



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2015 TMOB 103**  
**Date of Decision: 2015-06-08**

**IN THE MATTER OF AN OPPOSITION  
by Sequel Naturals Ltd. to application  
No. 1,529,208 for the trade-mark  
OVEGA-3 in the name of Health4All  
Products Limited**

FILE RECORD

[1] On May 26, 2011, Health4All Products Limited filed an application to register the trade-mark OVEGA-3, based on proposed use in Canada, in association with the following goods:  
dietary and nutritional supplements, namely essential fatty acids.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* issue dated May 23, 2012 and was opposed by Sequel Naturals Ltd. (located in Burnaby, British Columbia) on October 22, 2012. The Registrar forwarded a copy of the statement of opposition to the applicant on November 8, 2012, as required by s.38(5) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. The applicant responded by filing and serving a counter statement generally denying the allegations in the statement of opposition.

[3] The opponent's evidence consists of the affidavits of Charles Chang and Dulce Campos. The applicant's evidence consists of the affidavit of Joel Thuna. The opponent's reply evidence consists of the affidavit of Bronwen M. Jamison. Both parties file a written argument, however, only the opponent was represented at an oral hearing held on February 11, 2015.

STATEMENT OF OPPOSITION

[4] The opponent pleads that it is the owner of the registered marks VEGA and VEGA & V Design, shown below, both first used as early as 2004:



[5] The mark VEGA is registered for use in association with “natural health products” in various forms including powder, capsule, tablet, and drink mix, as well as with “natural food products namely, oil blends.” The mark VEGA & V Design is registered for use in association with “dietary food supplements” in the various forms mentioned above as well as in the form of “bars.” Further, in 2009, the opponent began to use the mark VEGA SPORT in association with nutritional and dietary supplements.

[6] Various grounds of opposition are alleged, however, the determinative issue for decision is whether the applied-for mark OVEGA-3 for use in association with dietary and nutritional supplements comprised of essential fatty acids, is confusing with the opponent’s mark VEGA used in association with the opponent’s products. In this regard, the applied-for mark OVEGA-3 resembles the mark VEGA more closely than any other of the opponent’s marks. The material dates for determining the issue of confusion arising from the grounds of opposition pleaded are: the date of filing the application (May 26, 2011); the date of opposition (October 22, 2012); and the date of my decision. However, in the circumstances of this case, nothing turns on whether the issue of confusion is assessed at a particular material date.

[7] Before assessing the issue of confusion, I will discuss the parties’ evidence, the evidential burden on the opponent, the legal onus on the applicant, the meaning of confusion within the context of the *Trade-marks Act*, and the test for confusion.

OPPONENT'S EVIDENCE

*Charles Chang*

[8] Mr. Chang identifies himself as the founder and President of the opponent company. The opponent was incorporated in 2001 and its head office is in Burnaby, British Columbia. As of June 31, 2013, the date of Mr. Chang's affidavit, the opponent employed about 125 people.

[9] The opponent makes dietary food supplements which include "powder, bar, drink mix, gel and oil forms . . ." The products contain minerals, vitamins, and plant based ingredients. The products are sold under the word marks VEGA, VEGA ONE, and VEGA SPORT, as well as under the marks VEGA Design and VEGA & Leaf Design, shown below:



[10] The opponent refers to its above referenced marks collectively as its "Vega Family of Marks." I will refer to them more simply as the opponent's "VEGA marks."

[11] In paras. 6 to 11 of his affidavit, Mr. Chang describes how he and Brendan Brazier, a former prominent athlete, developed the first VEGA product in 2003. By 2004, the opponent had developed a full line of nutritional products displaying the opponent's VEGA marks. Various of the opponent's products are described in paras. 12 to 23 of Mr. Chang's affidavit, and examples of the opponent's use of its VEGA marks, as well as product packaging, are shown in Exhibits 5 to 15.

[12] In paras. 24 to 35, Mr. Chang describes the opponent's presence on the Internet, at several websites, where the opponent advertises products under the VEGA marks, examples of which are shown in Exhibits 17 to 26. However, I have not had regard to the contents of Exhibit 23 as the contents are inadmissible hearsay consisting of a third party report on Canadian visitors for one of the opponent's websites.

[13] Paras. 36 to 43 introduce into evidence, by way of Exhibits 27 to 34, advertising featuring the opponent's VEGA marks at point of sale.

[14] The opponent advertises its products in various publications dealing with health, fitness and diet. Exhibits 35 to 47 illustrate examples of such advertising featuring the opponent's VEGA marks.

[15] Paras. 58 to 65 discuss the media exposure that the opponent's products have received; Exhibits 48 to 55 provide samplings of such exposure. Paras. 66 to 70 discuss (i) testimonials received by the opponent for its products and (ii) numerous awards for the opponent's products.

