

Federal Court



Cour fédérale

Date: 20140507

Docket: T-1179-12

Citation: 2014 FC 440

Toronto, Ontario, May 7, 2014

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

THE SERVICEMASTER COMPANY

Applicant

and

**385229 ONTARIO LTD. DBA MASTERCLEAN
SERVICE COMPANY**

Respondent

ORDER AND REASONS

[1] The present Application is an appeal from a decision pursuant to s. 56 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (*Act*), dated March 30, 2012 in which the Opposition Board on behalf of the Registrar of Trade-marks ("Registrar"), on opposition by the Respondent, refused Canadian Trade-mark Application No. 1,070,731 and Trade-mark Application No. 1,278,252 filed by the Applicant seeking registration of the trade-marks, respectively, SERVICEMASTER CLEAN (the "Word Mark") and SERVICEMASTER CLEAN & Design (the "Design Mark").

[2] The Applicant's Word Mark and Design Mark were advertised in association with the following services:

Business advisory, business consulting and franchising services, namely, offering technical assistance in the establishment or operation or both of cleaning, building management, or building repair management services companies; providing technical assistance in the establishment and operation of a business; providing technical assistance in the establishment and operation of cleaning services; cleaning services for the interiors of buildings, including private homes, commercial buildings, health care institutions, industrial facilities, and educational facilities, and the furnishings thereof, including carpets, floors, walls, furniture and fixtures; janitorial services, disaster restoration services, namely restoring building interiors and exteriors damaged by fire, flood, and other disasters.

Colour is claimed as a feature of the Design Mark: the word SERVICEMASTER is in turquoise and the triangle design is in yellow. The application disclaims the right to the exclusive use of the words SERVICE and CLEAN apart from the mark.



[3] The Respondent is the owner of the registered trade-mark MASTER CLEAN with registration number TMA226,306 registered February 24, 1978, in association with wares, being “carpet cleaning machines”, and the services “restoration, renovation and cleaning services”. The

registration is based on use in association with the Respondent's services since May 1, 1980. The Respondent has also used the trade-mark MASTERCLEAN in association with the Respondent's services since at least as early as November 1, 1971.

[4] With respect to the Word Mark, the Registrar dismissed each of the s. 30, s. 12(1)(d), s. 16(1)(c), and s. 2 grounds of the Respondent's opposition. However, with respect to s. 16(1)(a), the Registrar found that the Respondent's ground of opposition succeeded. With respect to the Design Mark, the Registrar found that the Respondent's grounds of opposition succeeded with respect to s. 12(1)(d), s. 16(1)(d), and s. 2.

[5] In the present appeal from the Registrar's decision, the Applicant has limited the challenge to the Registrar's findings upon which the Respondent's grounds of opposition succeeded, and relies heavily on a "new evidence" argument. With respect to the conduct of the present appeal, the law is well developed in *Molson Breweries, a Partnership v. John Labatt Ltd.*, (2000), 5 C.P.R. (4th) 180 (F.C.A.) and *Hawke & Company Outfitters LLC v. Retail Royalty Company and American Outfitters, Inc.* 2012 FC 1539: the standard of review for appeals pursuant to s.56 of the Act is reasonableness unless new evidence is filed that would have materially affected the Registrar's decision; in the absence of additional material evidence, decisions of the Registrar, whether fact, law or discretion, within his or her area of expertise, are to be reviewed on a standard of reasonableness; because of the expertise of the Registrar, decisions of the Registrar are entitled to some deference and should not be set aside lightly; however, where additional evidence is filed that would have materially affected the Registrar's finding of fact or exercise of discretion, the Court must come to its own conclusions as to the

correctness of the decision, and, accordingly, the evidence filed by the Applicant must be assessed to determine if it would have materially affected the Registrar's decision; if the Court determines that the evidence would not have materially affected the Registrar's decision, the decision of the Registrar must be given deference, not be set aside lightly, reviewed on a standard of reasonableness, and the question is whether the Registrar's decision can withstand a "somewhat probing" examination and is not "clearly wrong" (see Respondent's Argument of Fact and Law, paras. 23 – 29).

[6] A key feature of the present appeal is the Registrar's findings on the relevance of evidence, and, therefore, the admissibility of evidence with respect to both s. 12(1)(d) and s. 16(1)(a). Each provision reads as follows:

12. (1) Subject to section 13, a trade-mark is registrable if it is not

[...]

(d) confusing with a registered trade-mark;

[...]

