



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

Citation: 2016 TMOB 199
Date of Decision: 2016-12-30

IN THE MATTER OF AN OPPOSITION

Zast-Foods Corporation	Opponent
and	
nud fud Inc.	Applicant
1,622,447 for NUD & Design	Application

[1] Zast-Foods Corporation opposes registration of the trade-mark NUD & Design, shown below (the Mark), that is the subject of application No. 1,622,447 by nud fud Inc.



[2] The application was filed based on use of the Mark in Canada since at least as early as September 10, 2010 in association with “Raw, vegan, organic, gluten-free snack food, namely sesame crackers, flax crackers, seed based bars and granola”.

[3] The Opponent has opposed the application for the Mark on the basis that: (i) the application does not conform to the requirements of section 30 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act); (ii) the Mark is not registrable under section 12(1)(d) of the Act; (iii) the Applicant is not entitled to registration of the Mark under section 16 of the Act; and (iv) the Mark is not distinctive under section 2 of the Act.

[4] The last three grounds of opposition revolve around the likelihood of confusion between the Mark and the following trade-mark of the Opponent:

- NUD FRUIT (registration No. TMA834,734)

The Opponent's above-noted registration is registered in association with "Frozen fruit and frozen vegetables".

[5] For the reasons that follow, I refuse the application for the Mark.

The Record, Onus and Material Dates

[6] The application for the Mark was filed on April 12, 2013.

[7] It was advertised for opposition purposes in the *Trade-marks Journal* dated April 30, 2014. On June 27, 2014, the Opponent filed a statement of opposition to oppose it under section 38 of the Act. The Applicant then filed and served its counter statement on August 27, 2014.

[8] In support of its opposition, the Opponent filed the affidavit of Jayne Hughes, sworn on December 23, 2014, together with Exhibits A through Z. Ms. Hughes was not cross-examined on her affidavit.

[9] In support of its application, the Applicant filed the affidavit of Julia Kirouac, sworn April 8, 2015, together with Exhibits A through L. Ms. Kirouac was cross-examined on her affidavit, and the transcript of the cross-examination together with undertakings forms part of the record.

[10] Both parties filed a written argument and were represented at a hearing.

[11] 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 be reasonably concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155; and *Wrangler Apparel Corp v The Timberland Company*, 2005 FC 722, 41 CPR (4th) 223]. 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.

[12] With respect to the grounds of opposition, it is the following material dates that apply:

- Sections 38(2)(a)/30 - the filing date of the application, namely, April 12, 2013 [see *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) and *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 at 296 (FCTD) re: section 30(b); and *Tower Conference Management Co v Canadian Exhibition Management Inc* (1990), 28 CPR (3d) 428 at 432 (TMOB) re: section 30(i)];
- Sections 38(2)(b)/12(1)(d) – the date of my decision [see *Park Avenue Furniture Corp v Wickes/Simmons Bedding Ltd* (1981), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c)/16(1)(b) – the date of first use or making known, which in this case is September 10, 2010 [see *Metro-Goldwyn-Mayer Inc Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FCTD)]; and
- Sections 38(2)(d)/2 – the date of filing of the statement of opposition, namely, June 27, 2014 [see *Metro-Goldwyn-Mayer supra*].

Overview of the Parties' Evidence

The Opponent's Evidence

The Hughes Affidavit

[13] Ms. Hughes is the VP Operations of the Opponent and has been since June 2007.

[14] Ms. Hughes attests that the Opponent was founded in 2006 and “creates original and co-packed food brands for the public”, with such products found in movie theatres and event venues, as well as grocery, convenience, and club stores.

[15] Ms. Hughes attests that the Opponent has used its NUDE FRUIT trade-mark since 2010, in relation to frozen fruit products, under the following sub-brands: “wild and crazy blueberries”, “blushing strawberries”, “four very bare berries”, “ravishing raspberries”, “loveable sour cherries”, “scrumptious antioxidant”, and “peachy keen”. Ms. Hughes attests that the Opponent also displays its NUDE FRUIT trade-mark on its “Just Chillin” frozen vegetable products.

[16] With respect to association of the NUDE FRUIT mark with the aforementioned products, Ms. Hughes provides the following:

- Exhibits A to G – product sheets for the aforementioned frozen fruit products that include images of the associated product packaging bearing the NUDE FRUIT trade-mark, in the manner as follows:



- Exhibit H – copies of packaging for the aforementioned frozen fruit products bearing the NUDE FRUIT trade-mark in the same manner as shown in the images of packaging in Exhibits A to G.
- Exhibits I and J – product sheets for the “Just Chillin” product that include images of the associated product packaging. The products are frozen carrots and frozen edamame. Although not entirely clear, the NUDE FRUIT trade-mark may appear within a small leaf design to the upper right side of the larger “Just Chillin” mark on the package of frozen carrots; however, I do not see the NUDE FRUIT trade-mark on the frozen edamame packaging.

