



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2025 TMOB 130

**Date of Decision:** 2025-06-17

## **IN THE MATTER OF AN OPPOSITION**

**Opponent:** Purkis Circus Corporation

**Applicant:** Caitlin Clendinneng

**Application:** 1,862,225 for Junk Drawer Clothing

[1] Caitlin Clendinneng (the Applicant) has applied to register the trademark Junk Drawer Clothing (the Mark), for use in association with numerous types of clothing and bags, patterns for making clothing, custom clothing manufacture and repair services, and related retail services. A complete list of the goods and services listed in the application, and their Nice classifications (the Applicant's Goods and Services), is provided in Schedule A to this decision.

[2] Purkis Circus Corporation (the Opponent) opposes the registration of the Mark. The Opponent owns the registered trademark JUNK DRAWERS (registration No. TMA1,018,198, the Opponent's Trademark) for use in association with "men's clothing, namely boxer shorts, underwear" (the Opponent's Goods). The Opponent raises several grounds of opposition, including that the Mark is unregistrable because it is confusing with the Opponent's Trademark.

[3] For the following reasons, the application is refused in part, and the opposition is rejected in part.

#### **THE PROCEEDING AND THE EVIDENCE**

[4] The application was filed on October 11, 2017, and was advertised pursuant to section 37(1) of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on July 22, 2020.

[5] The opponent filed a statement of opposition pursuant to section 38(1) of the Act on October 22, 2021, raising several grounds of opposition. In support of these grounds, the Opponent submitted evidence in chief consisting of certified copies of: (a) the registration of the Opponent's Trademark; and (b) the Registrar's file in respect of the present application.

[6] In support of the application, the Applicant submitted a document entitled "Counter Evidence" (the Applicant's Evidence). Despite its title, the document consists largely of argument against the Opponent's grounds of opposition, rather than evidence. Nonetheless, the document does contain numerous assertions of fact, and the document was duly sworn by the Applicant before a commissioner for taking oaths on August 19, 2022 (see Applicant's Evidence, page 7). The factual assertions in the document relate to dictionary definitions of certain terms used in the statement of goods and services, the Applicant's use of the Mark to date, and the Applicant's interactions with the Opponent.

[7] By way of letter dated September 20, 2022 (the Objection Letter), the Opponent objected to the Applicant's Evidence on several grounds. The Opponent also sought and obtained an order to cross-examine the Applicant on her evidence, but did not proceed with the cross-examination.

[8] The Opponent also submitted the affidavit of Evelyn Dapito dated April 14, 2023 (the Dapito Affidavit) as reply evidence. Ms. Dapito's affidavit includes the results of a Google search for the words "Junk Drawer Clothing", and various screen shots of websites and an Etsy store operated by the Applicant. The Dapito Affidavit also encloses dictionary definitions of the words "junk" and "drawer", results from a Google search for the phrase "what items are in a junk drawer", and an excerpt from the *Trademarks Examination Manual*. Ms. Dapito was cross-examined on her affidavit on March 25, 2024, and the transcript of her cross-examination was made of record.

[9] As its written representations, the Opponent submitted a letter dated August 2, 2024, advising that the Opponent "intends to rely on the pleadings, evidence and various written representations that have already been filed", and asserting that: (a) Opponent has "satisfied its evidentiary burden with respect to each ground of opposition"; and (b) "the Applicant has not submitted admissible evidence sufficient to discharge [its burden]".

[10] The Applicant filed written representations on September 30, 2024.

[11] An oral hearing was requested by the Opponent, conditional on the Applicant also requesting a hearing. Since the Applicant did not request a hearing, no hearing was held.

### **THE OPPONENT'S OBJECTIONS TO THE APPLICANT'S EVIDENCE**

[12] The Opponent raised several objections to both the form and substance of the Applicant's Evidence, and requested that it be struck from the record. While the Registrar does not have the authority to remove documents from its file in respect of an application, the Registrar may find evidence to be inadmissible, and may decline to give weight to such evidence in appropriate circumstances. For the following reasons, I find

some aspects of the Applicant's Evidence to be inadmissible and will give no weight to these aspects.

