



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

**Citation: 2015 TMOB 68**  
**Date of Decision: 2015-04-07**

**IN THE MATTER OF AN OPPOSITION  
by Jarrow Formulas, Inc. to application  
No. 1,428,557 for the trade-mark POMx  
& Design in the name of Canada Bread  
Company, Limited**

[1] Jarrow Formulas, Inc. opposes registration of the trade-mark POMx & Design, shown below, applied for registration under serial No. 1,428,557, in association with nutrition bars for use as a functional food designed to provide specific health benefits, and fruit and nut based snack bars, as detailed later on.



[2] The determinative issue in this proceeding is whether the trade-mark POMx & Design (the Mark) is confusing with the trade-marks POME GREAT of application No. 1,277,280 and POMGUARD of application No. 1,312,430. At the date of advertisement of the application for the Mark, application No. 1,277,280 was pending for dietary supplements whereas application No. 1,312,430 was pending for dietary and nutritional supplements, as detailed later on.

[3] For the reasons that follow, I find that the application ought to be refused in part.

## The Record

[4] The application was filed by PomWonderful LLC on February 20, 2009 on the basis of proposed use in Canada and claims the priority of a United States application filed on February 19, 2009; it currently stands in the name of Canada Bread Company, Limited as assignee. The term “Applicant” used throughout my decision refers to the owner of the application at the relevant time.

[5] The full statement of goods of the application for the Mark reads as follows:

(1) Nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutrition bars for use as a meal replacement and nutrition bars for use as a dietary supplement; nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutritional fruit and nut based energy and snack food bars; fruit and nut based snack bars.

[6] The application was advertised in the December 9, 2009 issue of the *Trade-marks Journal*.

[7] The statement of opposition filed on May 10, 2010 by Jarrow Formulas, Inc. (the Opponent) raises three grounds of opposition under section 38 of the *Trade-marks Act*, RCS 1985, c T-13 (the Act). In summary, the grounds of opposition are premised on allegations that:

- (i) the application does not comply with the requirements of section 30(a) of the Act because it does not contain a statement in ordinary commercial terms of the goods associated with the Mark [section 38(2)(a) of the Act];
- (ii) the Applicant is not the person entitled to registration of the Mark under section 16(3)(b) of the Act in view of confusion with the Opponent’s trade-marks POME GREAT and POM GUARD in respect of which applications had been previously filed under Nos. 1,277,280 and 1,312,430 respectively [section 38(2)(c) of the Act]; and
- (iii) the Mark is not distinctive nor is it adapted to distinguish the Applicant’s goods from the goods and services of others [section 38(2)(d) of the Act].

[8] The Applicant filed a counter statement denying each ground of opposition.

[9] The Opponent's evidence consists of certified copies of application No. 1,277,280 for the trade-mark POME GREAT and No. 1,312,430 for the trade-mark POMGUARD as of April 29, 2011.

[10] The Applicant's evidence consists of two affidavits of Jessica Rodrigues-Cerqueira, a paralegal employed by the Applicant's trade-marks agent, both sworn on November 22, 2012. Ms. Rodrigues-Cerqueira, who was not cross-examined by the Opponent, introduces into evidence the particulars of registrations and applications that she obtained from the Canadian trade-mark database, namely the particulars of:

- active registrations and applications for trade-marks consisting of or comprising the term "POM" (the POM Marks) "for use in association with fruits, beverages, extract, supplements, cosmetics, pharmaceutical and related wares" that are owned by the Applicant; and
- application No. 1,122,704 for the trade-mark POM owned by the Applicant.

[11] Only the Applicant filed a written argument. A hearing was not held.

#### Legal Onus and Evidential Burden

[12] The legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA); and *Wrangler Apparel Corp v The Timberland Company* (2005), 41 CPR (4th) 223 (FC)].

## Grounds of Opposition Dismissed

[13] I summarily dismiss the grounds of opposition raised under sections 38(2)(a) and 38(2)(d) of the Act for the reasons that follow.