[16] The opponent's products are sold on-line through its websites as well as through retail stores including Shoppers Drug Mart (since 2008) and Loblaw's (since 2009). In 2004, the gross sales of products under the opponent's VEGA marks were about \$1 million, rising to \$5 million in 2006 and rising again to \$27 million in 2010. Since May of 2012, about 4 million units of products were sold under the opponent's VEGA marks. In 2004, gross advertising and marketing costs amounted to about \$.2 million, rising to \$4 million by 2011. For the first half of 2013, such costs rose to \$2.5 million.

[17] Mr. Chang expresses the opponent's concerns with the applied-for mark OVEGA-3 at paras. 77 -78 of his affidavit, shown below:

77. By virtue of the above described sales, and advertising and marketing activities, tremendous goodwill has accrued to Vega's VEGA Family of Marks. In addition to the sales described above, there has been substantial media coverage of these products especially through the use of internet and on-line followers of news and development of VEGA branded products by Vega.

78. This evidence, together with Vega's trade-mark registrations, show that there is a natural expansion of our VEGA brands into a variety of nutritional health foods and supplements. Further, I verily believe that the foregoing shows that Vega has had, and will continue to have, expansion of its VEGA Family of Marks to include other VEGA brands. As a result, I verily believe that consumers familiar with Vega's marks and products, which products contain OMEGA-3 fatty acids and are advertised and promoted as such, would be likely to assume that mark OVEGA-3 filed by Health4All Products Limited is part (and a natural extension of) of Vega's growing VEGA Family of Marks.

*Dulce Campos*

[18] Ms. Campos identifies herself as a trade-mark researcher. Her affidavit serves to introduce into evidence, by way of exhibit material, results of her online searches, on various websites, relating to fatty acids. Her evidence is not particularly helpful, except to confirm that ingestion of the fatty acid omega-3 is required for good health.

APPLICANT'S EVIDENCE

*Joel Thuna*

[19] Mr. Thuna identifies himself as the General Manager of the applicant company. The applicant began as a family business namely, a retail herbal store. It changed from being primarily a retailer to being a manufacturer, developer and seller of its own lines of herbal products. Its products are sold to health food stores across Canada as well as to national supermarket chains. However, as of November 13, 2013, the date of Mr. Thuna's affidavit, the applicant had not yet commenced use of the applied-for mark OVEGA-3.

[20] In paras. 5-8, of his affidavit, Mr. Thuna explains that the term "essential fatty acids" is a common phrase used in the health food and supplement business, and that the opponent itself uses the term, or its abbreviation EFA, in describing the opponent's products.

[21] Mr. Thuna provides state of the register evidence in respect of third party marks incorporating the terms "vega," (or "vege") for use in association with supplement products, that have been registered, allowed or approved namely, VEGAPURE; VEGANFIT; UTLIMATE VEGAN & Design; VEGESIL; VEGE GREENS; and NUTRAVEGE.

[22] Mr. Thuna notes that, aside from the abovementioned marks, there are other brands incorporating the term "vega" used in Canada in association with supplement products namely, VEGAPLEX, VEGAMAX; VEGLIFE; VITAVEGAN; and VEGAN PROTECT. Photographs of product containers with labels featuring the aforementioned marks are attached as Exhibit F to Mr. Thuna's affidavit.

[23] In paras. 17-20 of his affidavit, Mr. Thuna explains the significance of the term “vegan” in relation to dietary supplements, and why he believes the applied-for mark OVEGA-3 would not be confusing with the opponent’s mark VEGA:

17. Many products in the dietary supplement field are "vegan", that is, they do not include any animal or dairy products. In fact, all of the Opponent's products are vegan. No doubt this is why it selected "vega" as its brand.

18. As examples of the wide range of "vegan" products I have attached as Exhibit F photos of a variety of product packaging that features the word “vegan” prominently and is owned by parties other than the Opponent, as follows:

Vegan Proteins+ (various products/packages)  
Progressive Harmonized Vegan Protein  
Kaizen Vegan Protein  
DEVA Vegan Prenatal  
DEVA Vegan Omega-3 DHA DEVA Vegan Borage Oil  
Seabuckthorn Vegan Fruit Oil Vegan Protein (Natural Factors) Sunwarrior Protein  
Raw Vegan Pure Vegan (Olive Leaf Extract)

19. Thus, the whole of the Opponent's mark — with only an "n" added — exists on many products currently sold in Canada.

20. The Opponent deliberately selected a mark that is highly suggestive of its vegan product. Through its opposition to my Mark the Opponent now seeks to establish a monopoly on the use of "vega".

