



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

Citation: 2011 TMOB 242
Date of Decision: 2011-12-02

**IN THE MATTER OF AN OPPOSITION
by Kellogg Company to application
No. 1,306,494 for the trade-mark
NUTRASPROUT in the name of
Granovita UK Limited**

[1] On June 22, 2006, Granovita UK Limited (the Applicant) filed an application to register the trade-mark NUTRASPROUT (the Mark) based on proposed use in Canada for the following wares (hereinafter referred to as the Wares):

Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli and liquid form composed of organically grown plant sprouts, oils and powders; nutraceuticals for dietary purposes in tablet and liquid form for use as a dietary supplement and food supplements comprised of processed plant sprouts, oils and powders, for weight loss, weight gain, increasing energy and assisting digestion; processed vegetables namely, artichoke, asparagus, aubergene, beans, beet, broccoli, brussels sprouts, cabbage, carrot, cauliflower, celeriac, celery, chard, chicory, collards, corn, cress, cucumbers, gourds, jerusalem artichoke, kales, kohlrabi, leek, lettuce, melons, mushrooms, okra, onions, parsnips, peas, peppers, potatoes, pumpkins, radicchio, radish, rhubarb, rutabaga, shallots, spinach, squash, swede, sweetcorn, sweet potato, tomatoes, turnips, watercress, watermelon, yams; nutritional dietary supplements in capsule, tablet, liquid, cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion; processed sprouted seeds and grains processed for eating and unprocessed for eating; beans, flax sprouts, alfalfa sprouts, red clover sprouts, broccoli sprouts, radish sprouts, mustard sprouts, fenugreek sprouts, garlic sprouts, soy sprouts, chick pea, green pea, yellow pea sprouts, canola sprouts; all the aforesaid being processed

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of June 18, 2008.

[3] On November 25, 2008, Kellogg Company (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

- Pursuant to s. 38(2)(a) and 30(e) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act), the application does not conform with the requirements of s. 30(e) of the Act in that, as at the date of filing of the application and at all material times, the Applicant by itself and/or through a licensee, never intended to use the Mark in association with the Wares.
- Pursuant to s. 38(2)(a) and 30(i) of the Act, the Applicant, as at the date of filing the application and all material times, was aware of the confusingly similar marks of the Opponent, namely the Opponent's NUTRI-GRAIN marks set out in the s. 12(1)(d) ground of opposition below, due to the registration and extensive use of such marks by the Opponent in Canada in association with food products identical to those described in the application. As such, the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the Wares.
- Pursuant to s. 38(2)(b) and 12(1)(d) of the Act, the Mark is not registrable as it is confusing with the registered trade-marks of the Opponent, namely:
 - i. NUTRI-GRAIN (TMA201,374);
 - ii. NUTRI-GRAIN TWISTS (TMA557,127);
 - iii. NUTRI-GRAIN MINI CEREAL BARS (TMA677,347);
 - iv. NUTRI-GRAIN MINI BARRES DE CEREALS (TMA677,349);
 - v. NUTRI-GRAIN MINI BOUCHEES GRANOLA (TMA670,030); and
 - vi. NUTRI-GRAIN MINI GRANOLA BITES (TMA725,920) (hereinafter referred to as the Opponent's NUTRI-GRAIN Marks).
- Pursuant to s. 38(2)(c) and 16(3)(a) of the Act, the Applicant is not the person entitled to registration of the Mark at the filing date and all material times, because the Mark was confusing with the Opponent's NUTRI-GRAIN Marks, previously used in Canada by the Opponent in association with the wares/services set out in the statement of opposition. The Opponent has not abandoned its marks.
- Pursuant to s. 38(2)(d) and 2 of the Act, the Mark is not distinctive or adapted to distinguish the Wares from the wares of others, in particular the wares and services of the Opponent.

[4] The Applicant served and filed a counter statement in which it denied the Opponent's allegations and put the Opponent to the strict proof thereof.