16. (1) Any applicant who has filed an application in accordance with section 30 for registration of a trade-mark that is registrable and that he or his predecessor in title has used in Canada or made known in Canada in association with wares or services is entitled, subject to section 38, to secure its registration in respect of those wares or services, unless at the date on which he or his

12. (1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants:

[...]

d) elle crée de la confusion avec une marque de commerce déposée;

[...]

16. (1) Tout requérant qui a produit une demande selon l'article 30 en vue de l'enregistrement d'une marque de commerce qui est enregistrable et que le requérant ou son prédécesseur en titre a employée ou fait connaître au Canada en liaison avec des marchandises ou services, a droit, sous

predecessor in title first so used it or made it known it was confusing with

(a) a trade-mark that had been previously used in Canada or made known in Canada by any other person;

[...]

réserve de l'article 38, d'en obtenir l'enregistrement à l'égard de ces marchandises ou services, à moins que, à la date où le requérant ou son prédécesseur en titre l'a en premier lieu ainsi employée ou révélée, elle n'ait créé de la confusion:

a) soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne;

[...]

I. The Registrar's Word Mark Findings

A. *Re: s. 12(1)(d)*

[7] The Registrar found that this ground of opposition failed, which is, of course, not contested by the Applicant in the present appeal. However, the finding is important to the present appeal because, as described below, the Applicant relies upon it to address the Registrar's s. 16(1)(a) findings:

Having considered all of the surrounding circumstances, I find that the Applicant has established, on a balance of probabilities, that confusion is not likely between SERVICEMASTER CLEAN and MASTER CLEAN as of today's date for the reasons that follow.

It is difficult to monopolize weak words such as "master clean". While acknowledging that the Opponent has acquired a reputation of some extent in association with MASTER CLEAN, this is the sort of mark that is typically not given a broad scope of protection, with small differences being sufficient to distinguish a similar mark. SERVICEMASTER CLEAN does resemble MASTERCLEAN, but given that the first, more dominant portion is different, the marks are sufficiently different to make confusion

unlikely, especially in view of the fact that the Applicant has established a significant reputation in association with **SERVICEMASTER CLEAN**. The lack of evidence of any confusion as to source despite more than 10 years coexistence further supports my conclusion.

The s. 12(1)(d) ground of opposition accordingly fails.

[Emphasis added]

(Decision, paras. 50 – 52)

B. *Re: s. 16(1)(a)*

[8] The Registrar found that this ground of opposition succeeded which is contested by the Applicant:

Having considered all of the surrounding circumstances, I arrive at the conclusion that the probabilities of confusion between **MASTER CLEAN** and **SERVICEMASTER CLEAN** as of October 1997 are evenly balanced between a finding of confusion and of no confusion. I reach this conclusion because on the one hand **MASTER CLEAN** is not the type of mark that is typically accorded a broad scope of protection and the Applicant's Mark has a different beginning from the Opponent's mark, but on the other hand, only the Opponent had acquired a reputation in association with its mark as of October 1997, the parties are competitors and the Applicant's Word Mark consists of the Opponent's entire mark preceded by the inherently weak word **SERVICE**. As the legal burden is on the Applicant to establish, on a balance of probabilities, that the Mark is not confusing with the Opponent's trade-mark, the s. 16(1)(a) ground succeeds. I note that the difference in outcome between this ground and the s. 12(1)(d) ground is also attributable in part to the fact that the evidence of coexistence without confusion, as well as the evidence of third party use of similar marks, cannot be considered under this ground.

[Emphasis added]

(Decision, para. 60)

Evidence relied upon by the Registrar to reach the findings of fact emphasized in the quoted reasons is as follows:

The Opponent's evidence concerning use of its mark prior to October 1997 is as follows. Mr. English [President of the Respondent Company] attests that the Opponent and its predecessor have used MASTER CLEAN continuously since 1980 in association with restoration, renovation and cleaning services. In his affidavit he states that sales from May 1, 1996 to April 30, 1997 were \$2,093,828. In addition, at Question 356 of his cross-examination he was asked what the sales were prior to May 1, 1996 and responded that sales "hovered on the 2-million range for several years ... [and that his company] had 34 years of continuous growth, but always the same, a little bit per year." I am therefore satisfied that there were substantial sales of MASTER CLEAN services prior to the Applicant's claimed date of first use.

[...]

In his affidavit, Mr. English also attests that advertising expenditures associated with the Opponent's mark were \$92,065 between May 1, 1996 and April 30, 1997.

