



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 080

Date of Decision: 2023-05-11

IN THE MATTER OF AN OPPOSITION

Opponent: Traxxas, L.P.

Applicant: Zuru (Singapore) Pte. Ltd

Application: 1,871,916 for MAX BUILD MORE

INTRODUCTION

[1] Zuru (Singapore) Pte. Ltd (the Applicant) has filed application No. 1,871,916 (the Application) to register the trademark MAX BUILD MORE (the Mark). The Application, as amended, is based on proposed use of the Mark in Canada in association with “construction toys, namely toy building blocks and connecting links for the same; toy figures”.

[2] Traxxas, L.P. (the Opponent) has opposed the Application based on an alleged likelihood of confusion with the Opponent’s trademarks, including the trademarks XMAXX, T-MAXX and MAXX, which are used in association with radio-controlled model vehicles and related parts and accessories.

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


THE RECORD

[4] The Application was filed on December 7, 2017 and advertised for opposition purposes in the *Trademarks Journal* of April 3, 2019. On September 3, 2019, the Opponent opposed the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c. T-13 (the Act). I note that the Act was amended on June 17, 2019, and pursuant to section 70 of the Act, the grounds of opposition in this proceeding will be assessed based on the Act as it read prior to June 17, 2019.

[5] The grounds of opposition pleaded by the Opponent are as follows:

a) Pursuant to section 12(1)(d) of the Act, the Mark is not registrable as it is confusing with the following three registered trademarks owned by the Opponent, each covering radio-controlled model vehicles and parts therefor (the XMAXX Trademarks):

○ XMAXX (TMA982,851);

○ XMAXX Design (color):  (The colour(s) red, white, and black are claimed as a feature of the mark. The letters are black outlined with white and a thinner red outline) (TMA982,850); and

○ XMAXX design (B&W):  (TMA982,836).

b) Pursuant to section 16(1)(a) of the Act, the Applicant is not entitled to registration because at the filing date, the Mark was confusing with the XMAXX Trademarks that have been previously used in Canada by the Opponent and not abandoned at the date of advertisement.

c) Pursuant to section 16(1)(c) of the Act, the Applicant is not entitled to registration because at the filing date, the Mark was confusing with two trademarks of the Opponent, namely, T-MAXX in association with radio-controlled model vehicles and parts therefor, and MAXX in association with batteries and chargers for radio-controlled model vehicles, that have been previously used in Canada by

the Opponent and not abandoned at the date of advertisement. The trademarks T-MAXX and MAXX were the subject of the Opponent's then pending application Nos. 1,934,182 and 1,935,266, respectively.

- d) Pursuant to section 2, the Mark is not distinctive of the Applicant within the meaning of section 2 of the Act since it does not actually distinguish nor is it adapted to distinguish the goods of the Applicant from the goods of the Opponent under the Opponent's trademarks referenced above.

[6] The Applicant filed a counter statement denying the grounds of opposition.

[7] In support of its opposition, the Opponent filed the affidavit of Brian Zollinger (the Zollinger Affidavit), discussed below. Mr. Zollinger was not cross-examined. The Applicant did not file any evidence.

[8] Both parties filed written representations and attended a hearing.

EVIDENCE

The Zollinger Affidavit

[9] Mr. Zollinger is the Vice President and General Counsel of the Opponent. He states that the Opponent is a privately held company that engineers and builds radio-controlled model vehicles (including trucks, cars, and speedboats) and parts and accessories for those vehicles.

[10] Mr. Zollinger states that the Opponent, through its distributors and retailers in Canada, used the trademark T-MAXX since at least as early as 2000, used the trademark X-MAXX since at least as early as 2015, and used the trademark MAXX since 2015. Two invoices are included as Exhibit "B" to the Zollinger Affidavit, which Mr. Zollinger describes as being for sales made to retailers in British Columbia. The first invoice is from 2001 and includes reference to an item identified as "T-MAXX RTR W/ RADIO". The second invoice is from 2015 and includes reference to items identified as "BATTERY/CHARGER COMPLETER PACK" and "R6 – X – MAXX W/TSM".