[5] In support of its opposition, the Opponent filed an affidavit of Wendy Woods, sworn July 17, 2009 with Exhibits A – B and an affidavit of Cameron Clark, sworn July 14, 2009 with

Exhibits A – D as well as certified copies of the registrations for the Opponent’s NUTRI-GRAIN Marks. No cross-examinations were conducted.

[6] The Applicant did not file any evidence in support of its application.

[7] Only the Opponent filed a written argument and was represented at the oral hearing.

Onus and Material Dates

[8] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

[9] The material dates that apply to the grounds of opposition are as follows:

- s. 38(2)(a)/30(e) and (i) - the date of filing the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 at 475 (T.M.O.B.) and *Tower Conference Management Co. v. Canadian Exhibition Management Inc.* (1990), 28 C.P.R. (3d) 428 at 432 (T.M.O.B.)].
- s. 38(2)(b)/12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)].
- s. 16(3)(a) – the date of filing the application [see s. 16(3) of the Act].
- s. 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.)].

Non-compliance with Section 30 of the Act

Sections 30(e) of the Act

[10] Where an applicant has provided the statement required by s. 30(e), a s. 30(e) ground of opposition must include an allegation as to why that statement was false. The application for the Mark does contain a statement that the Applicant intends to use the Mark in Canada. The Opponent has not filed any evidence in support of this ground of opposition.

[11] I am not satisfied that the Opponent has met its evidential burden and thus the ground of opposition based on non-compliance with s. 30(e) is dismissed.

Section 30(i) of the Act

[12] Where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. The Applicant has provided the necessary statement and this is not an exceptional case; the s. 30(i) ground is accordingly dismissed.

Non-registrability Ground of Opposition – s. 12(1)(d) of the Act

[13] An opponent's initial onus is met with respect to a s. 12(1)(d) ground of opposition if the registrations relied upon are in good standing as of the date of the opposition decision. The Registrar has discretion to check the register in order to confirm the existence of the registration(s) relied upon by an opponent [see *Quaker Oats of Canada Ltd./La Compagnie Quaker Oats du Canada Ltée v. Menu Foods Ltd.* (1986), 11 C.P.R. (3d) 410 (T.M.O.B.)]. I have exercised that discretion and confirm that the registrations for the Opponent's NUTRI-GRAIN Marks remain valid and therefore the Opponent has satisfied its evidential burden. I must now assess whether the Applicant has met its legal burden.

[14] The Opponent's Marks all feature the word NUTRI-GRAIN which is the only element of the Opponent's Marks which shares any resemblance with the Mark. As a result, I consider registration No. TMA201,374 for the trade-mark NUTRI-GRAIN registered for "cereal and vegetable derived food products to be used as a breakfast food and snack food; food products, namely waffles; fruit-filled and fruit-flavoured cereal bars" (the Opponent's Wares) to present the Opponent's strongest case. I will therefore address the s. 12(1)(d) ground by focusing on the likelihood of confusion between the NUTRI-GRAIN mark of registration No. TMA201,374 and the Mark. Thus, the success or failure of this ground will turn on the issue of confusion with this registration.

[15] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that 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 wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[16] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See, in general, *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.) and *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 96 C.P.R. (4th) 361 (S.C.C.).]

Section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which they have become known

[17] The Mark and the Opponent's NUTRI-GRAIN mark contain the prefixes "nutra" and "nutri", respectively. While no evidence has been provided regarding the meaning of the "nutri" and "nutra" prefixes, I am willing to take judicial notice of the fact that they are suggestive of the words "nutrition", "nutritious" and/or "nutrient". Furthermore I can take judicial notice of dictionary definitions for the words "nutrition", "nutritious" and "nutrient" [see *Envirodrive Inc. v. 836442 Canada Inc.*, 2005 ABQB 446; *Aladdin Industries, Inc. v. Canadian Thermos Products Ltd.* (1969), 57 C.P.R. 230 (Ex. Ct.), aff'd (1974), 6 C.P.R. (2d) 1 (S.C.C.)]. These words are defined in *The Canadian Oxford Dictionary* respectively as "the process by which humans or animals utilize food for the proper functioning of the organism"; "rich in nutrients" and "any substance that provides essential nourishment for the maintenance of life". The NUTRI and NUTRA prefixes are thus suggestive of the parties' wares.