***First Person and Absence of Fact***

[13] The Opponent asserts that the Applicant's Evidence is not written in the first person, as required by section 80(1) of the *Federal Courts Rules*, SOR/98-106 (the *Federal Courts Rules*). The Opponent asserts that the rules of evidence which are applicable in Federal Court are applicable in opposition proceedings [Objection Letter at page 2, citing the Opposition Board's practice notice entitled *Practice in trademark opposition proceedings*, section IV].

[14] While legal rules of evidence such as hearsay and privilege are generally applicable in proceedings before the Registrar, the Registrar does not strictly adhere to the formal rules of practice of the Federal Court [see *Maximilian Fur Co v Maximillian for Men's Apparel Ltd*, 1983 CanLII 5430 (TMOB)]. Section 80(1) of the *Federal Courts Rules* is just such a formal rule, rather than a legal rule of evidence. The formal nature of section 80(1) of the *Federal Courts Rules* is underscored by its other requirement, which is that affidavits must be "in Form 80A". To my knowledge, no affidavit ever submitted to the Registrar in an opposition proceeding has been drawn in Form 80A of the *Federal Courts Rules*, which requires a style of cause in a form that is not applicable to opposition proceedings. Accordingly, it is apparent that non-compliance with section 80(1) of the *Federal Courts Rules* is not an impediment to the admissibility of an affidavit before the Registrar.

[15] The Opponent also asserts that the Applicant's Evidence contains "little to no fact", and that it is improper to include argument on the issues in evidence. It is apparent from the face of the Applicant's Evidence that much of it consists of argument on the merits of this matter. However, it is also apparent that the Applicant's Evidence contains several statements that

amount to assertions of fact, such as the Applicant's statement of what the Opponent's principal said to her [page 3, second paragraph], and the Applicant's statements regarding how the Mark has been used [page 4]. Since the document has been duly sworn before a commissioner for taking oaths, I am prepared to accept these statements as evidence of the facts asserted. I will not give any evidential weight to statements that are not assertions of fact, including those that amount to arguments on the merits.

### ***Settlement Privilege***

[16] The Opponent asserts that the Applicant's Evidence contains "statements that would fall under "without prejudice settlement discussion"", which should be struck from evidence [Objection Letter at page 3]. In particular, page 3 of the Applicant's Evidence contains an assertion that the Opponent's principal verbally stated to the Applicant his opinion of whether the parties' trademarks were confusing.

[17] To assert a claim to settlement privilege, a three-part test must be met [*Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669 at para 34]:

- a litigious dispute must be in existence or within contemplation;
- the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- the purpose of the communication must be to attempt to effect a settlement.

[18] The test for settlement privilege is conjunctive, and the burden to establish that privilege applies is on the party asserting it [*Robert Aquilini Successor Trust v Canada (Attorney General)*, 2021 CanLII 46435 at para 74 (FC)]. However, the Opponent has not addressed any of the required

elements set out above. In particular, and at a minimum, there is no evidence that the statement was made with the express or implied intention that it would not be disclosed in these proceedings, or that the purpose of the statement was to attempt to effect settlement. Therefore, evidence of the Opponent's statements will not be deemed inadmissible.

***Reference to documents not included in evidence***

[19] The Opponent objects to references in the Applicant's Evidence to correspondence with the trademark examiner who reviewed the present application, on the basis that the evidence does not include a certified copy of the application file history containing the correspondence [Objection Letter, page 3]. However, the evidence does contain such a certified copy; it was filed by the Opponent as part of its evidence in chief. Accordingly, references to correspondence with the examiner will not be deemed inadmissible.

***Improperly Notarized Evidence***

[20] The Opponent objects to the exhibits attached to the Applicant's Evidence on the basis that they are not properly notarized [Objection Letter, pages 3-4]. In particular, the exhibits are not identified with cover pages signed by the commissioner for taking oaths that commissioned the document. The Opponent's objection in this instance is well founded [see *Re Andres Wines Ltd and E and J Gallo Winery* (1975), 25 CPR (2d) 126 at 135-6 (FCA)]. Since the Opponent's objection in this regard timely made, and no action was taken by the Applicant to address the issue, no weight will be given to the exhibits attached to the Applicant's Evidence.

***Conclusion on Evidentiary Objections***

[21] In view of the foregoing, I find all statements in the Applicant's Evidence that do not constitute assertions of fact, including all statements

that constitute argument, to be inadmissible. I also find the exhibits attached to the Applicant's Evidence to be inadmissible. No weight will be given to any of the inadmissible evidence in this decision. In all other respects, the Applicant's Evidence is admissible and will be given weight.