[14] The ground of opposition raised under section 38(2)(a) of the Act, which is premised on an allegation that the application does not comply with the requirements of section 30(a) of the Act, appears to be a “boilerplate” pleading in that it merely repeats the wording of the Act. In any event, assuming that the ground of opposition has been sufficiently pleaded, it is dismissed for the Opponent’s failure to meet its evidential burden of showing that the application did not comply with section 30(a) of the Act.

[15] The non-distinctiveness ground of opposition raised under section 38(2)(d) of the Act also appears to be a “boilerplate” pleading as it merely alleges that the Mark does not distinguish, nor is it adapted to distinguish, the Applicant’s goods from the goods and services of others.

[16] According to *Novopharm Limited v AstraZeneca AB* (2002), 21 CPR (4th) 289 (FCA), I must assess the sufficiency of the pleading in association with the evidence. Since the Opponent has not furnished any evidence that would be relevant to the distinctiveness of the Mark, I dismiss the ground of opposition for having been insufficiently pleaded.

[17] Alternatively, as the pleading in the context of the statement of opposition could arguably be understood as alleging that the Mark is not distinctive in view of the Opponent’s trade-marks POME GREAT and POM GUARD, the ground of opposition is dismissed for the Opponent’s failure to meet its evidential burden. More particularly, the Opponent has failed to show that one or both of its alleged trade-marks had become known sufficiently in Canada as of the filing date of the statement of opposition, namely May 10, 2010, to negate the distinctiveness of the Mark [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC); *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles’ International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

### Analysis of the Remaining Ground of Opposition

[18] The remaining ground of opposition raised under section 38(2)(c) of the Act is based on section 16(3)(b) of the Act. It is premised on an allegation of confusion between the Mark and the Opponent's trade-marks POME GREAT of application No. 1,277,280 and POM GUARD of application No. 1,312,430.

[19] Although lengthy, I find it is useful to start my analysis of this ground of opposition by reproducing the following excerpts of the Applicant's written argument as they essentially reflect its position:

16. In view of the Applicant's prior registrations and previously filed applications for the POM Marks including the Applicant's previously filed trade-mark application number 1,122,704 that covers the same wares that are listed in the Opponent's trade-mark applications for POM GUARD and POME GREAT, the Applicant possesses superior rights in and to the trade-mark POM for use in association with the wares listed in the subject application. Furthermore, the trade-mark POM is distinctive of the Applicant and not the Opponent. Accordingly, the present opposition against [the application for the Mark] should be rejected.

[...]

22. [...] as is clearly demonstrated by the Applicant's evidence, the Applicant has superior rights in and to the trade-mark POM including all of the variations thereof (which includes the [Mark]) having regard to the Applicant's prior registrations and previously filed applications for the POM Marks in Canada, including application number 1,122,704 which covers the same wares as those listed in the Opponent's applications for POM GUARD and POME GREAT.

23. Such rights of the Applicant in and to the POM Marks, its prior registrations and previously filed applications for the POM Marks including previously filed application number 1,122,704 existed well before the alleged priority filing dates of both of the Opponent's trade-mark applications for POM GUARD and POME GREAT, namely March 3, 2006 and May 23, 2005, respectively.

24. In view of this, by the Opponent's own allegations in its Statement of Opposition that the [Mark] is confusing with the Opponent's applications for POM GUARD and POME GREAT, the Opponent's own applications must be considered to be confusing with the Applicant's POM Marks, the Applicant's prior registrations and previously filed applications for the POM Marks including previously filed application number 1,122,740 for POM which covers the same wares.

25. It is respectfully submitted that this was the finding of the Opposition Board in its rejection of the Opponent's application for POME GREAT. Furthermore, it is submitted that a similar decision would have been rendered in respect of the Opponent's application for POM GUARD but this application was withdrawn following the filing of the Applicant's Statement of Opposition against the application.

26. In any event, the above is moot as the Opponent has not filed any evidence for a finding of confusion to be rendered.

