarks Database of trademarks containing the element FIRESTONE in the name of Bridgestone Licensing Services, Inc. [paras 2 and 3, Exhibit A];

- Printouts of three STONE-formative third-party registrations and one application from the Canadian Trademarks Database [paras 4 and 5, Exhibit B];
- Printouts from the website *firestonetire.ca* [paras 6 and 7, Exhibits C to E]; and
- Printouts from the website *tires.tirerack.com/tires/Canada*, including a printout of search results for the term FIRESTONE [paras 6 to 9, Exhibits F and G].

[15] I note that Mr. Devenny does not speak to the significance of any of the aforementioned searches or printouts, nor does he make any statements clearly directed to the issues in this proceeding.

#### **EVIDENTIAL BURDEN AND LEGAL ONUS**

[16] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053 (FCTD)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

[17] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on an Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against it.

#### **SECTION 30(2) GROUND – NON-CONFORMANCE**

[18] Pursuant to section 38(2)(a) of the Act, the Opponent pleads that the application does not conform with the requirements of section 30(2)(d) of the Act, in that the application does not contain the information or statement prescribed by section 31 of the *Trademarks Regulations* (the Regulations). The pleading in the statement of opposition references, *inter alia*, section 31(c) of the Regulations. However, the

relevance of this section is not clear, as section 31(c) of the Regulations relates to the requirement to provide a transliteration of non-Arabic numerals.

[19] Indeed, in its written representations, the Opponent recites only a portion of its pleading, essentially as follows: the application does not comply with the requirements of section 30(2)(d) 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 applied-for goods, in view of the fact that at the filing date of the application, the Mark was confusing (within the meaning of section 6(2) of the Act), with the Opponent's Bridgestone Trademarks, in respect of which applications for registration had previously been filed in Canada in association with the goods set out in the registrations, as well as with the Opponent's trademarks that had been previously used or made known in Canada by the Opponent or its predecessors in title [Opponent's written representations at para 5(a)].

[20] At best, the pleading is insufficient as it does not clearly set out the prescribed information or statement for which the application is alleged not to contain. This ground appears to be pleaded in a manner that echoes pleadings pursuant to section 30(i) of the Act as it was prior to amendments that came into force in June 2019. Under the old Act, section 30(i) required that applications contain "a statement that the applicant is satisfied that he is entitled to use the trademark in Canada in association with the goods or services described in the application". No such statement is required under the current Act.

[21] It appears that the Opponent is attempting to utilize sections 38(2)(a) and 30(2)(d) of the Act as a "catch-all" for grounds that are not otherwise valid. Even if the Applicant could not have been so "satisfied", it is at best not clear how that amounts to non-conformance with the requirements of section 30(2)(d) of the Act, and section 31 of the Regulations in particular. Again, although the statement of opposition (but not the Opponent's written representations), references section 31(c) of the Act, it is not clear how that section is applicable in the present case.

[22] Accordingly, the ground as pleaded is not a valid ground and is rejected.

## **SECTION 12(1)(D) GROUND – CONFUSION WITH A REGISTERED TRADEMARK**

[23] The Opponent pleads that the trademark is not registrable because it is confusing with a registered trademark, and relies upon the aforementioned registrations for the Opponent's Bridgestone Trademarks. In particular, the Opponent pleads that it is the owner of the family of BRIDGESTONE trademarks, used and continuing to be used in Canada in association with, among other goods and services, vehicle tires.

[24] The material date with respect to confusion with a registered trademark is the date of this decision [*Simmons Ltd v A to Z Comfort Beddings Ltd*, 1991 CarswellNat 1119 (FCA)]. As the registrations for the Opponent's Bridgestone Trademarks are extant on the register, the Opponent meets its initial burden for each.

[25] Accordingly, the Applicant must establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and any of the Opponent's Bridgestone Trademarks.

[26] In this case, I consider it sufficient to focus on the Opponent's registration for the word mark BRIDGESTONE (TMA114978), as I consider this to represent the Opponent's strongest case for confusion.