### **GROUND OF OPPOSITION**

[22] In its statement of opposition, the Opponent raises the following grounds of opposition:

- the services "custom knitting and crocheting" and "upcycle/recycle/redesign existing fabrics and clothing" are not stated in ordinary commercial terms, as required by section 30(2)(a) of the Act (the 30(2)(a) Ground);
- the Mark is unregistrable because it is confusing with the Opponent's Trademark (the Registrability Ground);
- the Mark is not distinctive within the meaning of section 2 of the Act, for the reasons stated below (the Distinctiveness Ground);
- the Applicant was not using and did not propose to use the Mark in Canada as of the filing date of the application (the No Use or Proposed Use Ground); and
- the Mark is not registrable because it is clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the Applicant's goods and services (the Descriptiveness Ground).

[23] For each ground of opposition, there is an initial evidential burden on the Opponent to adduce evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition are true. If this initial burden is met, then the Applicant bears the legal onus of satisfying the Registrar that, on a balance of probabilities, the ground of

opposition should not prevent registration of the Mark [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)].

## **REASONS FOR DECISION**

### ***The Section 30(2)(a) Ground***

[24] In respect of this ground, the Opponent relies on sections 38(2)(a) and 30(2)(a) of the Act, and section 29 of the *Trademarks Regulations*, SOR/2018-227 (the Regulations). In particular, the Opponent asserts that the terms “custom knitting and crocheting” and “upcycle/recycle/redesign existing fabrics and clothing” are not ordinary commercial terms, as required by section 30(2)(a) of the Act, or do not describe the services specifically, as required by section 29 of the Regulations [statement of opposition, para 5].

[25] The Opponent’s initial burden in respect of this ground can be met by presenting sufficient argument to support its position, and the Registrar may take judicial notice of facts in support of the Opponent’s pleading [*Catherine Sidonio v Chanel Limited*, 2024 TMOB 189 at para 44]. However, since the Opponent has not presented any argument or evidence in respect of this ground, the Opponent has failed to meet its initial burden. This ground of opposition is therefore rejected.

### ***The Registrability Ground***

[26] In respect of this ground, the Opponent relies on sections 38(2)(b) and 12(1)(d) of the Act, and pleads that the Mark is confusing with the Opponent’s Trademark. The relevant date for this ground of opposition is the date of this decision [*Simmons Ltd v A to Z Comfort Beddings Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[27] Since the Opponent’s Trademark is registered, and the registration is in good standing as of the date of this decision, Opponent’s initial burden is



met. Accordingly, the Applicant bears the legal onus of demonstrating that the Mark is not confusing with the Opponent's Trademark.

#### The Test for Confusion

[28] A trademark causes confusion with another trademark if the use of both in the same area would be likely to lead to the inference that the goods or services associated with the trademarks are manufactured, sold, leased, hired or performed (as the case may be) by the same person [section 6(2) of the Act]. The issue is to be considered as a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applied-for trademark at a time when they have no more than an imperfect recollection of an opponent's trademark. This casual, hurried consumer 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 Clicquot Ltée*, 2006 SCC 23 at para 20 (*Veuve Clicquot*)].

[29] Applying the test for confusion is an exercise in finding facts and drawing inferences [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 102 (*Masterpiece*)]. All surrounding circumstances of the case must be considered, including those listed at 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, including in appearance or sound or in the ideas suggested by them.

### Inherent Distinctiveness and Extent Known

[30] The inherent distinctiveness of a trademark refers to its originality. When a trademark is a unique or invented name, such that it could only refer to one thing, the trademark is inherently distinctive [*Tommy Hilfiger Licensing Inc v Produits de Qualité IMD Inc*, 2005 FC 10 at para 53].

Conversely, trademarks consisting of or including words that are not original or unique, such as words used by all traders to describe the character or quality of their goods, have a low degree of inherent distinctiveness [see *General Motors Corp v Bellows*, 1949 CanLII 47 (SCC), see also *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)].