[11] Examples of the depictions of the Opponent's trademarks on radio-controlled model vehicles and accessories are included as Exhibit "C" to the Zollinger Affidavit. For example, the trademarks T-MAXX and XMAXX appear on the sides of the radio-controlled model trucks and the trademark MAXX is depicted on a battery charger.

[12] Mr. Zollinger states that the Opponent sells its radio-controlled model vehicles and parts and accessories through a number of stores, including national retailers such as Best Buy, hobby retailers such as Great Hobbies and Hobby 2000, and specialist radio-controlled model vehicle retailers such as Amazing RC Store. A more extensive list of the Opponent's Canadian retailers is included as Exhibit "D" to his affidavit. The Opponent also sells its products through its own website at *traxxas.com* and e-commerce platforms such as *amazon.ca*.

[13] Mr. Zollinger states that the Opponent's sales in Canada from 2000 to the present, "approximated so as to preserve confidentiality, total multimillions in US dollars". He does not provide any annualized breakdown of those sales, a breakdown by individual trademark, or identify the number of units sold in Canada.

[14] Mr. Zollinger indicates that the Opponent promotes its products in print advertisements in periodicals with North American circulation, including Canada, and on websites and online magazines. Examples of such promotion are included as Exhibits "F" and "G" to his affidavit. He states that the Opponent has also promoted its products through sponsoring stadium events in Canada including the Stadium Supertrucks Races and Traxxas Monster Truck Tours. No Canadian circulation or attendance data is included in the affidavit. He states that the Opponent has spent tens of millions in global advertising, marketing and promotion; however, there is no information regarding amounts spent on advertising in Canada specifically.

PRELIMINARY MATTERS

[15] Before considering the merits of each ground of opposition, there are three preliminary issues that I will address.

(i) Opponent's pleading of the non-entitlement ground

[16] As noted above, in its statement of opposition the Opponent pleaded its non-entitlement ground of opposition under sections 16(1)(a) and 16(1)(c) of the Act as amended. However, given that the Application in this case was advertised prior to June 17, 2019 and is based on proposed use of the Mark in Canada, the Opponent's non-entitlement ground of opposition ought to have been raised under section 16(3)(a) of the Act as it read prior to June 17, 2019. Also, I note that the Opponent does not allege confusion with any trade names and so the Opponent's reference in the statement of opposition to section 16(1)(c) of the Act similarly appears to be in error. During the hearing, the Opponent's agent acknowledged that the references to sections 16(1)(a) and (c) in the statement of opposition were incorrect and that the Opponent was instead relying on section 16(3)(a) for its non-entitlement ground.

[17] Given that the Applicant did not contest how the non-entitlement ground of opposition was pleaded in the statement of opposition, and appears to have proceeded via its written representations and oral arguments as though the non-entitlement ground had been properly pleaded, and in view of the evidence which the Opponent filed, I will assess the Opponent's non-entitlement ground under section 16(3)(a) of the Act as it read prior to June 17, 2019.

[18] In addition, the Opponent in its written representations makes reference to alleged use and *making known* of its trademarks in Canada; however, the Opponent did not plead any reference to making known in its statement of opposition, and the evidence of record does not support the proposition that the Opponent's trademarks were made known in Canada in accordance with the requirements of section 5 of the Act. Ultimately, the Opponent's agent confirmed at the hearing that for its non-entitlement ground of opposition, the Opponent was relying solely on prior *use* of its trademarks in Canada under section 4, and not prior making known of its trademarks under section 5 of the Act.

[19] In these circumstances, I will consider the non-entitlement ground as having been raised under section 16(3)(a), with the Opponent relying on alleged prior use of its XMAXX Trademarks as well as the trademarks T-MAXX and MAXX.