[18] The Opponent has provided dictionary definitions for the words "grain" and "sprout" submitting that the words mean "any plant or plants producing cereal seeds" and "a young growth on a plant as a stem or branch; shoot", respectively.

[19] The “nutri” prefix in association with the word “grain” renders the Opponent’s NUTRI-GRAIN mark highly suggestive of the Opponent’s Wares. The same is true for the prefix “nutra” in association with “sprout” for the Wares.

[20] As a result, I assess the inherent distinctiveness of the parties’ marks as being the same, and as being quite low, as was admitted by the Opponent at the oral hearing.

[21] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. I will now turn to the extent to which the trade-marks have become known in Canada.

[22] The Applicant has not provided any evidence of use of the Mark subsequent to the filing date and thus I can only conclude that it has not become known to any extent.

[23] By contrast, the Opponent provides sales figures for the Opponent’s NUTRI-GRAIN bars in Canada totaling \$377 million from 2002 to 2009 and advertising expenditures for the same period in excess of \$23 million (Woods affidavit, paragraphs 7, 8). The Opponent provides sample packaging for the Opponent’s Wares from 2001-2009 which clearly displays the NUTRI-GRAIN mark (Woods affidavit, Exhibits A, A1). The Opponent also provides sample advertising materials from 2002-2009, both print and television, which also clearly display the NUTRI-GRAIN mark (Woods affidavit, Exhibit B). In her affidavit, Ms. Woods states that a significant portion of the Opponent’s advertising budget is spent on the production and distribution of national television commercials which “have reached millions of Canadians”. Ms. Woods states that other advertising activities include: “coupon programs, contest activities, point-of-sale material, print and online advertising, and billboard and flyer advertisements”.

[24] The Opponent submitted, and I agree, that its reputation in the NUTRI-GRAIN mark, as evidenced by the substantial market share and sales figures for the Opponent’s Wares, the prominent placement of the NUTRI-GRAIN mark on packaging and the Opponent’s substantial advertising expenditures, should be sufficient to support a finding that the NUTRI-GRAIN mark is very well known if not famous in Canada.

[25] Based on a review of the evidence as a whole, I am satisfied that the Opponent's NUTRI-GRAIN mark has developed a substantial reputation in Canada. Based on the foregoing, this factor significantly favours the Opponent.

Section 6(5)(b) – the length of time each has been in use

[26] The application for the Mark is based upon proposed use in Canada and the Applicant has not filed any evidence of use subsequent to the filing date.

[27] Ms. Woods states that the Opponent has sold cereal bars in association with the NUTRI-GRAIN mark since 1994. In her affidavit, Ms. Woods clarifies that prior to December 10, 2003 Kellogg Canada Inc. was the owner and user of the NUTRI-GRAIN Marks in Canada. Pursuant to an assignment on December 10, 2003, the NUTRI-GRAIN Marks were transferred to the Opponent. Ms. Woods states that since the assignment, Kellogg Canada Inc. has used the NUTRI-GRAIN Marks under license from the Opponent. Ms. Woods states that the Opponent has at all times directly and/or indirectly controlled the character or quality of the Opponent's Wares.

[28] Ms. Woods provides supporting evidence (in the form of sample packaging and sales figures) back to 2001. As a result, I am satisfied that the evidence supports a finding that the Opponent and its predecessor have used the NUTRI-GRAIN mark since at least as early as 2001.

[29] I note that Ms. Woods also makes the sworn statement that "the words NUTRI-GRAIN have always appeared in a dominant position on all of the packaging" suggesting that the NUTRI-GRAIN mark has appeared on the Opponent's product packaging since 1994 (despite the fact that the documentary evidence displaying the mark on the packaging only goes back to 2001).

[30] In any event, whether the Opponent has evidenced use of the NUTRI-GRAIN mark since 1994 or 2001, both dates are substantially earlier than the Applicant who has not provided any evidence of use of the Mark whatsoever.