- Exhibit K – a copy of an advertisement which Ms. Hughes provides to show the manner in which the NUDE FRUIT trade-mark is displayed on the “Just Chillin” products and marketing materials. The NUDE FRUIT mark appears on the packaging for frozen onions and frozen edamame within a small leaf design to the upper right side of the larger “Just Chillin” mark.

[17] With respect to sales of the aforementioned products, Ms. Hughes attests that since 2010, sales have totalled approximately \$1.14 million. She then provides a breakdown of sales per year for the years 2010 to 2014 (up to the date of her affidavit). She also provides a list of specialty food/grocery stores wherein the aforementioned products are available, as well as a list of larger grocery store chains where such products are sold.

[18] With respect to marketing of the aforementioned NUDE FRUIT products, Ms. Hughes attests that since 2010, the Opponent has attended tradeshows, wholesale events, and conducted consumer sampling events and in-store demonstrations, wherein at these events, promotional materials are displayed. As examples of such promotional materials, Ms. Hughes provides as Exhibits L through T, images of banners, an exhibit stand, a brochure, and promotional items such as stress balls and reusable insulated bags, coupons, and “freezer door clings”, all displaying the NUDE FRUIT trade-mark.

[19] Ms. Hughes then describes various industry trade-shows attended throughout Canada by the Opponent in the years 2010 to 2014, wherein she states the NUDE FRUIT trade-mark was displayed on a banner, and other promotional materials such as product sheets, product brochures, promotional items, and coupons bearing the NUDE FRUIT trade-mark were distributed. She also provides details about the number of attendees, and the profiles of the attendees (i.e. – convenience and gas distributors, food brokers, etc).

[20] With respect to the in-store product demonstrations, Ms. Hughes provides particulars of such demonstrations held at a variety of locations in Ontario throughout the years 2010 to 2014, including specific locations, the number of demonstrations held per year at each location, and the number of attendees. She further attests that the NUDE FRUIT mark was displayed at these demonstrations on a banner and display stand, and on brochures, as well as on coupons and promotional items distributed during the demonstrations.

[21] With respect to advertising, Ms. Hughes states that in March 2014, the Opponent was featured in *Chatelaine*, a magazine she attests has a circulation of approximately 500,000 magazines in Canada. She attaches an excerpt from the magazine under Exhibit U. She further attests that the Opponent's NUDE FRUIT products are also featured prominently in "Santa's Choice" baskets, a Christmas basket purchase and delivery program. She attests that the Santa's Choice 2014 catalogue, in which the NUDE FRUIT products are featured, was distributed to 58,000 people across Canada. In support, she attaches an excerpt from the catalogue under Exhibit V. She attests that a "Santa's Choice" calendar featuring the NUDE FRUIT products was also distributed in 2014 to 10,500 people across Canada, and similarly provides an excerpt in support as Exhibit W. Lastly, she attests that the "Santa's Choice" website where the NUDE FRUIT products are featured, "has monthly page sessions of approximately 30,000 with close to 200,000 page views".

[22] According to Ms. Hughes, the Opponent first became aware of the Applicant and their NUD mark when they received inquiries from customers and friends who had watched an episode of CBC Television's *The Dragon's Den*, which aired on November 26, 2011. She attests that all of the inquiries, three of which she handled personally, were from individuals who were aware of the Opponent's products and trade-mark and inquired whether the Applicant and their NUD FUD products were associated with the Opponent.

[23] Lastly, Ms. Hughes attests that the Applicant has previously applied to register the identical NUD trade-mark; however, it is her understanding that due to the failure to file a counter statement, the application was deemed abandoned on July 18, 2013.

The Applicant's Evidence

The Kirouac Affidavit

[24] Ms. Kirouac is the President and CEO of the Applicant, previously a sole proprietor operating as nud fud (the Predecessor) registered in the province of Ontario on April 16, 2010.

[25] Ms. Kirouac states that she created the Mark in January 2010 and presented it as part of a school project while attending the Institute of Hollistic Nutrition. She further explains that the

Mark was adopted as the logo for the Predecessor and it has been used on letterhead, invoices, packaging, and promotional materials since April 2010.