#### OPPONENT’S REPLY EVIDENCE

*Bronwen Jamison*

[24] Ms. Jamison identifies herself as a law librarian. She was instructed by the firm representing the opponent to conduct computer searches concerning the marks VEGAPURE and VEGAMAX cited by Mr. Thuna in his affidavit. It appears that the owners of the two marks are not marketing products under those marks.

#### EVIDENTIAL BURDEN AND LEGAL ONUS

[25] As mentioned earlier, before considering the issue of confusion, I will review (i) the evidential burden on the opponent to support the allegations in the statement of opposition and (ii) the legal onus on the applicant to prove its case.

[26] With respect to (i) above, there is in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition: see *John Labatt Limited v. The Molson Companies Limited*, 30 CPR (3d) 293 at 298 (FCTD). The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on the applicant to show that the application does not contravene the provisions of the *Trade-marks Act* as alleged by the opponent in the statement of opposition (for those allegations for which the opponent has met its evidential burden). The presence of a legal onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant.

[27] In the instant case, the opponent has met the evidential burden on it to put its allegation of confusion into issue.

#### MAIN ISSUE FOR DECISION

[28] As noted earlier, the main issue for decision is whether the applied-for mark OVEGA-3 is confusing with the opponent's mark VEGA. In this regard, from my review of the exhibit material, the opponent most often uses its marks VEGA; VEGA & Leaf Design; and VEGA & V Design (see paras. 4 and 9, above). While the opponent has not relied on VEGA & Leaf Design in the statement of opposition, I consider that the mark VEGA & Leaf Design is a permitted variation of the mark VEGA (see *Promafil Canada Ltée v. Munsingwear, Inc.* (1992), 44 CPR (3d) 59 (FCA) at pp. 71-72). The opponent's use of the mark VEGA & Leaf Design is therefore equivalent to use of the word mark VEGA. I also consider that use of the mark VEGA & V Design qualifies as use of the mark VEGA *per se*: (see *Nightingale Interloc v. Prodesign Ltd.* (1984), 2 CPR(3d) 535 (TMOB) at p. 538) taking into account that the font style of the term "vega" appearing in VEGA & V Design is a permitted variation of the block letter form.

## MEANING OF CONFUSION BETWEEN TRADE-MARKS

[29] Trade-marks are confusing when there is a reasonable likelihood of confusion within the meaning of section 6(2) of the *Trade-marks Act*, shown below:

The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services . . . associated with those trade-marks are manufactured . . . or performed by the same person, whether or not the goods or services . . . are of the same general class.

[30] Thus, section 6(2) does not concern the confusion of the marks themselves, but confusion of goods or services from one source as being from another source. In the instant case, the question posed by section 6(2) is whether purchasers of the applicant's dietary and nutritional supplements, sold under the mark OVEGA-3, would believe that those goods were produced or authorized or licensed by the opponent who sells similar goods under the mark VEGA. The legal onus is on the applicant to show, on the usual civil balance of probabilities standard, that there would be no reasonable likelihood of confusion.

## TEST FOR CONFUSION

[31] The test for confusion is one of first impression and imperfect recollection. Factors to be considered, in making an assessment as to whether two marks are confusing, are "all the surrounding circumstances including" those specifically mentioned in section 6(5)(a) to section 6(5)(e) of the *Act*: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the goods, services or business; the nature of the trade; the degree of resemblance in appearance or sound of the marks or in the ideas suggested by them. This list is not exhaustive and all relevant factors are to be considered. Further, all factors do not necessarily have equal weight as the weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 CPR(3d) 308 (FCTD). However, as noted by Mr. Justice Rothstein in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 92 CPR(4th) 361 (SCC), although the degree of resemblance is the last factor cited in section 6(5), it is the statutory factor that is often likely to have the greatest effect in deciding the issue of confusion.



## CONSIDERATION OF SECTION 6(5) FACTORS

### *Inherent and Acquired Distinctiveness*

[32] The opponent's mark VEGA possesses a fair degree of inherent distinctiveness as it is a coined word. However, the inherent distinctiveness of the mark is lessened to the extent that it would be perceived as a truncation of the word "vegan," suggesting that the opponent's products do not contain constituents derived from animals. Similarly, the applied-for mark OVEGA-3 also possesses a fair degree of inherent distinctiveness as it is a coined term. However, the inherent distinctiveness of the mark is lessened to the extent that it would be perceived as an allusion to the nutrient omega-3, and also lessened to the extent that it suggests that the applicant's product is free of animal constituents. Given the marks' suggestive connotations, they are more in the nature of "weak marks" rather than "strong marks" of high inherent distinctiveness.