[31] Based on the foregoing, this factor significantly favours the Opponent.

Sections 6(5)(c) – the nature of the wares

[32] It is the Applicant’s statement of wares as defined in its application versus the Opponent’s registered wares that govern my determination of this factor [see *Esprit International v. Alcohol Countermeasure Systems Corp.* (1997), 84 C.P.R. (3d) 89 (T.M.O.B.)].

[33] To the extent that both parties’ wares cover food products, and more specifically, cereal-based food products, there is a clear overlap in the nature of the parties’ wares with respect to the following overlapping wares (hereinafter referred to as the Overlapping Wares):

Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli ... form composed of organically grown plant sprouts, oils and powders; ...; nutritional dietary supplements in ... cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion;
...

[34] At the oral hearing the Opponent submitted that there is also a point of overlap between the parties’ wares created by the Opponent’s “...vegetable derived food products...” and the Applicant’s “processed vegetables ...”.

[35] The Opponent’s submission has merit; however, I am of the view that a “vegetable derived food product” would be distinct from a “processed vegetable”. Based on a literal interpretation of the terms, a processed vegetable would likely be an actual vegetable which has been processed, whereas a vegetable derived food product would likely only feature a vegetable as its original starting matter or as one of its ingredients. In the absence of any evidence as to the nature of a “vegetable derived food product”, I am of the view that the fact that a food product may be derived from a vegetable is not sufficient to render it similar to an actual vegetable.

[36] Based on the foregoing, I find that the only point of overlap between the parties’ marks is with respect to the Overlapping Wares.

Section 6(5)(d) – the nature of the trade

[37] The Applicant has not provided any evidence of the channels of trade through which the Wares will be sold.

[38] The Woods affidavit establishes that the Opponent's Wares are sold through large national retailers including Loblaw's, Sobeys, Fortinos, Safeway, Costco, Walmart, Zellers, No Frills, IGA, A&P and Metro, as well as through independent grocery stores, convenience stores, variety stores, and drugstores.

[39] At the oral hearing, the Opponent submitted that since the Applicant did not file any evidence as to the nature of its trade it must be assumed that there is no limitation on where the Wares are sold. By corollary, the Opponent submitted that since the evidence establishes that the Opponent's Wares are sold across a wide range of food retailers it is likely that the parties' channels of trade will overlap.

[40] I accept the Opponent's submissions on this point. Given the overlap in the nature of some of the parties' wares, and in the absence of evidence of the Applicant's channels of trade, I find that the Wares could be sold through the same channels of trade as the Opponent's Wares.

Section 6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[41] At the oral hearing the Opponent submitted that in *Masterpiece*, the Supreme Court of Canada signaled a change in practice with respect to the analysis of the similarity between trade-marks. Specifically, the Opponent submitted that *Masterpiece* suggests a shift away from the previously followed doctrine set out in *Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183 (F.C.T.D.) at 188 where the first portion of a trade-mark is considered the most relevant for the purposes of distinction. The Supreme Court in *Masterpiece* advised that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trade-mark that is particularly striking or unique [see *Masterpiece, supra* at para 64].

[42] Based on this analysis, the Opponent submitted that the unique or striking element in the present case is the fact that both parties' marks are coined words or "combination marks" which combine the highly similar prefixes (NUTRI/NUTRA) with regular dictionary words. As a result of this unique combination, both elements of the marks must be considered when determining the degree of resemblance between them.

[43] The Opponent submitted that while the second elements of the parties' marks may look and sound different, these differences are counterbalanced and outweighed by the degree of similarity between the parties' marks in terms of the order of the words (NUTRI/NUTRA + dictionary word); the placement of a one syllable word after the prefixes and most importantly by the similarity in the ideas suggested by the marks as a whole.

[44] As set out above in the analysis of the s. 6(5)(a) factor, the Opponent has provided evidence of the definitions for the words "grain" and "sprout" as follows:

- grain – "any plant or plants producing cereal seeds";
- sprout – "a young growth on a plant as a stem or branch; shoot".