[26] Ms. Kirouac then discusses a previous application for the Mark and the reasons surrounding why that application was abandoned, and a new application (the current application) was filed. In this regard, she attests that in the initial application, she incorrectly assumed that the date of first use was the date she started using the Mark in association with the registered company. She explains, however, that she was subsequently advised when seeking a legal opinion, that the date of first use was actually the date of first sale, and that this date could not be amended after the trade-mark had been advertised. She attests that she was further advised to abandon the application and re-file with the revised date of first use; thus, she re-filed an application for the Mark on April 16, 2013 with the date of first use revised to September 10, 2010, and included updated applicant information.

[27] With respect to the nature of the goods, Ms. Kirouac attests that the Applicant produces (as did its Predecessor) healthy, raw, organic, vegan, gluten-free, paleo, tree nut-free snack foods (dehydrated, seed-based crackers, bars and granola). She attests that the Mark is prominently displayed on all packaging, as shown in the product packaging depicted in Exhibits C and D, and has been since the initial product launch in September 2010. I note the Mark clearly appears on the packaging shown in these exhibits in association with the applied-for goods. Ms. Kirouac further attests that the first commercial sales were at the Vegetarian Food Festival running September 10 to September 12, 2010 in Toronto, and she provides as Exhibit E the vendor fee receipt for her booth at the event.

[28] Ms. Kirouac then describes the nature of the Applicant's business and channels of trade, attesting that its products are available online, in health food stores, specialty stores and in raw, organic, gluten-free or health food sections of grocery stores. She states that the Applicant's goods are sold at more than 275 locations in 132 cities across Canada and the United States, and she provides annual sales figures for the goods in Canada for the years 2010 to 2014.

[29] With respect to advertising and promotion of the goods in association with the Mark, Ms. Kirouac explains that there has been considerable investment in this regard. She states that this includes the prominent display of the Mark on signs, banners, and marketing materials for trade-

shows and events, including extensive in-store demo programs, example photographs of which she provides under Exhibit G. She further provides particulars of several trade-shows and events in both Canada and the United States in which the Applicant participated as an exhibitor.

[30] In addition to trade-shows and industry events, Ms. Kirouac attests that the Applicant has had extensive exposure on social media, as well as television. In support, she provides particulars about the Applicant's website, followers on Facebook, Twitter and Instagram, and presence on Pinterest and targeted Google searches. She further provides details with respect to the Applicant's Mark and associated goods being featured on the CBC television show *The Dragon's Den*, as well as *Breakfast Television*, the *Marilyn Denis Show*, CHCH TV and Rogers.

[31] Ms. Kirouac attests that the Applicant's goods have been in various magazines, newspapers, and digital media sources. She provides sample advertisements and articles featuring the goods, which include an insert in the Toronto Star, dated October 2010.

[32] Ms. Kirouac attests that other than the Opponent, she has not heard of any issues with the Mark with other industry contacts, employees, suppliers, distributors, brokers, wholesale buyers, retail customers, or through social media. The remainder of her affidavit then effectively encompasses submissions regarding the elements of confusion and surrounding circumstances. In this regard, Ms. Kirouac makes submissions regarding differences in the parties' marks per sections 6(5)(c), (d), and (e) of the Act, and differences in the parties' respective product packaging. Lastly, she attests that the parties' marks have co-existed for some time, and that there are other registrations for food and food related marks with the word "nude" or "nud" in them. In support, she attaches as Exhibit L, a list of such trade-marks.

Summary of Cross-examination of Ms. Kirouac

[33] At the beginning of the cross-examination, Ms. Kirouac is asked how she pronounces her company name (see Q5: So, nud rhymes with mood) and attention is then drawn to website marketing materials of the Applicant with respect to 'nud' being promoted as "nude".

[34] Ms. Kirouac is then asked a number of questions concerning the Applicant's first application for the Mark, including questions regarding any trade-mark searches conducted prior

to the filing of that application and knowledge of the Opponent's mark. Ms. Kirouac indicates that she does not recall seeing the Opponent's mark at that time. She is further queried about an additional change to the application for the Mark in the subsequent (or current) application not noted in her affidavit, that is, the change in description of goods to remove "fruit sweetened" from the statement of goods. She is also asked for a copy of the legal opinion mentioned in paragraph 8 of her affidavit that she sought following the Opponent's opposition to the Applicant's first application. The legal opinion was filed as a response to undertakings.

[35] Ms. Kirouac is further asked about the nature/composition of the Applicant's products (i.e. – healthy, raw, vegan, paleo, organic, etc), and is queried as to whether the Opponent's goods fall within these descriptors/categories of goods. She is also questioned about where the Applicant's products are currently distributed and sold.