(ii) Opponent's pending applications referenced in its statement of opposition

[20] For its non-entitlement and non-distinctiveness grounds of opposition, the Opponent relies in part on the alleged prior use of its trademarks T-MAXX and MAXX, which are the subject of application Nos. 1,934,182 and 1,935,266, respectively, identified in the statement of opposition. Those two applications were filed after the Applicant's Application, and so cannot form a basis of a ground of opposition under section 16(3)(b). The two applications issued to registration during the course of this proceeding; however, as the Opponent did not seek leave to amend its statement of opposition to include these trademarks under its section 12(1)(d) ground, these trademarks will not be considered under the section 12(1)(d) ground and will only be considered in respect of the non-entitlement (section 16(3)(a)) and non-distinctiveness (section 2) grounds of opposition [see *Ferrero SpA v Cantarella Bros Pty Limited*, 2012 TMOB 45 at paras 11-14].

(iii) Applicant's reference to third-party trademarks not in evidence

[21] While the Applicant did not file any evidence in this proceeding, in its written representations the Applicant invited the Registrar to take judicial notice of multiple registered trademarks that include the word "MAX" and that are owned by third parties. I will not do so. While the Registrar may take judicial notice of an opponent's trademark registration or application expressly referred to in a statement of opposition, the Registrar has regularly refused to take judicial notice of the state of the Register to assist applicants in arguments that the state of the Register renders a trademark registrable [see *John Labatt Ltd./ John Labatt Ltée v WCW Western Canada Water Enterprises Inc* (1991), 39 CPR (3d) 442, at para 8 (TMOB); see also *Premier Tech Home & Garden Inc v 753146 Alberta Ltd*, 2022 TMOB 45 at para 22]. Accordingly, the third-party registrations referred to by the Applicant will not be considered in assessing the grounds of opposition. In any event, as will become apparent, my finding on this point has no impact on the ultimate outcome of the proceeding.

ONUS

[22] The legal onus is on the Applicant to show that the Application complies with the provisions of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once this initial burden is met, the Applicant must satisfy the Registrar, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of the Mark [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA* (2002), 20 CPR (4th) 155 (FCA)].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Registrability - Section 12(1)(d)

[23] The Opponent pleads that the Mark is not registrable because it is confusing with the Opponent's three registered XMAXX Trademarks. The material date for this ground of opposition is the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade-Marks* (1991), 37 CPR (3d) 413 (FCA)]. I have exercised my discretion to check the Register and confirm the Opponent's registrations remain extant [see *Quaker Oats Co of Canada Ltd v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial burden for this ground. The Applicant must therefore prove on a balance of probabilities that there is no reasonable likelihood of confusion between the Mark and any of the three registered trademarks on which the Opponent relies.

[24] When conducting the confusion analysis, I shall do so with reference to the Opponent's registered word mark XMAXX (TMA982,851), as I consider this registration to represent the Opponent's strongest case. If the Opponent is not successful with this trademark, it would not achieve a more favourable result with its other registered trademarks, as those other trademarks incorporate design elements which reduce the degree of resemblance to the Applicant's Mark.

The test for confusion

[25] The test for confusion, set out in section 6(2) of the Act, provides that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification.

[26] The test for confusion is one of first impression and imperfect recollection. In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be accorded equal weight [see, in general, *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54; *Veuve Cliquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 (*Masterpiece*)].

Inherent distinctiveness and extent known

[27] Both parties' trademarks possess at least some inherent distinctiveness. The Opponent's trademark XMAXX includes the term "MAX", which is a common abbreviation for the English word "maximum" [see *Canadian Oxford Dictionary*, 2nd Ed]. This term possesses a laudatory connotation, which aligns with the Opponent's own descriptions of its products as "the world's fastest and most innovative radio-controlled performance model vehicles" (para 2 of the Zollinger Affidavit). In my view, the inherent distinctiveness of the Opponent's trademark is derived principally from the prefix "X" at the beginning of the trademark and the duplicated "XX" at the end of the trademark, rather than the term "MAX".

