

**IN THE MATTER OF AN OPPOSITION  
by Nature's Path Foods Inc. to application  
No. 1,083,383 for the trade-mark NEW  
WORLD NATURAL FOODS & Design  
filed by Jiva Manufacturing & Distributing  
Inc.**

---

On November 16, 2000, Jiva Manufacturing & Distributing Inc. (the "Applicant") filed an application to register the trade-mark NEW WORLD NATURAL FOODS & Design (the "Mark"), which is shown below.



The Applicant has disclaimed the right to the exclusive use of the words NATURAL FOODS apart from the trade-mark.

The application was filed based upon use of the Mark in Canada since June 30, 1994 in association with various packaged natural food and grocery products, bottled alcohol free beverages, baked goods (including cereals), snacks, condiments, sauces, frozen foods, spreads, sweeteners, supplements and herbal products.

The application was advertised for opposition purposes in the Trade-marks Journal of June 11, 2003.

On October 16, 2003, Nature's Path Foods Inc. (the "Opponent") filed a statement of opposition against the application.

The Applicant filed and served a counter statement. The Applicant subsequently revised its

statement of wares, so that it now reads as follows:

- spreads namely peanut butter, almond butter, cashew butter, hazelnut butter, sesame tahini, sesame butter, mixed nut butter, pumpkin seed butter, sunflower seed butter, mixed seed butter
- bottled alcohol free beverages namely fruit juices and apple cider
- condiments such as East Indian style chutney paste namely mango chutney and tamarind chutney
- other condiments namely tomato salsa and curry paste
- sweeteners namely sugar, molasses, brown rice syrup sweetener.

The Opponent's evidence-in-chief consists of the affidavit of Robert Patrizio.

The Applicant's evidence consists of the affidavit of Kulwant Bagga. The Opponent obtained an order for the cross-examination of Mr. Bagga on his affidavit but did not conduct a cross-examination.

As reply evidence, the Opponent filed a second affidavit of Mr. Patrizio.

Each party filed a written argument. An oral hearing was not held.

### Onus

The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the "Act"). There is however an initial 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. [See *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.).]

### Section 30(b) Ground of Opposition

The Opponent has pleaded that the application does not comply with the requirements of s. 30(b)

of the Act as the statement that the Mark has been used in Canada since at least June 30, 1994 is false in that:

- i) the Mark has not been “used” by the Applicant within the meaning of s. 4 in association with all of the wares listed in the application;
- ii) if the Mark has been used in Canada, it was not used in Canada by the Applicant;
- iii) the Applicant did not use the Mark in Canada as early as June 30, 1994 in association with all of the wares identified in the application as alleged in the application.

Mr. Patrizio, the Opponent’s Vice-President, has presented two pieces of information that relate to this ground. First, he says that he monitors the Opponent’s competitors’ activities but was unaware of the Mark until the commencement of the present proceedings. Second, he provides a copy of a corporate search report that states that Jiva Manufacturing & Distributing Inc., the Applicant, was incorporated on November 25, 1998, *i.e.* after the Applicant’s claimed date of first use. It is this second point that I will focus on.

Mr. Bagga states that he has been the Applicant’s Vice-President since 1998. He has also been the President of the related companies New World Natural Foods Inc. since 1994 and Sweet Cherubim Natural Foods Ltd. since 1980. As I understand it, these three companies form a small family business that deals in organic and natural food products, with New World Natural Foods Inc. being a manufacturer and Sweet Cherubim being a retailer. Third party distributors originally distributed the manufactured products but Mr. Bagga and two brothers incorporated the Applicant in 1998 in order to “sell directly to the retail stores to keep the prices down rather than going through distributors”.

The Opponent is arguing that if there was use of the Mark in Canada at the claimed date of first use, such use was not by the Applicant, since the Applicant did not exist at that time. The Opponent has met its initial burden in this regard by providing a corporate search and the Applicant has not denied that it did not exist as of the claimed date of first use. While it may be true that the Mark was in use as of June 30, 1994, clearly it was not being used by the non-existent Applicant. I appreciate that where individuals own a number of small businesses, the principles do not always understand that use by one entity may not qualify under law as the use

by another. Although this is sometimes remedied by the existence of an oral license, in the present case it is impossible for a non-existent entity (namely the Applicant) to have licensed the use of the Mark. It is possible that the principles of the business intended that any rights owned by New World Natural Foods Inc. were to be assigned to the Applicant upon its creation. However, there is no evidence that this was the case. Moreover, if that were the case, the application would still be in breach of s. 30(b) because the application did not refer to a predecessor-in-title in its use claim. In other words, the filing of the application in the name of an entity that did not exist at the time of the first use of the Mark, without the naming of a predecessor, is fatal to the application. The application is accordingly refused on this basis. [See *Ritz Hotel Ltd. v. Shen Manufacturing Co.* (1993), 47 C.P.R. (3d) 106.]

#### Remaining Grounds of Opposition

Since I have already refused the application in respect of all of its wares, it is superfluous to examine the other grounds of opposition. Each of those grounds is based on the issue of confusion between the Mark and the Opponent's trade-mark NATURE'S PATH & Design and would require analysis of all of the circumstances at play, including those set out in s. 6(5) of the Act.

#### Disposition

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I refuse the application pursuant to s. 38(8).

DATED AT TORONTO, ONTARIO, THIS 5th DAY OF JULY 2007.

Jill W. Bradbury  
Member  
Trade-marks Opposition Board