[36] Ms. Kirouac is then asked about the parties' product packaging and associated leaf designs, as well as what in her mind is suggested by the word "nud" in relation to food. She responds "[...], in general, I would say that it means it's naked, unprocessed food in its simplest form."

[37] Lastly, Ms. Kirouac is questioned about the trade-mark search results attached under Exhibit L to her affidavit, and in particular, which of the trade-marks identified in the search results have food listed in their goods or services.

Grounds of Opposition

Ground of Opposition Summarily Dismissed – Section 16(1)(b)

[38] The Opponent has the initial burden to prove not only that its application relied upon was filed prior to the claimed date of first use, but also that it was pending at the date of advertisement of the present application (April 30, 2014) [see section 16(4) of the Act].

[39] I have exercised my discretion to check the Register in order to confirm the existence of the application relied upon by the Opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. In doing so, I note that in the present case, while the Opponent's application was filed prior to the material

date, it had matured to registration prior to April 30, 2014. Thus, the Opponent's application was no longer pending at the date of advertisement of the Mark.

[40] Consequently, this ground of opposition is dismissed.

Section 30(b) Ground

[41] The Opponent has plead that the application does not conform to the requirements of section 30(b) of the Act, because the Mark has not been used in Canada by the Applicant since the date of first use claimed, and is not continuing to be used by the Applicant.

[42] To the extent that the relevant facts pertaining to a ground of opposition based on section 30(b) of the Act are more readily available to the Applicant, the initial evidentiary burden on the Opponent with respect to this ground is relatively light [see *Tune Master v Mr P's Mastertune Ignition Services Ltd* (1986), 10 CPR (3d) 84 (TMOB)]. Furthermore, the Opponent may rely upon both its own evidence and that of the Applicant in order to meet its initial evidential burden [*Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) (FCTD) 216 at 230].

[43] In the present case, the Opponent has relied upon the Applicant's evidence to meet its burden. In this regard, the Opponent submits that the Applicant has not provided any evidence of use of the Mark in relation to the goods in the application pursuant to section 4(1) of the Act. More particularly, the Opponent submits that the Applicant has not provided any evidence to demonstrate that any goods were transferred in the normal course of trade as of the date of alleged first use. The Opponent submits that the only evidence submitted by the Applicant is an invoice for the Toronto Vegetarian Association for payment for a "fair booth" dated September 30, 2010, and that the date of the first invoices for goods provided by the Applicant are October 1, 2010 and October 10, 2010. The Opponent submits that the mere assertion that there have been sales by the Applicant or its predecessor-in-title, is not, in itself, sufficient evidence of use of the Mark in Canada within the meaning of section 4(1) of the Act [citing *Constellation Brands Quebec Inc v A Lassande Inc*, 2015 TMOB 26 at para 23 citing *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980) 53 CPR (4th) 62]. Furthermore, the Opponent submits that the mere advertising and promotion of the goods, such as at a tradeshow, does not constitute evidence of

use of a trade-mark in association with goods; rather, there has to be evidence of a transfer of property [citing *Gesco Industries Inc v Sim & McBurney* (2000), 2000 CanLII 16369 (FCA), 9 CPR (4th) 480 (FCA); *Jamieson Laboratories Ltd v Jensens Laboratories Inc*, 2013 TMOB 226].

[44] At the hearing, the Opponent submitted that what would further cast doubt with respect to the Applicant's claimed date of first use is that this application is not the first application filed for the Mark. In particular, the Opponent highlighted the fact that the first application went abandoned as the Applicant failed to file a counter statement. Further to this, the Opponent pointed out that the first application included a date of first use that differs from the date of first use claimed in the current application. The Opponent submitted that the explanation surrounding the discrepancies between the first and second application at paragraph 8 of the Kirouac affidavit may constitute grounds to put the date of first use into question.

[45] The Applicant submits that it has provided evidence of commercial transactions of its marked goods which is consistent with the claimed date of first use in the Application, and that the Opponent has not provided any evidence to dispute the claimed date.

[46] In response to the Opponent's comments at the hearing regarding the first application, the Applicant submitted that an explanation was provided in the Kirouac affidavit as to why an earlier application for the same mark had been filed with an incorrect date of first use and was subsequently abandoned. The Applicant submitted that it would be silly to amend to a date of first use that was wrong once again.