[20] With due respect for the Applicant, the issue arising from the section 16(3)(b) ground of opposition is neither the Opponent's entitlement to the registration of the trade-mark POME GREAT as of May 23, 2005, nor the Opponent's entitlement to the registration of the trade-mark POM GUARD as of March 3, 2006. Rather, the issue is whether the Applicant was the person entitled to the registration of the Mark as of February 19, 2009. Also, it is the Applicant who has the ultimate burden of evidencing its entitlement to the registration of the Mark.

[21] It is true that the Opponent's application No. 1,277,280 for the trade-mark POME GREAT was refused under sections 16(3)(b) and 12(1)(d) of the Act by the Registrar further to the Applicant's opposition. I rendered the decision on behalf of the Registrar as I concluded to confusion between the Opponent's trade-mark POME GREAT and the Applicant's trade-mark POM WONDERFUL & Design of application No. 1,176,267 and registration No. TMA832,083. The decision issued on June 18, 2013, indexed as *Canada Bread Company, Limited v Jarrow Formulas Inc*, 2013 TMOB 108 (CanLII), is currently under appeal before the Federal Court [Court File No. T-1539-13]. Also, having exercised the Registrar's discretion to review the trade-marks register to inspect the Opponent's application No. 1,312,430 for the trade-mark POM GUARD, I have confirmed that it was voluntarily abandoned on February 19, 2013 [see *Royal Appliance Mfg Co v Iona Appliance Inc* (1990), 32 CPR (3d) 525 (TMOB) at 529].

[22] Nevertheless, all that is required from the Opponent to discharge its initial burden for the section 16(3)(b) ground of opposition is to show that its alleged applications had been filed before the priority filing date of the application for the Mark, i.e. February 19, 2009, and were pending at the date of advertisement of the Applicant's application, i.e. December 9, 2009 [section 16(4) of the Act]. In other words, even if the Federal Court dismisses the appeal in

*Canada Bread Company, Limited, supra*, the refusal of the Opponent's alleged application No. 1,277,280 for the trade-mark POME GREAT subsequently to the material date is of no consequence when considering the section 16(3)(b) ground of opposition. The same is true for the voluntary abandonment of the Opponent's alleged application No. 1,312,430 for the trade-mark POMGUARD [see *ConAgra Inc v McCain Foods Ltd* (2001), 14 CPR (4th) 228 (FCTD) where the abandonment of the opponent's application subsequent to the material date was found not to be a relevant circumstance in the assessment of confusion under section 16(3)(b) of the Act].

[23] In the present case, the Opponent has met its initial burden with respect to each of its alleged applications. Indeed, application No. 1,277,280 was filed on October 27, 2005 claiming a priority filing date of May 23, 2005 and application No. 1,312,430 was filed on August 10, 2006 claiming a priority date of March 3, 2006; each application was pending at the date of advertisement of the application for the Mark.

[24] Thus, the question becomes whether the Applicant has met its legal onus to show that, as of February 19, 2009, the Mark was not likely to cause confusion with the trade-marks POME GREAT of application No. 1,277,280 and POMGUARD of application No. 1,312,430.

[25] The certified copies of the applications dated April 29, 2011, which have been provided by the Opponent, reflect the following statements of goods:

No. 1,277,280 (POME GREAT): "dietary supplements namely fruit juice concentrates containing pomegranate and vitamin and fruit extract supplements containing pomegranate in liquid form sold through retailers that specialize in health foods, natural foods, vitamins, or nutritional supplements";

No. 1,312,430 (POMGUARD): "dietary and nutritional supplements, namely, pomegranate-containing vitamin, fruit extract and mineral supplements in tablet, soft gel, powder, and capsule form, sold through retailers that specialize in health foods, natural foods, vitamins, or nutritional supplements".