[31] Both the Mark and the Opponent's Trademark lie somewhere in between the two scenarios described above. The trademarks consist primarily or entirely of the phrase "Junk Drawer", or its plural equivalent "Junk Drawers". While such words are not original or unique, there is no evidence that either trademark has a meaning that relates to the parties' goods or services. There is also no evidence to suggest that traders generally use these phrases to describe such goods or services. Accordingly, both trademarks have a fair degree of inherent distinctiveness, despite their lack of uniqueness or originality.

[32] As for the extent to which the trademarks have become known, there is no evidence that the Opponent's Trademark has been used in Canada or become known to Canadian consumers in any other manner. On the other hand, the Applicant's Evidence establishes the following:

- the Applicant has used the Mark since at least 2008, and has had a publicly available online store since January 2009 [Applicant's Evidence, page 4, second full paragraph];

- the Applicant's online presence is "one of the top search results when using an online search engine" [page 3, fourth paragraph]; and
- the Applicant's business has a "local reputation" [page 3, last paragraph].

[33] Based on the foregoing, I accept that the Mark has been used and become known in Canada to some degree. However, the Applicant's Evidence does not provide any way of determining the extent to which the Mark has become known, such as sales volumes, the amount of visitors to the website, or evidence of the extent of the Applicant's advertising. Without such evidence, I cannot make any meaningful determination of the extent to which the Mark has become known in Canada. Accordingly, this factor favours the Applicant, but to only a minimal extent.

#### Length of Time in Use

[34] As stated above, there is no evidence that the Opponent's Trademark has ever been used in Canada, whereas the Applicant has been using the Mark in Canada since at least 2008 [Applicant's Evidence, page 3, last paragraph]. However, in view of the absence of evidence of the extent to which the Mark has been used since 2008, I find that this factor favours the Applicant to only a minimal extent.

#### Nature of the Goods and Services

[35] When considering the parties' goods and services, the Applicant's Goods and Services as stated in the application must be compared with the Opponent's Goods as stated in the registration of the Opponent's Trademark [see *Mr Submarine Ltd v Amandista Investments Ltd*, 1987 CanLII 8953 (FCA)]. That being said, evidence of the parties' actual use of their trademarks is relevant in understanding the meaning and scope of the goods

and services stated in the application and registration [see *McDonald's Corp v Coffee Hut Stores Ltd.* (1996), 68 CPR (3d) 168 (FCA)].

[36] It is clear on the face of the parties' respective statements of goods and services that there is at least some degree of overlap. Specifically, the Opponent's Goods consist of "men's clothing, namely boxer shorts, underwear", and a number of the Applicant's Goods directly overlap with these goods, or are closely related in that they constitute other types of underclothing or intimate apparel, for either men or women (the Overlapping Goods):

- Bathing suits;
- Bikinis;
- Corset undergarment;
- Corsets;
- Bikini bottoms;
- Bikini tops;
- Boxer briefs;
- Boxer shorts;
- Fitted swimming costumes with bra cups;
- Ladies' underwear;
- Lingerie;
- Loungewear;
- Lounging pyjamas;
- Men's underwear;
- Muscle shirts;
- Night dresses;
- Night gowns;
- Nightdresses;
- Nightgowns;

- Nighties;
- Nightwear;
- Panties;
- Pyjamas;
- Sleeping garments;
- Sleepwear;
- Socks;
- Sports bras;
- Swim suits;
- Swim wear for gentlemen and ladies;
- Swimming costumes;
- Swimming suit bottoms;
- Swimming trunks;
- Swimsuits;
- Swimwear;
- Tankinis;
- Thong underwear;
- Underclothing;
- Undergarments;
- Underskirts;
- Underwear;
- Women's lingerie;
- Women's underwear.

[37] The Applicant's Goods and Services also contain numerous other items in Nice class 25, as well as retail sale services relating to clothing in Nice class 35. These goods and services all relate to clothing, just as the Opponent's Goods do. However, many of the clothing items, such as aprons, clothing for gymnastics, and Halloween costumes, are substantially different in nature from boxer shorts and underwear.

[38] In addition, the Applicant's evidence is that her clothing goods in Nice class 25 are "custom, one-off hand-made", whereas the Opponent's Goods are mass-produced [Applicant's Evidence at page 3, last paragraph]. I accept the Applicant's sworn statement as to the nature of her own clothing goods, and in the absence of cross-examination or evidence to the contrary from the Opponent, I accept her sworn statement as to the nature of the Opponent's Goods as well. This difference in the nature of the parties' clothing goods and related services decreases the likelihood of consumer confusion.