### ***Test to determine confusion***

[27] The test to determine the issue of confusion is set out in section 6(2) of the Act which provides that 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, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification.

[28] The test to be applied is a matter of first impression in the mind of a casual consumer "somewhat in a hurry" who sees the Mark in association with the applied-for goods at a time when they have no more than an imperfect recollection of the Opponent's BRIDGESTONE trademark and does not pause to give the matter any



detailed consideration or scrutiny [see *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20].

[29] In making such an assessment, all the relevant surrounding circumstances must be taken into consideration, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods, services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[30] The criteria or factors in section 6(5) of the Act are not exhaustive and different weight will be given to each one in a context-specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. In *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, the Supreme Court of Canada stated that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis [at para 49] and that, while the first word in the trademark may be the most important in some cases, the preferable approach is to consider whether there is an aspect of the trademark that is particularly “striking or unique” [at para 64].

### ***Degree of Resemblance***

[31] In its written representations, the Applicant emphasizes that, as the first portion of the parties’ trademarks differ, the trademarks “do not look and sound the same, and suggest very different meaning to the ordinary consumer somewhat in a hurry” [paras 13 to 16].

[32] However, I agree with the Opponent that there is some degree of resemblance in the parties’ trademarks at least in appearance and sound, given the common suffix element STONE in both trademarks.

[33] As such, this factor favours the Opponent, albeit not as strongly as the other statutory factors.

***Inherent Distinctiveness and the Extent Known***

[34] The parties' trademarks have similar degrees of inherent distinctiveness, as neither trademark is descriptive or particularly suggestive of the nature of the relevant goods.

[35] I agree with the Opponent that the Hsu Affidavit evidences significant use and promotion of the BRIDGESTONE trademark in Canada in association with vehicle tires [Opponent's written representations at paras 24 and 31]. In contrast, there is no evidence with respect to use or extent known of the Mark.

[36] Overall, this factor strongly favours the Opponent.

***Length of Use***

[37] The application for the Mark is based on proposed use, and there is no evidence of use of the Mark as of the date of this decision.

[38] The Opponent has evidenced use of the Mark in association with vehicle tires since 1955 [Hsu Affidavit at para 17].

[39] Accordingly, this factor strongly favours the Opponent.

***Nature of Goods, Services, Business / Nature of the Trade***

[40] Both parties' goods are in the nature of tires and tire-related products. In the absence of evidence regarding the Applicant's business or channels of trade, at a minimum, there is potential for overlap in the nature of the parties' businesses and trades.

[41] Accordingly, these factors also strongly favour the Opponent.

***State of the Register and Marketplace***

[42] In its written representations, the Applicant submits that the Devenny Affidavit shows that other trademarks containing the suffix STONE for tires and related goods co-exist on the trademarks register with the Opponent's Bridgestone Trademarks. These include a family of FIRESTONE trademarks, as well as the third-party

trademarks STARSTONE, STONEGARD, VALLEYSTONE Design and ROADSTONE [para 4, citing the Devenny Affidavit at paras 2 and 4, Exhibits A and B]. As noted by both parties, the owner of the FIRESTONE trademarks, Bridgestone Licensing Services Inc., is identified as an affiliate of the Opponent as part of the Bridgestone group of corporations [per the Hsu Affidavit at para 6].

[43] Nevertheless, the Applicant further submits that the website printouts at Exhibits C to E of the Devenny Affidavit show that vehicle tires bearing the FIRESTONE trademarks are sold at retail in Canada, and “have been available for over a century” [Applicant’s written representations at paras 7 to 9]. The Applicant’s representations emphasize the co-existence of the FIRESTONE trademarks with the Bridgestone Trademarks [paras 18 to 24]. In this respect, the Applicant submits that it would be “utterly unfair, unreasonable and unconscionable for the Opponent to be allowed to ignore the coexistence of the FIRESTONE trademarks owned by its affiliated company with the BRIDGESTONE marks, but now seek to rely on the alleged strength of its BRIDGESTONE trademarks to prevent the registration of [the Mark]” [para 24].