[33] The opponent's evidence indicates that its mark VEGA had acquired a substantial reputation in Canada at all material times. The applicant has not evidenced that the applied-for mark OVEGA-3 had become known at any material time. The first factor, which is a combination of inherent and acquired distinctiveness, therefore favours the opponent at all material times.

### *Length of Time the Marks have been in Use*

[34] The opponent began to use its mark VEGA in 2004, that is, seven years before the applicant filed its trade-mark application which is based on proposed use. The second factor therefore also favours the opponent at all material times.

### *Nature of the Goods and the Channels of Trade*

[35] The parties' goods are very similar and, in the absence of evidence to the contrary, I would expect that the parties' products would be sold through the same channels of trade. It follows that there is every likelihood that the parties' products would be found in close proximity on retail store shelves, if not side-by-side. The third and fourth factors therefore also favour the opponent.

### *Degree of Resemblance*

[36] The parties' marks resemble each other to a fair degree visually and aurally as the applicant has incorporated the whole of the opponent's mark, adding the prefix "O" and the suffix "3." However, those additions significantly differentiate the ideas suggested by the parties' marks. In this regard, the opponent's mark VEGA suggests a product free of animal constituents while the applied-for mark OVEGA-3 suggests, primarily, the nutrient omega-3 and secondarily that the product is free of animal constituents. Overall, when all three aspects of resemblance are considered together, I find that the parties' marks are more different than alike, but only slightly so. The fifth factor and most important factor therefore favours the applicant, but only to a limited extent.

[37] I am aware that comparatively small differences may suffice to distinguish between "weak" marks, that is, between marks of low inherent distinctiveness: see *GSW Ltd. v. Great West Steel Industries Ltd.* (1975), 22 CPR(2d) 154 (FCTD). However, in this case, the opponent has presented evidence of acquired distinctiveness for its mark, which mitigates the advantage accorded to the applicant when the opponent's mark is inherently weak.

[38] I have also taken guidance from a recently issued decision of this Board, *Breville Pty Limited v Keuring Green Mountain, Inc.*, 2014 TMOB 248 (CanLII). In *Breville*, the owner of the marks YOUBREW and BREW IQ opposed the applied-for mark MYBREW intended for use in association with electric brewing machines. The Board noted as follows:

[27] In considering the degree of resemblance, the Supreme Court of Canada in *Masterpiece [Masterpiece Inc. v. Alavida Lifestyles Inc.]*, [2011] 2 SCR 387, 2011 SCC 27 (CanLII), *supra* sets out that resemblance is defined as the quality of being either like or similar (para 62) and that the approach to assessing resemblance should involve a consideration of whether there is an aspect of a trade-mark that is particularly striking or unique (para 64). In this case, there is nothing striking or unique about the word BREW given that the goods of each party relate to brewers and products to be used with them (see, for example, *Molson Companies Ltd v John Labatt Ltd* (1994), 58 CPR (3d) 527 (FCA)). Similarly, the prefix component of the parties' marks (a personal pronoun) is not particularly striking or unique given that consumers often use brewing machines to make beverages for themselves.

[28] The parties' trade-marks therefore resemble each other to some extent in appearance and as sounded since they both share the suffix component BREW.

While the parties' trade-marks YOUBREW and MYBREW suggest the same idea, a brewer which allows for customizing of and individual's beverages, there can be no monopoly in this type of idea (*American Assn of Retired Persons v Canadian Assn. of Retired Persons/Assoc Canadienne des Individus Retraites* (1998), 84 CPR (3d) 198 at para 34 (FCTD)).

(emphasis added)

[39] Similarly, in the instant case, the parties' marks resemble each other in appearance and sounding since they share the term VEGA. However, there is nothing particularly striking or unique in the term VEGA as it would be perceived as a truncation of "vegan," and there can be no monopoly in the idea of vegan products. Mr. Thuna's evidence of third party marks incorporating the term "vega" underscores that such marks are not unique in the marketplace for use in association with supplement products.

#### DISPOSITION

[40] Having regard to the evidence of record, the section 6(5) factors and the jurisprudence discussed above, I find that, at all material times, the balance of probabilities with respect to the issue of confusion weighs equally for both parties notwithstanding my finding that the first four factors weigh decidedly in favour the opponent. However, as the legal onus is on the applicant, the subject application must be refused.

[41] I would add that had the applicant been in a position to evidence that its mark had acquired distinctiveness, and that the parties' marks coexisted in the marketplace in proximate locales without instances of actual confusion, then the outcome of this proceeding may have favoured the applicant.

[42] In view of the foregoing, the subject application is refused. This decision has been made pursuant to a delegation of authority by the Registrar of Trade-marks under section 63(3) of the *Trade-marks Act*.

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Myer Herzig, Member,  
Trade-marks Opposition Board  
Canadian Intellectual Property Office