[39] The remainder of the Applicant's Goods and Services constitute various types of bags, as well as goods and services relating to the manufacture or repair of clothing. There is an even greater degree of difference between these goods and services and the Opponent's Goods, relative to the Applicant's Goods and Services that have already been discussed.

[40] Upon considering the foregoing, I find that the nature of the parties' goods and services favours the Opponent in respect of the Overlapping Goods, despite the fact these goods are custom made, as opposed to the Opponent's mass-produced goods. I find this factor to be evenly balanced with regard to the remaining goods in Nice class 25, and the Applicant's services in Nice class 35. I find this factor favours the Applicant in respect of the remaining Applicant's Goods and Services.

#### Nature of the Trade

[41] In respect of this factor, the Applicant argues that the custom, hand-made nature of her goods versus the Opponent's mass-produced goods favours her position. Since custom-made clothing would necessarily require the placing of an order in advance, and possibly the taking of measurements, I find it reasonable to infer that such custom-made clothing would likely be sold in a different manner, through different channels of

trade, than the Opponent's mass-produced underwear. Differences such as this are a significant factor that favours the Applicant in this case [see *Jacques Vert Group Limited v YM Inc (Sales)*, 2014 FC 1242 at para 45 (*YM Sales*)]. And while the parties' present use (or intended use) should not be considered to the exclusion of future uses that could fall within the scope of the application or registration, there is no evidence in this case to suggest that the parties' channels of trade may converge in the future [see *YM Sales* at para 46].

[42] In view of the foregoing, I find that the nature of the parties' trade favours the Applicant, in respect of all of the Applicant's Goods and Services.

#### Degree of Resemblance

[43] The Mark and the Opponent's Trademark both bear obvious similarity in terms of both appearance and sound, since both trademarks consist primarily of the phrase "Junk Drawer", or its plural equivalent. The degree of resemblance is decreased, however, in terms of the ideas suggested by the trademarks. While the Opponent's Trademark suggests the idea of "junk drawers" generally, the Mark suggests the idea of clothing that is somehow associated with a "junk drawer".

[44] Overall, I find that the degree of resemblance between the trademarks favours the Opponent, given the strong resemblance between the trademarks in appearance and sound.

#### Surrounding Circumstance – Statements of the Opponent

[45] The Applicant also relies on alleged statements from the Opponent's principal to the effect that the parties' trademarks are not confusing [Applicant's written representations at page 2, second last paragraph]. In this regard, the Applicant relies on her sworn statement that "the Opponent verbally stated on January 21, 2021, and on March 24, 2021, that he did not

think the two [trademarks] were confusing and agreed that they were distinct enough not to cause conflict” [Applicant’s Evidence, page 3, second paragraph].

[46] As stated above, the Opponent objects to this evidence on the basis of settlement privilege, but has failed to substantiate its objection with any evidence of the purpose for which the statement was given, or of an intention that it not be disclosed. In addition, the Opponent had the opportunity to both cross-examine the Applicant on this evidence, and to respond in reply, and declined to do either. Since the Opponent has not disputed the truth of the Applicant’s evidence on this point, despite having ample opportunity to do so, I accept that the Opponent’s principal did make some statement to the effect that, in his view, the parties’ trademarks are not likely to be confused.

[47] That being said, in my view this statement from the Opponent’s principal is of limited value in determining the issue of confusion. There is no evidence of the Opponent’s principal’s level of familiarity with trademark law, including whether he or she is familiar with the test for confusion set out in the Act. While it is reasonable to infer that the Opponent’s principal was familiar with the nature of the parties’ goods and services to at least some extent, and with the degree of similarity between the trademarks, it is unclear whether the Opponent’s principal had considered the remaining surrounding circumstances, as required by section 6(5) of the Act. It is also unclear whether the Opponent’s principal was stating his view in respect of all of the Applicant’s Goods and Services, or only some. For these reasons, in my view the Opponent’s statements in this regard are of limited assistance. This surrounding circumstance therefore favours the Applicant, but only to a limited extent.