[45] The Opponent relies on excerpts from books discussing "sprouted grains" and "grain sprouts", including bread-making books (Clark affidavit paragraph 4, Exhibits B, D, D1). The Opponent also relies on a third party "sprouted grain cereal product" as evidence of the interconnectedness of grains and sprouts (see Clark affidavit paragraphs 2, 3; Exhibits C, C-1, C-2).

[46] At the oral hearing the Opponent submitted that the Wares themselves include "processed sprouted seeds and grains", further suggesting a connection between "grain" and "sprout".

[47] I am willing to accept that the words "grain" and "sprout" both relate to plants and have some connection to food products.

[48] The Opponent submits that when you combine the words "grain" and "sprout" with the prefixes NUTRI/NUTRA, the overall degree of resemblance between the parties' marks is high.

[49] Finally, the Opponent submits that although the parties' marks differ slightly in their component parts, the general idea and impression left by the NUTRI/NUTRA prefixes combined with the suffixes GRAIN and SPROUT is the same. Specifically, the Opponent submits that the parties' marks suggest that the related wares are composed of plant related elements that are beneficial to the health and well-being of the consumer. I agree.

[50] Based on the foregoing, I find that the parties' marks share some degree of similarity in terms of sound, appearance and idea suggested.

Additional Surrounding Circumstance – The NUTRI Prefix

[51] At the oral hearing I advised the Opponent that I am aware of case law in which it was found that consumers have become used to seeing “nutri” prefixed marks in the food and vitamin trades and would therefore be able to distinguish such marks on their other components [see *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (F.C.A.); *Sunny Crunch Foods Ltd. v. Wyeth-Ayerst Canada Inc.* (unreported decision of T.M.O.B., Application No. 740,514, January 8, 1999, 1999 CarswellNat 3336); and *Amway Corp. v. Nutravite Pharmaceutical Inc.* (unreported decision of T.M.O.B., Application No. 790,667, February 16, 2001, 2001 CarswellNat 4017)]. In each of these cases, the applied for “nutri” prefixed mark was found not to be confusing with the opponent’s “nutri” or “nutra” prefixed marks. I asked the Opponent to provide me with submissions on this line of case law and its application to the present case.

[52] The Opponent submitted that the present case is distinguishable from the above-noted cases as in each of the above-noted cases the applicant had presented substantive state of the register evidence showing the existence of numerous “nutri” prefixed marks on the register for related wares. Evidence of use of “nutri” prefixed marks for related wares in the marketplace was also presented in two of the cases. In the present case, the Applicant has filed no state of the register evidence or any evidence of use of “nutri” prefixed marks in the relevant marketplace.

[53] The Opponent relied on *Sandoz Nutrition Ltd. v. Sirois* (2002), 27 C.P.R. (4th) 570 (T.M.O.B.) in support of its submissions. The Opponent acknowledged that NUTRI prefixed marks *de facto* lack inherent distinctiveness. However, the Opponent submitted that it is important to look to the evidence to determine what is occurring on the register and in the marketplace in terms of the ability of consumers to distinguish between the marks.

[54] In the present case, the Applicant has not filed any state of the register or marketplace evidence with respect to the NUTRI prefix. The Registrar, when adjudicating in an opposition proceeding, does not exercise discretion to take cognizance of its own records except to verify whether trade-mark registrations and applications are extant [see *Quaker, supra* and *Royal Appliance Mfg. Co. v. Iona Appliance Inc.* (1990), 32 C.P.R. (3d) 525 at 529 (T.M.O.B.)]. The parties are expected to prove each aspect of their case following fairly strict rules of evidence.

[55] I accept the Opponent's submissions.

Conclusion

[56] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection, bearing in mind also that the Applicant has shown little interest in this proceeding (the Applicant not having filed any evidence nor having filed a written argument or requested an oral hearing). Having considered all of the surrounding circumstances, in particular, the extent to which the Opponent's NUTRI-GRAIN mark has become known and the potential for overlap in the parties' channels of trade, I am not satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the marks at issue with respect to the Overlapping Wares, namely:

Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli ... form composed of organically grown plant sprouts, oils and powders; ...; nutritional dietary supplements in ... cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion;

[57] With respect to the remainder of the Wares, I am satisfied that the difference in the nature of the parties' wares is sufficient to shift the balance of probabilities in the Applicant's favour.