[28] With respect to the Applicant's Mark, the component "MAX" is similarly laudatory when considered in association with the Applicant's goods. The term "BUILD" is suggestive, if not descriptive, when used in association with construction toys. The term "MORE" adds little inherent distinctiveness, as this is a common English adjective and adverb meaning "in a greater degree" [see *Canadian Oxford Dictionary*, 2nd Ed]. The inherent distinctiveness of the Mark arises from the combination of the words MAX, BUILD and MORE in an unusual grammatical construction. For this reason, consumers would likely understand it to be a trademark rather than simply a descriptive phrase [see *Clarkson Gordon v Register of Trademarks* (1985), 5 CPR (3d) 252 (FCTD) and *Pizza Pizza Ltd v Canada (Registrar of Trademarks)* (1982), 67 CPR (2d) 202 at para 8].

[29] The distinctiveness of a trademark may be enhanced through use and promotion in Canada [see *Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD); *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)].

[30] While the Opponent has provided some rudimentary evidence of the use of its trademark XMAXX in Canada, ultimately, at best for the Opponent I have one invoice from 2015 for the sale of 24 items bearing that trademark to a retailer in Canada. The Opponent has otherwise not provided any detailed Canadian sales information in respect of the trademark, or any circulation or attendance figures from which I might assess the impact of its advertising in Canada. In these circumstances, I can only conclude that the Opponent's trademark is known to some minimal extent in Canada in association with radio-controlled vehicles and parts and accessories.

[31] I note that the Applicant argued that there is no acquired distinctiveness in the Opponent's trademarks because any use thereof in Canada was not by the Opponent directly and there is no evidence that such use accrued to the Opponent via license pursuant to section 50(1) of the Act (see Applicant's written representations, paras 46-47). However, I reject that argument as the Zollinger Affidavit expressly describes the Opponent's Canadian sales as occurring through distributors and retailers in Canada, which does not engage the requirements of section 50(1) of the Act [see for example *Advance Magazine Publishers Inc v Vogue Sculptured Nail Systems Inc*, 2010 TMOB

129 at para 28 and *BCF SENCRL v Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co KG* (2008), 72 CPR (4th) 226 (TMOB) at para 10]. Based on the evidence of record, I am satisfied that any use of the Opponent's trademarks in Canada was use by the Opponent.

[32] The Applicant has not filed any evidence of use or reputation of the Mark in Canada, and therefore I must conclude the Mark has not become known to any extent.

[33] Taking the above into consideration, including the inherent distinctiveness of the parties' trademarks and the extent to which they have become known, I consider this factor to favour the Opponent but only to a slight degree.

Length of time the trademarks have been in use

[34] The Opponent has demonstrated at least some sales of its goods in Canada in association with the trademark XMAXX since 2015. In contrast, there is no evidence that use of the Applicant's Mark has commenced in Canada. Consequently, this factor favours the Opponent.

Nature of the goods and nature of the trade

[35] When considering the nature of the goods, it is the statement of goods in the parties' application and registration that govern the analysis [see *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)]. Those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties can be useful, particularly where there is an ambiguity as to the goods or services covered in the application or registration at issue [see *McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA); *Procter & Gamble Inc v Hunter Packaging Ltd* (1999), 2 CPR (4th) 266 (TMOB)].

[36] With respect to the Opponent's remote-controlled model vehicles and parts therefor, I note that these items are not described as "toys" either in the Opponent's registration or in the body of the Zollinger Affidavit. Indeed, based on the evidence of record, I find it difficult to characterize the Opponent's products as "toys", at least to the

extent that term refers to a child's plaything. The XMAXX branded vehicles depicted in Exhibit "E" to the Zollinger Affidavit are listed as weighing over twenty (20) pounds, capable of reaching speeds in excess of 50 mph, and costing in excess of \$1,300 CDN. The battery and battery charger for the vehicle together cost in excess of \$600 CDN. While I appreciate that some types of remote-controlled vehicles might be considered to fit within the "toy" product category, on balance, I consider the nature of the goods in the Opponent's registrations to be slightly different from the toy building blocks and toy figures described in the Application.