#### Conclusion regarding confusion

[48] As stated above, the Applicant bears the burden of demonstrating that the Mark is not confusing with the Opponent's Trademark, on a balance of probabilities. Having considered all of the foregoing, as a matter of first impression in the mind of a casual consumer, I am not satisfied that the Applicant has met this burden in respect of the Overlapping Goods. I reach this conclusion primarily on the basis of the degree of similarity between the trademarks and the fact that the Overlapping Goods are identical to the Opponent's Goods, or nearly so. I reach this conclusion despite the fact that: (a) the Opponent's Trademark has not been shown to be known in Canada to any appreciable extent; (b) the differences between the Applicant's custom made goods and the mass produced goods of the Opponent, and the channels of trade in which such goods will move; and (d) the Opponent's stated view that the parties' trademarks are not likely to be confused. In my view, considering all of the foregoing, the chances are approximately even that a casual consumer would infer that the Overlapping Goods emanate from the same source as the Opponent's Goods.

[49] I reach a different conclusion in respect of the remainder of the Applicant's Goods and Services. These remaining goods and services are at least somewhat less similar to the Opponent's Goods than the Overlapping Goods, which in my view tips the balance of probabilities in favour of the Applicant. The likelihood of confusion in respect of the remaining Applicant's Goods and Services is therefore somewhat less than even.

[50] For the foregoing reasons, the Registrability Ground succeeds in respect of the Overlapping Goods, and is rejected in respect of the remainder of the Applicant's Goods and Services.

### ***The Distinctiveness Ground***

[51] In respect of this ground, the Opponent relies on sections 38(2)(d) and 2 of the Act, and asserts that the Mark does not actually distinguish, and is not adapted to distinguish, the Applicant's Goods and Services from the goods of the Opponent offered and sold in association with the Opponent's trademarks JUNK DRAWER and JUNK DRAWERS [statement of opposition, para 8]. The material date for assessing this ground is the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185 para 25].

[52] To meet its initial burden, the Opponent must establish that, as of the material date, the Opponent's asserted trademarks had a reputation in Canada that was "substantial, significant or sufficient" to negate the established distinctiveness of the Mark [*Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657 at para 34]. Since there is no evidence that the asserted trademarks have a reputation in Canada of any kind, the Opponent has failed to meet its initial evidential burden. This ground of opposition is therefore rejected.

### ***The No Use or Proposed Use Ground***

[53] In respect of this ground, the Opponent relies on section 38(2)(e) of the Act, and pleads that as of the filing date of the application, the Applicant was not using and did not propose to use the Mark in Canada in association with various goods and services identified in paragraph 9 of the statement of opposition. Rather, the Opponent asserts that the Applicant "merely selected a number of items from the [Trademarks Office's] goods and services manual without having used the Mark in association with each good and service and without an intention to use the Mark in association with each good and service" [statement of opposition, para 9].

[54] In the absence of submissions from the Opponent, it is not apparent how any of the Opponent's evidence supports its factual assertions in respect of this ground. Accordingly, I find that the Opponent has failed to meet its initial evidential burden, and this ground of opposition is rejected.

### ***The Descriptiveness Ground***

[55] In respect of this ground, the Opponent relies on sections 38(2)(b) and 12(1)(b) of the Act, and asserts that the Mark is not registrable because it is either clearly descriptive or deceptively misdescriptive, in English, of the character or quality of the Applicant's Goods and Services [statement of opposition, para 10]. The Opponent also relies on section 38(2)(d) of the Act, and asserts that the Mark is not distinctive of the Applicant's Goods and Services, for essentially the same reason [statement of opposition, para 11].

[56] The opponent's initial evidential burden in respect of this ground can be met by reference to the ordinary dictionary meaning of the words in the Mark [see *Flowers Canada/Fleurs Canada Inc v Maple Ridge Florist Ltd* (1998), 86 CPR (3d) 110 (TMOB)]. However, the only such evidence of record appears in the Dapito Affidavit, which was filed in reply pursuant to section 52 of the Regulations.