[58] Based on the foregoing, the s. 12(1)(d) ground of opposition is successful with respect to the Overlapping Wares and dismissed with respect to the remainder of the Wares.

Non-entitlement Ground – s. 16(3)(a) of the Act

[59] Despite the burden of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and one or more of the Opponent's NUTRI-GRAIN Marks, the Opponent has the initial onus of proving that one or more of the trade-marks alleged in support of its ground of opposition based on s. 16(3)(a) of the Act was used or made known prior to the filing date for the Applicant's application (June 22, 2006) and had not been abandoned at the date of advertisement of the application for the Mark (June 18, 2008) [s. 16(5) of the Act].

[60] As discussed more fully above in the analysis of the s. 12(1)(d) ground of opposition, the Opponent provided evidence supporting a finding that the NUTRI-GRAIN mark has been used in Canada since before the date of filing the application for the Mark, and had not been abandoned as of the date of advertisement. As a result, the Opponent has met its evidential burden. I must now assess whether the Applicant has satisfied its legal burden.

[61] The difference in material dates is not significant and as a result my findings under the ground of opposition based on s. 12(1)(d) of the Act are equally applicable here. As a result, I find that the Applicant has not discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the marks at issue with respect to the Overlapping Wares, namely:

Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli ... form composed of organically grown plant sprouts, oils and powders; ...; nutritional dietary supplements in ... cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion;

[62] With respect to the remainder of the Wares, I am satisfied that the difference in the nature of the parties' wares is sufficient to shift the balance of probabilities in the Applicant's favour.

[63] The s. 16(3)(a) ground of opposition is therefore successful with respect to the Overlapping Wares and dismissed with respect to the remainder of the Wares.

Non-distinctiveness Ground – s. 38(2)(d) of the Act

[64] While there is a legal onus on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its Wares from those of others throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)], there is an initial evidential burden on the Opponent to establish the facts relied upon in support of the ground of non-distinctiveness.

[65] In order to meet its initial burden with respect to this ground, the Opponent must establish that one or more of the Opponent's NUTRI-GRAIN Marks was known at least to some extent in Canada as of November 25, 2008 [see *Bojangles' International LLC v. Bojangles Café Ltd.*

(2006), 48 C.P.R. (4th) 427 (F.C.) and *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.)).

[66] As set out in further detail above in the analysis of the s. 12(1)(d) ground of opposition, the Opponent has provided evidence supporting a finding that the NUTRI-GRAIN mark had developed a reputation in Canada as of the material date such that the Opponent has met its evidential burden.

[67] I must now assess whether the Applicant has satisfied its legal burden.

[68] The difference in material dates is not significant and as a result my findings under the ground of opposition based on s. 12(1)(d) of the Act are equally applicable here. As a result, I find that the Applicant has not discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the marks at issue with respect to the Overlapping Wares, namely:

Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli ... form composed of organically grown plant sprouts, oils and powders; ...; nutritional dietary supplements in ... cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion; ...

[69] With respect to the remainder of the Wares, I am satisfied that the difference in the nature of the parties' wares is sufficient to shift the balance of probabilities in the Applicant's favour.

[70] The non-distinctiveness ground of opposition is therefore successful with respect to the Overlapping Wares and dismissed with respect to the remainder of the Wares.

Disposition

[71] Pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application with respect to the Overlapping Wares, namely, "Nutritional and health food supplements in breakfast cereal, processed cereal, cereal bar, meal replacement bar, biscuit, museli ... form composed of organically grown plant sprouts, oils and powders; ...; nutritional dietary supplements in ... cereal-bar and muesli-bar form for weight loss, weight gain, increasing energy and assisting digestion; ..." and reject the opposition with respect to the remainder of the

Wares pursuant to s. 38(8) of the Act [see *Produits Menagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 C.P.R. (3d) 492 (F.C.T.D.) as authority for a split decision].

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