Of course, as of the Applicant's claimed date of first use there had been no use or advertising of the Word Mark, with the result that a consideration of the length of time that the marks had been in use and the extent to which each had become known necessarily favours the Opponent.

The Applicant's position is clearly less strong under this ground than under the s. 12(1)(d) ground. I note that the evidence of state of the marketplace postdates the material date under this ground and so is of no avail to the Applicant.

[Emphasis added]

II. The Registrar's Design Mark Findings

[9] The Applicant contests each of the Registrar's findings with respect to the Design Mark.

A. Re: 12(1)(d)

[10] The Registrar provided the following reasons for finding that this ground of opposition succeeded:

Having considered all of the surrounding circumstances, I arrive at the conclusion that as of today's date the probabilities of confusion between MASTER CLEAN and the Design Mark are evenly balanced between a finding of confusion and of no confusion. I reach this conclusion because on the one hand MASTER CLEAN is not the type of mark that is typically accorded a broad scope of protection and there are differences between the Opponent's mark and the Design Mark, while on the other hand, the parties are competitors and the Applicant has chosen a design that emphasizes the words in its mark that comprise the Opponent's entire mark. As the legal burden is on the Applicant to establish, on a balance of probabilities, that the Design Mark is not confusing with the Opponent's trade-mark, the s. 12(1)(d) ground succeeds based on registration No. TMA226,306. I note that the difference in outcome under s. 12(1)(d) between the Design Mark and the Word Mark is also attributable in part due to the vague evidence concerning the reputation acquired by the Design Mark, which resulted in me being unable to draw any inference from the lack of evidence of confusion.

[Emphasis added]

(Decision, para. 71)

With respect to the “vague” evidence of reputation finding, the Registrar relied on the following evidence:

Another factor whereby the analysis with respect to the Applicant's Design Mark differs from that with respect to the Applicant's Word Mark is the extent to which the Applicant's mark has become known. For example, Mr. England [Director, Vice President and Secretary, ServiceMaster of Canada LTD.] has provided sales and advertising figures for the Applicant's services annually since 1997; however, each figure provided relates to both the Word Mark and the Design Mark. While use of the Design Mark qualifies as use of the Word Mark, the reverse is not true.

Therefore, it is unclear what percentage of those figures is attributable to the Design Mark. Therefore, to some degree the sales and advertising figures provided by the Applicant must be accorded reduced weight.

[Emphasis added]

(Decision, para. 70)

B. *Re: s. 16(1)(a)*

[11] The Registrar provided the following reasons for finding that this ground of opposition succeeded:

Having considered all of the surrounding circumstances, I arrive at the conclusion that as of October 1, 1997 the probabilities of confusion between MASTER CLEAN and the Design Mark are evenly balanced between a finding of confusion and of no confusion. I reach this conclusion because on the one hand MASTER CLEAN is not the type of mark that is typically accorded a broad scope of protection and there are differences between MASTER CLEAN and the Design Mark, but on the other hand, only the Opponent had acquired a reputation in association with its mark as of October 1, 1997, the parties are competitors and the design features of the Applicant's Design Mark emphasize that portion of the Design Mark that replicates the Opponent's mark in its entirety. As the legal burden is on the Applicant to establish, on a balance of probabilities, that the Mark is not confusing with the Opponent's trade- mark, the s. 16(1)(a) ground succeeds. As noted with respect to the Word Mark, any evidence of coexistence without confusion or third party use of similar marks postdates the material date under this ground and cannot be considered.

[Emphasis added]

(Decision, para. 75)

Evidence relied upon by the Registrar to reach the findings of fact emphasized in the quoted reasons is as follows:

The Opponent's evidence concerning use of its mark prior to October 1, 1997 in the opposition against the Design Mark is less than it is with respect to the Word Mark because when Mr. English was cross-examined with respect to the application for the Design Mark he was not asked to evidence sales prior to May, 1996. Nevertheless, in his affidavit he did provide sales and advertising figures for the time period May 1, 1996 to April 30, 1997 and I find that the Opponent has met its initial burden under s. 16(1)(a) with respect to the Design Mark. [...]

Of course, as of the Applicant's claimed date of first use there had been no use or advertising of the Design Mark, with the result that a consideration of the length of time that the marks had been in use and the extent to which each had become known necessarily favours the Opponent.