[47] Upon review of the Applicant's evidence, I see nothing inconsistent with the claimed date of first use in the application or that Ms. Kirouac misunderstood, subsequent to seeking a legal opinion, what qualified as "use" pursuant to section 4(1) of the Act. In this regard, the explanation she provides in her affidavit concerning the abandonment of the first application for the Mark makes sense (see Rule 32(b) of the *Trade-marks Regulations*). Further to this, she also clearly attests that the first *commercial* sales of her products prominently displaying the Mark (per Exhibit C packaging) occurred at the Vegetarian Food Festival, which ran from September 10th to the 12th of 2010. While it is true that she did not provide invoices or sales receipts for the products, in this case, the *vendor* fee receipt she provides at Exhibit E for the event is consistent

with and supports her statement. Indeed, the cases cited above by the Opponent are of no assistance in the present case, as the legal onus was on the opponent (see *Constellation Brands, supra*), the registered owner (as per *Gesco, supra*), and the applicant (see *Jamieson Laboratories, supra*) to prove use of their respective marks pursuant to section 4 of the Act. In the present case, I find the Opponent has failed to satisfy its burden under this ground of opposition, and thus, the burden does not shift to the Applicant.

[48] Accordingly, the ground of opposition based upon section 30(b) of the Act is dismissed.

Section 30(i) Ground

[49] Where an applicant has provided the statement required by section 30(i) of the Act, a section 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 CPR (2d) 152 (TMOB) at 155].

[50] The Opponent has plead that since it had filed an earlier opposition on February 4, 2013 to an identical trade-mark previously filed by the Applicant's principal, Julia Kirouac (application No. 1,525,490 – NUD & Design, filed on April 28, 2011), the Applicant could not truthfully state that she/it is satisfied that she/it is entitled to the use of the Mark in Canada in association with the goods described in the application. In this regard, the Opponent submits that in the prior statement of opposition, the Opponent clearly stated in its grounds of opposition that the Mark was confusing with the Opponent's mark.

[51] To begin with, even if the Applicant had been aware of the Opponent's trade-mark, the mere knowledge of the existence of the Opponent's trade-mark does not in and of itself support an allegation that the Applicant could not have been satisfied of its entitlement to use the Mark [see *Woot, Inc v Woot Restaurants Inc Les Restaurants Woot Inc* 2012 TMOB 197].

Furthermore, as previously stated in the ground of opposition based upon section 30(b) of the Act, I am satisfied that the Applicant has provided a reasonable explanation regarding the previous filing and subsequent abandonment of the first application for the Mark and there is no evidence to suggest that the current application was filed in bad faith.

[52] As the Applicant has provided the necessary statement in the present case and this is not an exceptional case, the section 30(i) ground is dismissed.

Section 12(1)(d) Ground of Opposition

[53] The Opponent has plead that the Mark is not registrable having regard to the provisions of section 12(1)(d) of the Act in that it is confusing with its NUDE FRUIT registration identified above at paragraph 4.

[54] I have exercised the Registrar's discretion to confirm that this registration is in good standing as of today's date, which as previously indicated is the material date for assessing a section 12(1)(d) ground of opposition [per *Park Avenue Furniture Corp, supra*].

[55] As the Opponent's evidentiary burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and the Opponent's registered NUDE FRUIT trade-mark.

The test for confusion

[56] 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. 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, that means, whether consumers of the Applicant's snack foods sold under the Mark, would believe that those snack foods were being sold by the Opponent, or that the Applicant was authorized or licensed to sell snack foods by the Opponent, who sells frozen fruits and vegetables under its NUDE FRUIT trade-mark.

[57] 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 each has 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 criteria are not exhaustive and it is not necessary to give each one of them equal weight [see, in general, *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 1 SCR 772 (SCC) at para 54; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; and *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361].

[58] 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 marks.

Section 6(5)(e) – degree of resemblance in appearance, when sounded, or in idea suggested

[59] When considering the degree of resemblance between the marks, the law is clear that the marks must be considered in their totalities; it is not the correct approach to lay the trade-marks side by side and compare and observe similarities or differences among the elements or components of the marks. The Supreme Court of Canada in *Masterpiece, supra* 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.

[60] The Opponent submits that the most distinctive part of each party's respective mark is the term "nude", as despite the difference in spelling of the Applicant's Mark, it is intended to be pronounced as "nude". I agree. Not only do I accept in context with the Applicant's goods, that "nud" would be readily understood as suggesting or implying "nude", it is also the first and most dominant portion of each mark. Furthermore, the leaf design in the Applicant's Mark is small relative to the word NUD and its placement is almost suggestive of a diacritic (e.g. an umlaut), which could further reinforce the suggestion that NUD is intended to be pronounced "nude". Thus, I find there is a high degree of resemblance between the parties' marks in appearance and when sounded.