[37] Despite the difference in the nature of the goods, it is apparent that there is potential for overlap in the parties' channels of trade. While many of the Opponent's retailers in Canada (as taken from the list in Exhibit "D" to the Zollinger Affidavit) appear to be electronics and specialty hobby stores, it appears likely that at least some of the Canadian retailers which sell the Opponent's products also sell toys. Therefore, I agree with the Opponent that there is the potential for overlap in the parties' channels of trade.

[38] In view of the above, the nature of the goods factor slightly favours the Applicant, while the nature of the trade factor slightly favours the Opponent.

Degree of resemblance in appearance, sound or idea suggested

[39] In *Masterpiece, supra*, at para 49, the Supreme Court of Canada identifies the degree of resemblance between the parties' trademarks as the factor that will often have greatest effect on the confusion analysis. I consider that to be the case here.

[40] The parties' trademarks are quite different in appearance and sound, given that the Opponent's trademark is much shorter in length, begins with the letter "X" and includes the misspelled term "MAXX". The Applicant's Mark is noticeably longer and is comprised of three separate, conventionally spelled, English words.

[41] Of course, the degree of resemblance in this case arises from the common presence of the term "max" contained within each party's trademark. However, it has been widely recognized that when a shared portion of two trademarks is descriptive, this minimizes the impact of the similarity [see *Venngo Inc v Concierge Connection Inc*,

2015 FC 1338, aff'd 2017 FCA 96, 146 CPR (4th) 182 (Venngo); see also *Prince Edward Island Mutual Insurance Co v Insurance Co of Prince Edward Island* (1999), 86 CPR (3d) 342 (FC)]. In the present case, I do not consider the common presence of the laudatory term “max”, on its own, to give rise to a high degree of resemblance. Indeed, I consider the ideas conveyed by the parties’ trademarks to be different. The Opponent’s trademark XMAXX likely conveys a general idea of “extreme” and “maximum”, while the Applicant’s Mark conveys an idea relating to building.

[42] Overall, when the trademarks are considered as a whole, in my view they are more different than they are similar, and consequently the degree of resemblance factor favours the Applicant.

Conclusion re confusion

[43] Taking all of the above into account, and in particular considering the limited degree of resemblance between the parties’ trademarks, and the fact that any resemblance is based on the common presence of the laudatory term “max”, I find that the Applicant has met its burden of demonstrating that there is no reasonable likelihood of confusion. Therefore, the section 12(1)(d) ground of opposition is rejected in respect of each of the Opponent’s three registered XMAXX Trademarks.

Non-entitlement Ground – Section 16(3)(a)

[44] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because at the date of filing of the Application, the Mark was confusing with the Opponent’s XMAXX Trademarks as well as the trademarks T-MAXX and MAXX. The material date for assessing the non-entitlement ground is the filing date of the Application, namely, December 7, 2017.

[45] In order to meet its initial evidential burden in support of this ground of opposition, the Opponent is required to show that it had used or made known its trademark as of the material date and that it had not abandoned the trademark as of April 3, 2019 [see section 16(5)].

XMAXX Trademarks

[46] Based in part on the invoice dated December 14, 2015, which includes reference to the sale of “X-MAXX” items (see Exhibit “B” to the Zollinger Affidavit), I am prepared to accept that the Opponent has demonstrated use of its trademark XMAXX in Canada prior the material date for the non-entitlement ground of opposition, and therefore has met its initial evidential burden. The legal burden then shifts to the Applicant. For essentially identical reasons to those set out above in respect of the section 12(1)(d) ground of opposition, the Applicant has met its legal burden of demonstrating that on a balance of probabilities there is no likelihood of confusion between the Mark and any of the Opponent’s XMAXX Trademarks. Therefore, the Opponent’s non-entitlement ground of opposition based on its XMAXX Trademarks is rejected.