[Emphasis added]

(Decision, paras. 73 and 74)

C. *Re: s. 2*

[12] The Registrar provided the following reasons for finding that this ground of opposition succeeded::

In order to meet its initial burden with respect to its distinctiveness ground of opposition the Opponent must evidence that its MASTER CLEAN trade-mark had become sufficiently known as of November 6, 2006 to negate the distinctiveness of the Design Mark. Mr. English's evidence satisfies the Opponent's initial burden.

The Applicant's position as of November 6, 2006 is no stronger than it is as of today's date under the s. 12(1)(d) ground of opposition and for reasons similar to those discussed with respect to the s. 12(1)(d) ground, the distinctiveness ground of opposition succeeds with respect to the Design Mark.

(Decision, paras. 77 and 78)

III. The Applicant's "New Evidence" Argument

[13] A factor driving the Applicant's arguments in the present appeal is the fact that, with respect to the Word Mark, the Applicant was successful on the Registrar's application of s. 12(1)(d). Nevertheless, the Registrar effectively made a finding of confusion under s. 16(1)(a) with respect to the Word Mark and the Design Mark. Since it takes only one finding of confusion for each Mark to make each Mark unregistrable, a primary thrust of the Applicant's new evidence argument is to negate the Registrar's s. 16(1)(a) findings. In addition, the Applicant offers new evidence to address an evidentiary issue with respect to the Registrar's finding under s. 12(1)(d) of the Design Mark in hopes that it can be overturned as well.

[14] The new evidence tendered by the Applicant is described in Counsel for the Applicant's argument as follows:

The Applicant has put forward evidence on appeal from two witnesses, Mr. Ian England [Director, Vice President and Secretary, ServiceMaster of Canada LTD.] and Ms. Mary Noonan [researcher]. This new evidence directly responds to those specific alleged evidentiary deficiencies which the Board pointed to as in its decision. (Affidavit of Ian England, dated August 2, 2012 ("England 2012 Affidavit").

Ian England explained that the \$1.2 billion in revenue from 1997 to 2006 stated in his previous affidavits were sales made in association with the Design Mark. As noted by the Board, use of the Design Mark qualifies as use of the Word Mark.

Ian England testified that in the 9 year period of 1988 to 1996, just prior to the adoption of the Word Mark and Design Mark in 1997, the revenue for services offered by ServiceMaster in Canada under the SERVICEMASTER trade-mark totaled [sic] over \$440 million. Mr. England stated this was a conservative figure as it did not include all of their distributors.

During the same period of 1988 to 1996, \$4.4 million was spent in advertising and promotion using the SERVICEMASTER trade-mark. Again, this is a conservative figure.

Ian England also explained that the business segment that ServiceMaster competes with Masterclean is in disaster restoration, and not in general cleaning, but that ServiceMaster has adopted different branding for its disaster restoration business - SERVICEMASTER RESTORE and SERVICEMASTER RESTORE & Design, essentially using the identifier RESTORE instead of CLEAN since it better reflected the nature of the work performed, i.e., restoration and not cleaning.

The change occurred in April 2009, prior to the Board decision, but after the evidentiary phase before the Trade-marks Opposition Board, and evidence surrounding this change was therefore not before the Board when it rendered its decision.

Ian England also affirms that he is aware of no instances of any confusion between use of the Word Mark, or Design mark with the Respondent or its trade-mark MASTER CLEAN.

The Applicant also filed the affidavit of Mary P. Noonan on appeal. She provided evidence of the State of the Registrar as of October 1997. She located active trade-marks as of 1997 which included MASTER, for use in association with cleaning products or cleaning services. (Affidavit of Mary P Noonan dated August 2, 2012 ("Noonan 2012 Affidavit").

Ms. Noonan also did a search for active trade-marks from 1997 which included CLEAN, for use in association with cleaning products or cleaning services. She located 416 such marks.

Ms. Noonan also located Hydra Master Cleaning Systems Ltd., which was an active Federal Corporation in 1997.

Ms. Noonan also located 69 trade-names active in 1997 which included MASTER and CLEAN. The trade-name include: M&M MASTER CLEAN; MASTER CLEAN CARPET CLEANING, MASTER CLEAN INC. MASTER CLEAN LTD. MASTERCLEAN JANITORIAL SERVICES (RED DEER); and MASTERCLEAN SERVICES.

Ms. Noonan was not cross examined and her testimony remains uncontroverted.

(Applicant's Memorandum of Fact and Law, paras. 58 – 69)

[15] The relevance of the Applicant's new evidence is the primary issue for determination in the present Application.