[61] With respect to the ideas suggested by the parties' marks, I also find a high degree of resemblance. In this regard, while "nude" has no clear meaning in association with the parties' respective goods, in context with the parties' goods, I find Ms. Kirouac's response under cross-examination that the word "nud", may suggest "naked, unprocessed food in its simplest form" (A281), is reasonable. Indeed, the packaging of the Opponent's goods also reflects a similar connotation, as it refers to the product as "unadulterated • naturel".

[62] Having regard to the above, I am of the view that the differences in the parties' trademarks are not significant enough to outweigh their similarities in appearance, sound and ideas suggested, as a matter of first impression and imperfect recollection. The section 6(5)(e) factor therefore favours the Opponent.

[63] I will now turn to the remaining relevant surrounding circumstances to determine whether any of those factors are significant enough to shift the balance of probabilities in favour of the Applicant [see *Masterpiece*, *supra* at para 49].

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

[64] The overall consideration of the section 6(5)(a) factor, involves a combination of inherent and acquired distinctiveness of the parties' marks.

[65] The Mark consists of the word NUD, together with a small leaf design (which as previously indicated, I accept that the word "nud" would be readily understood as suggesting or implying "nude"), while the Opponent's mark consists of the words NUDE and FRUIT.

[66] The Opponent submits that both parties' marks are inherently distinctive as they are not descriptive and there is no direct connotation between the marks and the goods with which they are associated. I agree that the word NUD or NUDE has no clear meaning in association with the parties' respective goods, in context with the parties' goods; however, as previously indicated, I find that its use in both cases is suggestive of unprocessed or unadulterated food. Nevertheless, the meaning ascribed is neither clear nor direct, and thus, I find that both parties' marks are inherently distinctive.

[67] I conclude that the Mark possesses a marginally greater degree of inherent distinctiveness by virtue of the unique spelling of the word NUD. I would add that the Mark also incorporates a small leaf design; whereas, the Opponent's registered mark contains no such graphic element, but only the descriptive word FRUIT in combination with the word NUDE.

[68] In any event, the strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use.

[69] The Applicant claims use of the Mark in Canada as of September 10, 2010, which is consistent with the Applicant's evidence, as previously discussed in the ground of opposition under section 30(b) of the Act. As for the extent of use, the Kirouac affidavit indicates that the Applicant's sales have steadily grown in Canada between 2010 and 2014, from \$6,400 to \$180,560; totalling more than \$500,000 approximately. Ms. Kirouac also attests that products under the Mark are sold at more than 275 locations in 132 cities across Canada and the United States. Indeed, a response to undertakings following Ms. Kirouac's cross-examination to provide a list of the Applicant's retailers, although not current, shows a substantial number of retailers throughout Canada (see Exhibit 4 to the transcript).

[70] With respect to promotion of the Mark, the goods in association with the Mark have been showcased at numerous trade-shows and industry events since the fall of 2010 (each of which Ms. Kirouac attests had thousands of attendees), as well as through in-store product demonstrations. Further to this, although not substantial, Ms. Kirouac also attests to the Applicant's online presence on social media. Lastly, the Kirouac affidavit shows that the goods associated with the Mark have been featured on various television programs and publications, which of note, includes the television program *The Dragon's Den*, with more than 1 million viewers, and the widely circulated newspapers, *Metro* and the *Toronto Star* (see *Milliken & Co v Keystone Industries (1970) Ltd* (1986), 12 CPR (3d) 166 (TMOB) at 168-169, re: judicial notice regarding circulation of publications). Consequently, I accept that the Mark has developed a growing reputation in association with the goods over the years.

[71] The Opponent's evidence on the other hand, shows that it too has developed a growing reputation for its NUDE FRUIT products since 2010. Specifically, Ms. Hughes attests in her affidavit that sales of goods featuring the Opponent's NUDE FRUIT mark have totalled

approximately \$1.14 million, and she provides an annual breakdown beginning with sales of \$22,668 in 2010 which has risen to \$400,000 in 2014 as of the date of her affidavit. In addition, the Hughes affidavit shows distribution of such products to numerous specialty food/grocery stores, as well as several larger grocery store chains.