T-MAXX

[47] With respect to alleged prior use of its trademark T-MAXX in Canada, the Opponent has included a single invoice dated February 2, 2001 showing a sale in connection with the trademark T-MAXX (see Exhibit “B” to the Zollinger Affidavit). Even if I was to accept this as sufficient evidence of use of the trademark T-MAXX as of December 7, 2017 and non-abandonment as of April 3, 2019, the outcome of the confusion analysis remains the same and favours the Applicant. That is to say, even if I were to accept that the Opponent has met its initial evidential burden for the non-entitlement ground of opposition in respect of its trademark T-MAXX, the Applicant has satisfied its legal burden by demonstrating that there is no likelihood of confusion for essentially the same reasons as discussed above for the section 12(1)(d) ground of opposition. I do not consider the Opponent’s position with respect to confusion to be any stronger with the trademark T-MAXX than for the trademark XMAXX. Thus, the Opponent’s non-entitlement ground of opposition based on its trademark T-MAXX is rejected.

MAXX

[48] With respect to alleged prior use of its trademark MAXX in association with batteries and chargers for radio-controlled model vehicles, the Opponent relies on the

invoiced dated December 14, 2015 which includes reference to the sale of a “BATTERY/CHARGER COMPLETER PACK” (see Exhibit “B” to the Zollinger Affidavit). This invoice does not depict the trademark MAXX in association with the battery charger, but the Opponent’s position is that the item itself displays the trademark MAXX as seen in the images of the battery charger in Exhibit “C” to the Zollinger Affidavit. Even if I was to accept this proposition and conclude that the Opponent had met its initial evidential burden, the ultimate outcome is the same as I find that the Applicant has met its legal burden of demonstrating no likelihood of confusion between the Mark and the Opponent’s trademark MAXX, for the same reasons discussed above with respect to the section 12(1)(d) ground. Indeed, the Applicant’s position on the issue of confusion is arguably even stronger when considering the Opponent’s trademark MAXX, given the trademark MAXX has an even lower level of inherent distinctiveness than the trademark XMAXX. Thus, the Opponent’s non-entitlement ground of opposition based on its trademark MAXX is also rejected.

Distinctiveness Ground – Section 2

[49] The Opponent alleges that the Mark is not distinctive of the Applicant within the meaning of section 2 of the Act because it does not actually distinguish nor is it adapted to distinguish the goods of the Applicant from those of the Opponent. The material date for this ground is the date of opposition, namely, September 3, 2019 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

[50] In order to meet the initial evidential burden for a distinctiveness ground of opposition, an opponent must show that its trademark had a substantial, significant or sufficient reputation in Canada as of the material date [see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 (FC) at paras 33 and 34].

[51] Based on the evidence of record, I am not satisfied that the Opponent has met that initial evidential burden. As discussed above, aside from two invoices, the Opponent’s evidence provides only generalities regarding the use of its trademarks in Canada, and provides no quantitative information regarding its sales or the scope of its advertising in Canada prior to the material date from which one could conclude that that

the Opponent had a substantial, significant or sufficient reputation in Canada in connection with any of its trademarks. Consequently, the Opponent has failed to meet its initial evidential burden for the section 2 ground and it is rejected on that basis. In any event, even if I had concluded that the Opponent had met its initial evidential burden for this ground, the ground would have been rejected based on a finding of no likelihood of confusion for the reasons discussed above in respect of the section 12(1)(d) and 16(3)(a) grounds.

DISPOSITION

[52] 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.

Timothy Stevenson
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2023-01-31

APPEARANCES

For the Opponent: Theo Yates

For the Applicant: Chris Zelyas

AGENTS OF RECORD

For the Opponent: Miltons IP/PI

For the Applicant: Dentons Canada LLP