[44] With respect to the non-FIRESTONE trademarks referenced in the Devenny Affidavit, the Opponent notes that the registrations for VALLEYSTONE Design and ROADSTONE have been expunged; that the application for STARSTONE has been abandoned; and that the trademark STONEGARD (registered in association with “Tires” since October 2010) does not end with the suffix STONE. In any event, I agree with the Opponent that, even considered together with the FIRESTONE trademarks registered in association with tire-related goods, there are too few relevant registered trademarks to draw any inference regarding the state of the Canadian marketplace. Inferences about the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc*, 1992 CarswellNat 124 (FCA)].

[45] With respect to the purported state of the marketplace evidence in the Devenny Affidavit, given that Mr. Devenny makes no statements regarding use of the FIRESTONE trademarks, the affidavit is of little value. As Mr. Devenny allows the

exhibited webpages to speak for themselves, to the extent one is meant to make inferences regarding the state of the marketplace – including the extent to which the FIRESTONE trademarks have become known in Canada – the exhibits largely constitute hearsay and I agree with the Opponent that conclusions should not be drawn based on “results of online searches of the type put into evidence” [Opponent’s written representations at para 46]. Generally speaking, an affidavit of an employee of an agent is admissible only to the extent that the evidence relates to non-controversial and non-central matters [*Cross Canada Auto Body Supply (Windsor) Limited et al v Hyundai Auto Canada*, 2005 FC 1254, aff’d 2006 FCA 133]. Although Mr. Devenny is not an employee of the Applicant’s agent of record *per se*, the probative value of the Devenny Affidavit holds the same effect, given that it amounts to confirmation that he followed instructions to print certain pages from the Internet and its otherwise hearsay content.

[46] Even if I were to give some weight to the Devenny Affidavit, at best, it indicates that the FIRESTONE trademark has become known in the Canadian marketplace in association with tires to some extent. However, I agree with the Opponent that this extent is not clear and, as such, this factor would only favour the Applicant somewhat.

***Conclusion – Confusion with the BRIDGESTONE trademark***

[47] Having considered all of the surrounding circumstances, I find that the Applicant has not met its legal burden with respect to the likelihood of confusion between the parties’ trademarks. I reach this conclusion due to all of the statutory factors favouring the Opponent under this ground, and notwithstanding some limited evidence of co-existence of the FIRESTONE trademark in the marketplace.

[48] Accordingly, the section 12(1)(d) ground based on confusion with the Opponent’s BRIDGESTONE trademark is successful.

[49] As I considered the registration for the Opponent’s word mark BRIDGESTONE to represent its strongest case for confusion, it is not necessary to address the remaining Bridgestone Trademarks. However, I will note that the registrations for the Opponent’s BRIDGESTONE design marks cover a wider variety of tire-related goods (e.g. “inner tubes for bicycles”) that further directly overlap with the applied-for goods at issue.

Furthermore, as noted by the Opponent in its written representations, the Mark is similar to the registered BRIDGESTONE design marks in that there is a “similarity in typeface and the suggestion of motion ... with the letters leaning slightly to the right” [at para 40].

#### **SECTION 16 GROUNDS – NON-ENTITLEMENT TO REGISTRATION**

[50] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark having regard to section 16(1)(a) of the Act, since at the filing date of the application for the Mark, the Mark was confusing with the Bridgestone Trademarks, previously used or made known in association with, among other goods and services, vehicle tires.

[51] The Opponent further pleads that the Applicant is not the person entitled to registration of the Mark having regard to section 16(1)(c) of the Act, since at the filing date of the application for the Mark, the Mark was confusing with the trade name “Bridgestone” that had been previously used in Canada by the Opponent and/or the Opponent’s licensees.

[52] The Applicant does not dispute that the Opponent meets its initial burden under these grounds. In this respect, at a minimum, the Opponent has evidenced extensive use of the BRIDGESTONE trademark in association with vehicle tires prior to the filing date of the application.