[57] Proper reply evidence is that which responds directly to points raised in an applicant's evidence that are unanticipated; it is not meant to correct or complete an opponent's earlier evidence, and does not entitle a party to split its case [see *Halford v Seed Hawk Inc*, 2003 FCT 141]. Improper reply evidence, such as evidence which ought to have been part of a party's case in chief, can be excluded [see *DMC SRL v Giusti*, 2024 FC 605 at para 29]. In the present case, while there has been no request to exclude the Opponent's reply evidence, the Dapito Affidavit is clearly improper reply in respect of the Descriptiveness Ground. The meaning of the words in the Mark has been in issue since the moment the Opponent asserted the

Descriptiveness Ground in its statement of opposition. The Opponent's evidence on this issue therefore should have been included in its case in chief. By introducing the evidence only in reply, the Opponent has effectively split its case. In view of the improper nature of the Dapito Affidavit, in respect of the Descriptiveness Ground, I am not prepared to permit the Opponent to rely on it for this ground. The Descriptiveness Ground is therefore rejected, since the Opponent has failed to meet its initial burden.

**DISPOSITION**

[58] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application with respect to the Overlapping Goods, and I reject the opposition with respect to the remainder of the Applicant's Goods and Services, pursuant to section 38(12) of the Act. The application will proceed to registration in association with the goods and services listed in Schedule B to this decision.

Jaimie Bordman  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

## **SCHEDULE A**

### ***The Applicant's Goods and Services***

- 16 (1) Patterns for making clothes; patterns for making clothing
- 18 (2) Backpacks, book bags, sports bags, bum bags, wallets and handbags; change purses; clothing for dogs; clothing for pets; clutch bags; clutch purses; coin purses; cosmetic bags; dog clothing; handbags, purses and wallets; knitted bags; leather purses; multi-purpose purses; purses; purses and wallets; small clutch purses; small purses
- 25 (3) Aprons; athletic apparel; athletic clothing; bathing suits; bikinis; business clothing; casual clothing; casual clothing featuring pants, dresses and shorts; coats for women; corset undergarment; corsets; jackets; jeans; knitted gloves; knitted hats; knitted sweaters; shoes; women's shoes; athletic wear; bikini bottoms; bikini tops; blouses; body suits; boxer briefs; boxer shorts; business attire; button down shirts; capri pants; cardigans; casual pants; casual shirts; casual wear; children's clothing; clothing for gymnastics; coats for men and women; coats made of cotton; coats of denim; cocktail dresses; crop tops; denim coats; denim jackets; dress clothing; dress pants; dress shirts; dresses; ear muffs; earmuffs; evening dresses; evening gowns; exercise wear; fashion hats; fitted swimming costumes with bra cups; fleece pants; formal wear; gowns; gym wear; Halloween costumes; headbands; hooded jackets; hooded pullovers; hooded sweatshirts; hooded tops; jogging pants; jumper dresses; jumpsuits; knit hats; knit jackets; knit shirts; knit skirts; knit tops; ladies' suits; ladies' underwear; leg warmers; leg-warmers; legwarmers; leotards; lingerie; long jackets; long sleeve pullovers; long sleeve shirts; long-sleeved t-shirts; loungewear; lounging pyjamas; masquerade costumes; men's shirts; men's underwear; mittens; money belts; monokinis; muscle shirts; neck warmers; night dresses; night gowns; nightdresses; nightgowns; nighties; nightwear; outdoor winter clothing; outerwear jackets; overalls; pant suits; panties; pants; pea coats; petticoats; pockets for clothing; pullovers; pyjamas; rain jackets; scarves; shawls; shawls and headscarves; shell jackets; shirt fronts; shirts; shirts for suits; short pants; short petticoats; short trousers; short-sleeve shirts; short-sleeved shirts; short-sleeved t-shirts; shorts; skirt suits; skirts; skirts and dresses; sleep masks; sleeping garments; sleepwear; sleeved jackets; sleeveless jackets; sleeveless jerseys; slippers; socks; sport coats; sport jackets; sport shirts; sports bras; sports clothing; sports jerseys; suits; sweat pants; sweat shirts; sweat suits; swim suits; swim wear for gentlemen and ladies; swimming costumes; swimming suit bottoms; swimming trunks; swimsuits; swimwear; t-shirts; tank tops; tankinis; theatrical costumes; thong underwear; tights; toques; track and field

shoes; track jackets; track pants; track suits; tube tops; tutus; underclothing; undergarments; underskirts; underwear; warm-up pants; winter gloves; women's blouses; women's lingerie; women's shirts; women's sportswear; women's suits; women's underwear; woolly hats; woven shirts; woven tops; yoga pants