[26] As indicated before, there is a legislative requirement that an application alleged in support of a section 16(3)(b) non-entitlement ground of opposition be pending at the date of advertisement of the opposed application. Accordingly, in my assessment of confusion as of February 19, 2009, I believe it is consistent with the intention of the legislator to consider the

statement of goods of each of the Opponent's alleged applications as it read at the date of advertisement of the application for the Mark. Having exercised the Registrar's discretion to review the trade-marks register, I have determined that the statement of goods of each application as of December 9, 2009 read as follows:

No. 1,277,280 (POMEGREAT): "dietary supplements namely fruit juice concentrates and vitamin and fruit extract supplements in liquid form" further to a voluntary amendment of November 12, 2009;

No. 1,312,430 (POMGUARD): "dietary and nutritional supplements, namely, vitamin, fruit extract and mineral supplements in tablet, liquid, soft gel, powder, and capsule form, powder drink mixes, powder meal replacements, fruit juices and fruit juice concentrates" further to an amendment of June 15, 2007.

[27] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that 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, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[28] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 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 the trade-marks have been in use; c) the nature of the goods, 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 *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al* (2006), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 for a thorough discussion of the general principles that govern the test for confusion.]

[29] In my view, the trade-mark POMGUARD presents the Opponent's strongest case as I find it more similar to the Mark than the trade-mark POMEGREAT, if only given the identity of their respective "pom" components. In other words, if the section 16(3) ground of opposition



based on confusion with the mark POMGUARD does not succeed, a more favourable result will not be achieved when considering the trade-mark POME GREAT.

[30] Accordingly, I will focus my assessment of the surrounding circumstances of this case on comparing the Mark with the Opponent's trade-mark POMGUARD of application No. 1,312,430.

[31] In *Masterpiece, supra*, the Supreme Court of Canada stated that the degree of resemblance between marks, although the last factor listed in section 6(5) of the Act, is often likely to have the greatest effect on the confusion analysis; the Court chose to begin its analysis by considering that factor. Thus, I turn to the assessment of the section 6(5) factors starting with the degree of resemblance between the trade-marks.

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

[32] When considering the degree of resemblance, the law is clear that the trade-marks must be considered in their totality; it is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trade-marks.

[33] The first portion of a trade-mark is usually considered more important for assessing the likelihood of confusion [see *Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 at 188 (FCTD)]. At paragraph 64 of the *Masterpiece* decision, the Court writes that to measure the degree of resemblance, a preferable approach is to first consider whether there is an aspect of the trade-mark that is particularly striking or unique.

[34] As I find that the Opponent's trade-mark is composed of two equally dominant components, i.e. "pom" and "guard", I conclude that its prefix "pom" is somewhat more important for the purposes of distinction. The Mark is also composed of two components, i.e. "pom" formed with a heart-shaped "o", and the letter "x" displayed in subscript. As letters of the alphabet are not particularly distinctive, I conclude that the first component of the Mark is somewhat more important for the purposes of distinction. To the extent that the heart-shaped "o" is intrinsic to the prefix "pom" of the Mark I find it is equally important.

[35] In terms of the ideas suggested, I do find that the trade-marks are as similar as they are different from one another for the reasons that follow.

[36] My own knowledge of my mother tongue leads me to conclude that “pom” sounds like the French word “*pomme*” (in English: apple). Therefore, both trade-marks to a French speaking consumer would be evocative of apple, even more so when considering the Mark for “nutritional *fruit* and nut based energy and snack food bars” and “*fruit* and nut based snack bars” and the trade-mark POMGUARD for “dietary and nutritional supplements, namely [...] *fruit* extract [...] *fruit* juices and *fruit* juice concentrates” (emphasis added). It should be remembered that a trade-mark cannot be registered when there is confusion on the part of either the average English speaking consumer, the average French speaking consumer or the average bilingual consumer [see *Pierre Fabre Medicament v SmithKline Beecham Corporation* v (2001), 11 CPR (4th) 1 (FCA)].