[72] With respect to advertising and promotion of the Opponent's NUDE FRUIT products, similar to the Applicant, the Opponent has also attended numerous trade-show and industry events since 2010, with attendees ranging from 500-13,000. The Opponent has also showcased its products through in-store or on-premise product demonstrations. Lastly, the Hughes affidavit shows that the NUDE FRUIT products have been featured in *Chatelaine* magazine in 2014, in which Ms. Hughes attests has a circulation in Canada of approximately 500,000 magazines, and in Santa's Choice baskets and associated promotional materials distributed to thousands across Canada.

[73] Having regard to the aforementioned, while I conclude that the Mark possesses a marginally greater degree of inherent distinctiveness, I find that both parties' marks have become known to a similar extent in Canada. Hence, I find that the overall consideration of the section 6(5)(a) factor only minimally favours the Applicant.

Section 6(5)(b) – the length of time of use

[74] As per my analysis under the section 6(5)(a) factor, both parties have been using their respective marks since 2010. While I accept the Applicant commenced use of the Mark on September 10, 2010, the Opponent's specific date of first use in 2010 is unclear from the evidence. In this regard, the Opponent has provided sales figures dating back to 2010, but not invoices or other evidence which refers to a specific date of first use of the Opponent's mark, or permits a date to be inferred. I am therefore unable to determine which party began using their respective Mark first.

[75] In any event, the evidence shows that both parties have been using their respective marks since some point in 2010, which, at most, would amount to a difference in use of only months; thus, I find the section 6(5)(b) factor does not favour either party.

Sections 6(5)(c) and (d) – the nature of the services and business or trade

[76] It is the Applicant's statement of goods as defined in its application versus the Opponent's registered goods and services that govern my determination of this factor [see *Esprit International v Alcohol Countermeasure Systems Corp* (1997), 84 CPR (3d) 89 (TMOB)]. These statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. However, evidence of the parties' actual trades is useful in this respect [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA)].

[77] In the present case, the goods of the parties are different, in that the Applicant's goods are snack foods which can be consumed directly after purchase and are directed at particular niche markets (i.e. – dietary restrictive markets). Furthermore, Ms. Kirouac attests that the Applicant's goods are available online, in health food stores, specialty stores and in raw, organic, gluten-free or health food sections of grocery stores. In contrast, the Opponent's registered goods are neither ready-to-eat specialty goods directed at a particular niche consumer base, nor would they be considered snack foods *per se*. Rather the Opponent's goods either require preparation such as thawing or heating prior to consumption, or in some instances would be mixed with other foods for consumption, as by way of example, a fruit smoothie. Furthermore, the Applicant correctly submits that the parties' products would be located in different sections of grocery stores, as the Opponent's products would be confined to the freezer or frozen food section of the grocery store.

[78] While it is true that the goods are different, they may also be related in the sense that the Applicant's products may contain fruit. In this regard, as previously indicated, Ms. Kirouac was questioned on cross-examination about a change in the description of goods from the first or initial application for the Mark to remove "fruit sweetened" from the statement of goods. While her response that it was "because everything we make isn't fruit sweetened" makes sense, the fact remains that at least some of the Applicant's products are fruit sweetened.

[79] Furthermore, it is conceivable in my view, that the goods of the parties may be purchased by the same consumer; certainly questions asked of Ms. Kirouac on cross-examination were directed in this manner, as Ms. Kirouac was queried as to whether the Opponent's products

would also be considered to fall within the same definitions as the Applicant's products (i.e. healthy, raw, vegan, gluten-free, etc).

[80] Lastly, while the goods of the parties would be sold in different areas of grocery stores, the evidence shows that the parties' channels of trade overlap, as both parties' products are distributed through Sobeys, Whole Foods, McEwan's and The Goodness Me stores. I would also note that there is further potential for overlap in channels of trade, as Ms. Kirouac attested on cross-examination that the Applicant has no control over the accounts obtained by their distributor, and in dealing with their distributor, has no say over which retail outlets are targeted to sell the Applicant's products.

[81] Accordingly, having regard to the aforementioned, I find the section 6(5)(c) and (d) factors favour the Opponent.

Additional Surrounding Circumstances

Actual Confusion

[82] Ms. Hughes attests that the Opponent first became aware of the Applicant and their NUD mark when they received inquiries from customers and friends who had watched *The Dragon's Den* episode that aired on November 26, 2011. Further particulars which Ms. Hughes attests at paragraph 31 of her affidavit are reproduced below:

31. All of the inquiries that Zast received in response to *The Dragon's Den* episode were from individuals who were aware of Zast's NUDE FRUIT products and trademark and inquired whether the applicant and their NUD FUD products were associated with Zast. I personally dealt with at least 3 such inquiries and the remainder were received from other Zast employees who relayed the content of the conversations to me.