- 35 (1) Mail order services in the field of clothing; online sales of clothing; operation of a clothing store; retail clothing store services; retail sale of clothing; retail store services featuring clothing; sale of clothing
- 37 (2) Mending clothing
- 40 (3) Custom knitting and finishes to clothing; clothing alteration; custom clothing alteration; custom tailoring or dressmaking; dressmaking; dyeing of clothing; embroidering; embroidery services; needlework and dressmaking; printing of patterns on textiles; sewing; sewing services; t-shirt embroidering services; textile dyeing; textile weaving; wool treatment and finishing
- 42 (4) Upcycle/ recycle/redesign existing fabrics and clothing; clothing design; dress design services; dress designing; fashion design consulting services; jewelry design; clothing design services; design of clothing

## **SCHEDULE B**

### ***Goods and Services for which the Opposition is Rejected***

- 16 (1) Patterns for making clothes; patterns for making clothing
- 18 (2) Backpacks, book bags, sports bags, bum bags, wallets and handbags; change purses; clothing for dogs; clothing for pets; clutch bags; clutch purses; coin purses; cosmetic bags; dog clothing; handbags, purses and wallets; knitted bags; leather purses; multi-purpose purses; purses; purses and wallets; small clutch purses; small purses
- 25 (3) Aprons; athletic apparel; athletic clothing; business clothing; casual clothing; casual clothing featuring pants, dresses and shorts; coats for women; jackets; jeans; knitted gloves; knitted hats; knitted sweaters; shoes; women's shoes; athletic wear; blouses; body suits; business attire; button down shirts; capri pants; cardigans; casual pants; casual shirts; casual wear; children's clothing; clothing for gymnastics; coats for men and women; coats made of cotton; coats of denim; cocktail dresses; crop tops; denim coats; denim jackets; dress clothing; dress pants; dress shirts; dresses; ear muffs; earmuffs; evening dresses; evening gowns; exercise wear; fashion hats; fleece pants; formal wear; gowns; gym wear; Halloween costumes; headbands; hooded jackets; hooded pullovers; hooded sweatshirts; hooded tops; jogging pants; jumper dresses; jumpsuits; knit hats; knit jackets; knit shirts; knit skirts; knit tops; ladies' suits; leg warmers; leg-warmers; legwarmers; leotards; long jackets; long sleeve pullovers; long sleeve shirts; long-sleeved t-shirts; masquerade costumes; men's shirts; mittens; money belts; monokinis; neck warmers; outdoor winter clothing; outerwear jackets; overalls; pant suits; pants; pea coats; petticoats; pockets for clothing; pullovers; rain jackets; scarves; shawls; shawls and headscarves; shell jackets; shirt fronts; shirts; shirts for suits; short pants; short petticoats; short trousers; short-sleeve shirts; short-sleeved shirts; short-sleeved t-shirts; shorts; skirt suits; skirts; skirts and dresses; sleep masks; sleeved jackets; sleeveless jackets; sleeveless jerseys; slippers; sport coats; sport jackets; sport shirts; sports clothing; sports jerseys; suits; sweat pants; sweat shirts; sweat suits; t-shirts; tank tops; theatrical costumes; tights; toques; track and field shoes; track jackets; track pants; track suits; tube tops; tutus; warm-up pants; winter gloves; women's blouses; women's shirts; women's sportswear; women's suits; woolly hats; woven shirts; woven tops; yoga pants
- 35 (1) Mail order services in the field of clothing; online sales of clothing; operation of a clothing store; retail clothing store services; retail sale of clothing; retail store services featuring clothing; sale of clothing
- 37 (2) Mending clothing

- 40 (3) Custom knitting and finishes to clothing; clothing alteration; custom clothing alteration; custom tailoring or dressmaking; dressmaking; dyeing of clothing; embroidering; embroidery services; needlework and dressmaking; printing of patterns on textiles; sewing; sewing services; t-shirt embroidering services; textile dyeing; textile weaving; wool treatment and finishing
- 42 (4) Upcycle/ recycle/redesign existing fabrics and clothing; clothing design; dress design services; dress designing; fashion design consulting services; jewelry design; clothing design services; design of clothing



## Appearances and Agents of Record

**HEARING DATE:** No hearing held

### **AGENTS OF RECORD**

**For the Opponent:** McMillan LLP

**For the Applicant:** No agent appointed