[37] That being said, the heart-shaped “o” in the Mark conveys the idea that its associated goods are healthy or provide health benefits. Arguably, this idea is reinforced by the “x” displayed in subscript as I find it is somewhat reminiscent of the “x” in subscript in the abbreviation “Rx” standing for “prescription” [see the online *Canadian Oxford Dictionary* (2 ed)]. By comparison, the suffix “guard” does result in the trade-mark POMGUARD as a whole being suggestive of goods that protect or defend.

[38] In the end, considering the trade-marks as a matter of first impression and not of close scrutiny, I do find that they resemble each other in terms of sound owing to their first component “pom”. I also find that they resemble each other in terms of appearance, although to a lesser extent. In this regard, the design feature of the Mark, that is the heart-shaped “o” and the “x” displayed in subscript, cannot be ignored. In terms of the ideas suggested, I do find that the trade-marks are as similar as they are different from one another.

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

[39] I consider that both trade-marks possess some measure of inherent distinctiveness, which I assess as about the same. Furthermore, neither party has filed evidence to establish that its trade-mark acquired distinctiveness through promotion or use in Canada.

*Section 6(5)(b) - The length of time the trade-marks have been in use*

[40] This factor is of no significance. The parties' trade-marks have been applied for registration on a proposed use basis and neither party filed evidence of use in Canada.

*Sections 6(5)(c) and (d) - The nature of the goods and the nature of the trade*

[41] As mentioned before, I find it is appropriate to consider the statement of goods of the Opponent's application No. 1,312,430 as it read at the advertisement date of the application for the Mark, namely "dietary and nutritional supplements, namely, vitamin, fruit extract and mineral supplements in tablet, liquid, soft gel, powder, and capsule form, powder drink mixes, powder meal replacements, fruit juices and fruit juice concentrates" (the Opponent's dietary and nutritional supplements).

[42] I acknowledge that the Opponent's dietary and nutritional supplements differ in form from the goods described in the application for the Mark. However, to the extent that the goods associated with the Mark are intended for use as a meal replacement or as a dietary supplement, I find it is reasonable to conclude to an overlap between them and the Opponent's dietary and nutritional supplements.

[43] Accordingly, absent representations from the Applicant to convince me otherwise, I find it may reasonably be concluded to an overlap between the following goods listed in the application for the Mark and the Opponent's dietary and nutritional supplements:

(1) Nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutrition bars for use as a meal replacement and nutrition bars for use as a dietary supplement; [...] (the Applicant's meal replacements and dietary supplements).

[44] However, absent representations from the Opponent to convince me otherwise, I conclude that the following goods listed in the application for the Mark are distinguishable from the Opponent's dietary and nutritional supplements:

(1) [...] nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutritional fruit and nut based energy and snack food bars; fruit and nut based snack bars (the Applicant's fruit and nut based bars).

[45] Indeed, not only are the Applicant's fruit and nut based bars not referenced in the application as being for use as a meal replacement or as a dietary supplement, they are listed separately from the Applicant's meal replacements and dietary supplements.

[46] Finally, to the extent that I conclude to an overlap between the Applicant's meal replacements and dietary supplements and the Opponent's dietary and nutritional supplements, for the purposes of assessing confusion and without evidence to convince me otherwise, I also conclude to a potential for overlap between the parties' channels of trade for these goods.

[47] Accordingly, I conclude that the overall consideration of the sections 6(5)(c) and (d) factors favours the Opponent only as regards the Applicant's meal replacements and dietary supplements.

*Additional surrounding circumstances*

[48] The Applicant's evidence and submissions arguably advance the Applicant's ownership of registrations for trade-marks consisting of or comprising the term "POM" as an additional surrounding circumstance.

[49] However, none of the POM Marks disclosed by the Applicant's evidence were registered at the material date of February 19, 2009. In any event, it is trite law that the ownership of a registration does not give the automatic right to obtain further registrations no matter how closely they may be related to the original registration [see *Groupe Lavo Inc v Procter & Gamble Inc* (1990), 32 CPR (3d) 533 (TMOB) at 538].