A. The “coexistence without confusion” new evidence that post-dates the date of first use

[16] As emphasized by the underlining in the quoted passages from the Registrar's decision, the Registrar communicated clear opinions on the correct interpretation of the relevant date with respect to each ground of opposition. That is, for the purpose of reaching a conclusion on the existence of confusion between a Mark advanced for registration and a registered trade mark, with respect to s. 12(1)(d) the relevant date is the date of the Registrar's decision, but with respect to s. 16(1)(a) the relevant date is the date of first use of the Mark advanced for registration: for the Word Mark it is October 1997, and for the Design Mark it is October 1, 1997.

[17] As recounted above, with respect to both the Word and Design Marks, the Registrar made a s. 16(1)(a) finding that “coexistence without confusion” and “evidence of third party use of similar marks” cannot be considered. By this statement the Registrar is making the point that, with respect to the s. 12(1)(d) conclusion on the Word Mark that confusion did not exist at the time that the Opposition decision was rendered, the evidence supporting that conclusion is irrelevant to the application of s. 16(1)(a) to both Marks because the key time under consideration is the date of first use of the Marks.

[18] The Applicant directly challenges the Registrar's findings on the relevance of evidence that post-dates the date of first use. Counsel for the Applicant makes the argument that the Registrar's exclusion of the post-date of first use evidence constitutes an error in principle:

[...] there is no principled reason why the Board member could not consider the long evidence of co-existence without confusion as part of the s.16 analysis. The Board Member did not cite any case law for her interpretation of the applicable law. As a matter of logic, one should be able to consider inference to be drawn from lack of no evidence of confusion for over 15 years, with significant overlap in disaster restoration services between 1997 to 2009, to give an indication as to whether there was a likelihood of confusion at the very beginning.

(Applicant's Memorandum of Fact and Law, para. 110)

[19] I find that the Registrar's conclusion is based on a literal interpretation of the words used in s. 16. That is, the confusion analysis concerns the evidence that existed "at the date of first use". As a result, I do not agree with Counsel for the Applicant that the Registrar's inadmissibility findings are not based on a principled reason. The issue is one of statutory interpretation. In my opinion, for Counsel for the Applicant to succeed on the "no principled reason" argument it is necessary to produce a principled argument that challenges the Registrar's opinion on the law. No such argument is advanced. It is not enough to resort to "logic" to support the challenge. Only a properly framed statutory interpretation argument establishing that the Registrar's literal interpretation of s. 16(1)(a) is not correct, when viewed in the context of compelling evidence and, or, compelling precedent, will suffice; none was advanced.

[20] As a result, I find that there is no error in principle in the Registrar's findings of the exclusion of irrelevant evidence under s. 16(1)(a). Therefore, I also find that Mr. England's post-date of first use evidence is irrelevant.

B. *The “reputation” new evidence that pre-dates the date of first use*

[21] With respect to both the Word Mark and Design Marks, the Registrar made a s. 16(1)(a) finding that “only the Opponent had acquired a reputation in association with its mark” as of the date of first use, being as of October 1997 and October 1, 1997, respectively. The Applicant advanced the new evidence of the Applicant’s reputation prior to the dates of first use to support a factual finding to the contrary.

[22] On the basis of the following argument Counsel for the Applicant argues that, contrary to the Registrar’s opinion, evidence of reputation that pre-dates the date of first use is also relevant:

The Applicant has filed new evidence demonstrating there was a significant reputation in the SERVICEMASTER trade-mark prior to 1997, generated through, inter alia, \$440 million in revenue; there were significant sales made in association with the SERVICEMASTER CLEAN & Design mark; there were numerous trade-marks and trade-names incorporation [sic] CLEAN and MASTER in 1997; there was no overlap in the services offered under the Word and Design Marks and the MASTER CLEAN mark. This new evidence directly addresses the evidentiary deficiencies in the record before the Board.