[83] On the other hand, Ms. Kirouac attests that other than the Opponent, she has not heard of any issues with the Mark with other industry contacts, employees, suppliers, distributors, brokers, wholesale buyers, retail customers, or through social media. Further to this, the Applicant submits that only three calls were placed, to which there is no evidence, and that these individuals were not consumers, but friends of the Opponent.

[84] It is not necessary for an opponent to evidence confusion in order to find that there is a likelihood of confusion, but an absence of confusion despite an overlap of the parties' goods and channels of trade may result in a negative inference being drawn about an opponent's case [see *Monsport Inc v Vetements de Sport Bonnie* (1978) *Ltee* (1988), 22 CPR (3d) 356 (FCTD); *Mercedes-Benz AG v Autostock Inc* (1996), 69 CPR (3d) 518 (TMOB)]. In the present case, the only instances of purported confusion revolve around one episode of *The Dragon's Den* dating back to 2011, are insignificant in numbers, and are also reported to be from "friends and customers". As such, I am not prepared to afford such purported confusion much weight.

State of the Register and Marketplace

[85] As previously discussed in the evidence summary, Ms. Kirouac attests in her affidavit that "there are other registrations for food and food related marks with the word "nude" or "nud" in them", and provides the results of an undated trade-mark search under Exhibit L.

[86] State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace, and inferences about the state of the marketplace can only be drawn where large numbers of relevant registrations are located [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432; *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FCTD); *Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA)].

[87] In the present case, no particulars of the registrations contained in the Exhibit L list, with respect to associated goods and/or services have been provided in the evidence and the Registrar does not exercise discretion to take cognizance of her own records except to verify whether claimed trade-mark registrations and applications are extant [see *Quaker Oats* at 411 and *Royal Appliance Mfg Co v Iona Appliance Inc* (1990), 32 CPR (3d) 525 (TMOB)]. Furthermore, many of the trade-marks listed in Exhibit L are identified as abandoned or expunged. Lastly, I note that when Ms. Kirouac was questioned on cross-examination about which of the trade-marks identified in the search results have food listed in their goods or services, she identifies only four or five registrations, and admits that the list is a broader in scope than just for those registrations for food and food related goods.

[88] Consequently, I am of the view that the state of the register evidence is insufficient to find that NUD or NUDE have been commonly adopted with respect to food and food related goods.

Conclusion

[89] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection.

[90] As previously indicated, the *Masterpiece, supra*, the Supreme Court of Canada highlighted the importance of the section 6(5)(e) factor in the analysis of the likelihood of confusion. In the present case, I have found the parties' marks share a high degree of similarity in appearance, when sounded, and in ideas suggested, owing to the most striking and dominant portions of the parties' marks, NUD and NUDE.

[91] Further to this, I have concluded that there is overlap in the nature of the parties' goods and channels of trade, and while the inherent distinctiveness of the parties' marks marginally favours the Applicant, the acquired distinctiveness and length of time of use of the parties' marks are evenly balanced. Lastly, absent sufficient state of the marketplace evidence that NUD or NUDE, is common in the trade, I cannot conclude that consumers are accustomed to distinguishing between such marks with respect to food and food related goods. Consequently, I find that the Applicant has failed to shift the balance of probabilities in its favour, that there is not a reasonable likelihood of confusion between the parties' marks.

[92] Having regard to the foregoing, I allow the ground of opposition based on section 12(1)(d) of the Act.

Non-distinctiveness Ground of Opposition

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

[94] In order to meet its initial burden with respect to this ground, the Opponent must establish that as of the filing date of the statement of opposition, namely, June 27, 2014, the Opponent's NUDE FRUIT mark had become known sufficiently to negate the distinctiveness of the Mark, and that the reputation of the NUDE FRUIT mark in Canada was substantial, significant, or sufficient [see *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427].

[95] As set out in further detail above in the analysis of the section 12(1)(d) ground of opposition, the Opponent has provided evidence supporting a finding that the NUDE FRUIT trade-mark had become known to a sufficient extent in Canada as of the material date; thus, the Opponent has met its evidential burden.

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

[97] The difference in material dates is not significant and as a result, my findings under the ground of opposition based on section 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.

[98] Accordingly, the non-distinctiveness ground is also successful.

Disposition

[99] Having regard to the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(8) of the Act.

Kathryn Barnett
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

Hearing Date: 2016-08-25

Appearances

Rohit Parekh For the Opponent

Julia Kirouac For the Applicant

Agents of Record

Conduit Law Professional Corp For the Opponent

No Agent Appointed For the Applicant