[50] Finally, despite not being relevant to the assessment of the issue before me, the Applicant's submissions regarding the Opponent's non-entitlement to the registration of the

trade-mark POMGUARD arguably advance the fact that the application for the Mark was approved by the Examination Section of the Canadian Intellectual Property Office despite the Opponent's previously filed application. I wish to stress that the burden on an applicant differs whether the application is at the examination stage or at the opposition stage. More particularly, at the examination stage, the Registrar is under an obligation to advertise an application unless he is satisfied that the applicant is not the person entitled to registration of the trade-mark [section 37 of the Act]. At the opposition stage, the burden is on the applicant to satisfy the Registrar that it is the person entitled to registration of the trade-mark.

*Conclusion on the likelihood of confusion*

[51] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. In weighing all of the factors enumerated at section 6(5) of the Act and their relative importance, I am not satisfied that the Applicant has discharged its legal onus of establishing that there was no reasonable likelihood of confusion between the Mark in association with the Applicant's meal replacements and dietary supplements and the Opponent's trade-mark POMGUARD of application No. 1,312,430 as of February 19, 2009.

[52] Indeed, as I conclude that there are points of similarity as well as points of difference between the trade-marks as a whole, when I factored in the overlap between the nature of the Applicant's meal replacements and dietary supplements and the potential for overlap in the nature of the trade, I find that there is an even balance of probabilities between a finding of confusion and a finding of no confusion. As the onus is on the Applicant to establish on a balance of probabilities that the Mark was not confusing with the trade-mark POMGUARD of application No. 1,312,430 as of February 19, 2009, I must decide against the Applicant.

[53] However, I am satisfied that the Applicant has discharged its legal onus of establishing that there was no reasonable likelihood of confusion between the Mark in association with the Applicant's fruit and nut based bars and the Opponent's trade-mark POMGUARD of application No. 1,312,430 as of February 19, 2009. Indeed, when I factor in the fact that the trade-mark POMGUARD does not benefit from acquired distinctiveness with my finding that the Applicant's fruit and nut based bars are distinguishable from the Opponent's dietary and nutritional supplements, I find that the balance of probabilities tips in favour of the Applicant.

[54] As I previously indicated that the trade-mark POMGUARD presents the Opponent's strongest case, I also conclude that the Applicant has discharged its legal onus of establishing that there was no reasonable likelihood of confusion between the Mark in association with the Applicant's fruit and nut based bars and the trade-mark POME GREAT of application No. 1,277,280 as of February 19, 2009.

[55] Finally, since I accept the section 16(3)(b) ground of opposition as regards the Applicant's meal replacements and dietary supplements based on the Opponent's previously filed application for POMGUARD, I am not considering the ground of opposition based on the Opponent's previously filed application for POME GREAT as regards to the Mark in association with the Applicant's meal replacements and dietary supplements.

[56] Accordingly, to the extent that the section 16(3)(b) ground of opposition is based upon the Opponent's previously filed application No. 1,312,430 for the trade-mark POMGUARD, this ground of opposition succeeds only with respect to the following goods:

(1) Nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutrition bars for use as a meal replacement and nutrition bars for use as a dietary supplement; [...]

[57] I wish to add that had the Applicant provided evidence to establish that its POM Marks had been used or had become known to some extent in Canada as of the material date, I might have concluded that the overall consideration of the section 6(5) factors weighs in its favour when considering the Applicant's meal replacements and dietary supplements. However, the outcome of an opposition is based on the evidence and pleadings of the parties and not on the unsupported submissions of the parties.

#### Disposition

[58] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application under section 38(8) of the Act for the following goods:

(1) Nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutrition bars for use as a meal replacement and nutrition bars for use as a dietary supplement; [...]

[59] However, I reject the opposition under section 38(8) of the Act for the following goods:

(1) [...] nutrition bars for use as a functional food designed to provide specific health benefits, namely, nutritional fruit and nut based energy and snack food bars; fruit and nut based snack bars.

[See *Produits Menager Coronet Inc v Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 CPR (3d) 492 (FCTD) as authority for a split decision.]

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office