(Applicant’s Memorandum of Fact and Law, para. 75)

[23] The Registrar acknowledged the reputation issue in delivering the decision under review. In conducting the confusion analysis under s. 12(1)(d) with respect to the Word Mark, on the issue of “the inherent distinctiveness of the marks, the extent to which each had become known, and the length of time the marks have been in use”, the Registrar made the following observation:

A mark's distinctiveness may be increased through use and promotion. The Applicant has used SERVICEMASTER in Canada

since at least 1954 and it adopted SERVICEMASTER CLEAN in 1997 to better distinguish its divisions that offered cleaning-related services. Use of the Word Mark in Canada has been continuous since 1997 and the associated national ad fund exceeded \$3.5 million between 1997 and 2007. The Word Mark has been advertised on the website www.servicemaster.ca, in magazines, in directories, through pamphlets, at trade shows and conferences, through the sponsorship of events, via direct mailings, on franchisees' service vehicles, and by radio advertisements. Sales associated with SERVICEMASTER CLEAN services in Canada between 1997 and 2006 exceeded \$1.28 billion, which is broken down by division approximately as follows: disaster restoration - \$800 million; residential cleaning services - \$25 million; commercial cleaning services - \$138 million; janitorial services - \$320 million.

[Emphasis added]

(Decision, para. 25)

And on the issue of “the degree of resemblance between the marks”, the Registrar made the following observation:

Although the Word Mark begins with a word that is not in the Opponent's mark, the Applicant has incorporated the Opponent's mark in its entirety into its Word Mark. This results in there being a fair degree of resemblance between the marks in appearance, sound and ideas suggested. I note however that the Applicant has argued that, due to the existing reputation of the Applicant's SERVICEMASTER mark/name, the Word Mark would suggest cleaning services offered by Servicemaster while the Opponent's mark suggests that they are the masters of cleaning. While I recognize that the Applicant's ownership of a registration for SERVICEMASTER does not give it the automatic right to obtain any further registrations no matter how closely they may be related to the original registration [see *Coronet-Werke Heinrich Schlerf GmbH v. Produits Menagers Coronet Inc.* (1984), 4 C.P.R. (3d) 108 at 115 (T.M.O.B.)], I nevertheless accept that a reputation established for the first and dominant portion of the Word Mark would be of assistance in distinguishing the source of the services associated with the Word Mark, especially in a case such as this where one is dealing with inherently weak marks.

[Emphasis added]

(Decision, para. 36)

[24] In reaching the decision under review it is clear that the Registrar was alive to the reputation concerning the SERVICEMASTER mark/name, and in my opinion, being supplied with more evidence on the same topic as advanced by the Applicant would not have materially affected the Registrar's findings.

[25] In Counsel for the Applicant's description of the new evidence as quoted above, Ms. Noonan advances third party evidence existing at the date of first use of both the Work Mark and Design Marks on the issue of confusion at that date.

[26] Counsel for the Respondent makes the point in argument that, with respect to third party evidence, it is necessary for the Applicant to establish third party use of similar marks as of the date of first use (Applicant's Memorandum of Fact and Law, para. 81). I accept this argument. Because Ms. Noonan's evidence does not establish third party use of similar marks as of the date of first use, I find that it is irrelevant and, as such, it would not have materially affected the Registrar's findings.

C. The s. 12(1)(d) Design Mark Evidentiary Deficiency

[27] The Applicant argues that the new evidence will have a material affect on the finding made in paragraph 71 of the Registrar's decision, being that the Applicant provided "vague evidence concerning the reputation acquired by the Design Mark". The finding is based on the Registrar's expectation expressed in paragraph 70 of the decision: the sales and advertising

figures provided relates to both the Word Mark and the Design Mark "therefore, it is unclear what percentage of those figures is attributable to the Design Mark". The following is Mr.

England's "new evidence" provided to meet this deficiency:

In my earlier affidavits [April 17, 2007 and May 7, 2008] I provided evidence on the sales of SERVICEMASTER CLEAN brand services in Canada, which totalled over \$1.2 billion between 1997 to 2006. As the sales figures were provided at the customer level sales in each of our divisions, I want to clarify that these sales were made in association with our SERVICEMASTER CLEAN & DESIGN trade- mark.

[Emphasis added]

(Affidavit, August 2, 2012, para. 19)

Since the new evidence does not meet the Registrar's expectation, I find that it would not have materially affected the Registrar's decision.

IV. Conclusion

[28] I find that the Applicant has failed to produce new evidence that would have materially affected the Registrar's decision, and, therefore, no need exists to exercise my discretion with respect to the decision under appeal. I further find that the Registrar's decision is reasonable because it exhibits no error in principle and is not clearly wrong.

ORDER

THIS COURT ORDERS that the present Application is dismissed.

The issue of costs will be addressed in a separate order following argument.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-1179-12

STYLE OF CAUSE: THE SERVICEMASTER COMPANY v 385229
ONTARIO LTD. DBA MASTERCLEAN SERVICE
COMPANY

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 22, 2014

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DATED: MAY 7, 2014

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