[53] In my view, the foregoing confusion analysis with respect to the Opponent’s BRIDGESTONE trademark does not substantially differ under this ground, notwithstanding the earlier material date.

[54] Accordingly, the section 16 ground of opposition is successful as it relates to the Opponent’s BRIDGESTONE trademark.

[55] Similarly, as above, it is unnecessary to consider the section 16 grounds as they relate to the Opponent’s other Bridgestone Trademarks or trade name.

## **SECTION 2 GROUND – NON-DISTINCTIVENESS**

[56] The Opponent pleads that the Mark is not distinctive within the meaning of section 2 of the Act, in that it does not distinguish the Applicant's products from those of others, including the Opponent's. Moreover, the Opponent pleads that the Mark is not adapted so as to distinguish the Applicant's products from those of others, including the Opponent's trademarks that have been and are being used in Canada.

[57] The material date for this ground is the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185].

[58] Section 2 of the Act defines "distinctive" as follows:

"distinctive", in relation to a trademark, describes 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 that is adapted so to distinguish them.

[59] 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].

[60] The question of distinctiveness is primarily one of fact [*Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10 at para 14] and, in *Auld Phillips Ltd v Suzanne's Inc*, 2005 FCA 429, the Federal Court of Appeal stated that "Obviously, it will be a rare occurrence when one party is in a position to cause a mark to lose its distinctiveness, but nothing in principle prevents this result" [at para 7].

[61] With these principles in mind, at best, I consider it questionable whether this ground is sufficiently pleaded in the statement of opposition. In this respect, where an opponent relies on its own trademark (or trade name) in support of a non-distinctiveness ground, to meet its initial evidentiary burden, the issue is not merely one of whether the opponent's trademark was used or extant. Rather, the initial burden is on the Opponent to prove that, as of the material date, its trademark i) was known to some extent in Canada in association with the relevant goods and ii) had a reputation in Canada that

was “substantial, significant or sufficient” so as to *negate* the distinctiveness of the Mark [see *Bojangles’ International, LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 33 and 34; and *Canadian Dental Association v Ontario Dental Assistants Association*, 2013 FC 266 at para 42, *aff’d* 2013 FCA 279].

[62] In this case, while the Opponent has evidenced use and reputation in its BRIDGESTONE trademark, there is no evidence of *negation* of the inherent distinctiveness of the applied-for Mark. As such, even if I considered the ground to be sufficiently pleaded, I would not consider the Opponent to have met its initial evidential burden.

[63] Accordingly, the non-distinctiveness ground of opposition is rejected.

**SECTION 38(2)(F) GROUND – NON-ENTITLEMENT TO USE**

[64] The Opponent pleads that, at the filing date, the Applicant was not entitled to use the Mark in Canada in association with the applied-for goods since the Mark was confusing with the Opponent’s Bridgestone Trademarks.

[65] In my view, this pleading is insufficient. Section 38(2)(f) of the Act is not a confusion-based ground, and the mere allegation that an applied-for trademark was confusing with another trademark is insufficient under this ground [see, for example, *DCK Concessions Limited v Hong Xia Zhang*, 2022 TMOB 200 at para 39]. In any event, as of the material date of May 22, 2018, no determination regarding confusion between the parties’ trademarks had been made, much less a determination regarding the Applicant’s entitlement to use the Mark.

[66] In this respect, I note that the confusion analysis above may have differed had the Applicant evidenced actual use of the Mark. As such, it cannot be said that the Applicant was not entitled to use the Mark as of the material date, nor should any conclusion regarding confusion in this decision be construed as a finding regarding the Applicant’s entitlement *to use* the Mark as of the filing date or as of any other date.

[67] Accordingly, the non-entitlement to use ground is rejected.

**DISPOSITION**

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

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Andrew Bene  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



# Appearances and Agents of Record

**HEARING DATE:** 2022-11-08

## **APPEARANCES**

**For the Opponent:** Michelle Noonan

**For the Applicant:** No one appearing

## **AGENTS OF RECORD**

**For the Opponent:** Deeth Williams Wall LLP

**For the Applicant:** Aventus IP Law LLP