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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 32

Date of Decision: 2021-02-24

IN THE MATTER OF AN OPPOSITION

NSE Products, Inc.

Opponent

and

**Svelte LLC (formerly California
Natural Products Inc.)**

Applicant

1,684,646 for YOU'VE GOT APPEAL

Application

FILE RECORD

[1] California Natural Products Inc. (the Applicant) filed application No.1,684,646 for the trademark YOU'VE GOT APPEAL (the Mark) on July 10, 2014.

[2] The application for the Mark is based upon proposed use for the following goods:

Nutritional drinks and food bars used for meal replacement; therapeutic agents, namely, processed foods and beverages adapted for medical purposes for use in weight control and appetite suppression regimes; dietary supplements in liquid, solid and powdered form, namely, meal replacement powders, bars and drinks containing vitamins, minerals and proteins; soy-based and rice-based meal replacement beverages.

[3] The application for the Mark was advertised for opposition purposes in the *Trademarks Journal* dated November 23, 2016.

[4] NSE Products, Inc. (the Opponent) opposes the application for the Mark under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act), primarily on the basis that the applied for Mark is confusing with the Opponent's registration No. TMA397,727, for the trademark APPEAL, registered in association with nutritional dietary supplements namely a food concentrate which can be made into a beverage and snack bars.

[5] A statement of opposition was filed on February 27, 2017, and the grounds of opposition are based upon sections 30(e), 30(i), 16(3)(a), 12(1)(d) and 2 of the Act. I note that the Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019, applies to applications advertised prior to that date).

[6] A counterstatement was filed by the Applicant on May 2, 2017.

[7] In support its opposition, the Opponent filed the affidavits of Jim Boyle and Mary P. Noonan. Only Mr. Boyle was cross-examined and his cross-examination transcript, exhibits and answers to undertakings are part of the record.

[8] In support of its application, the Applicant filed the affidavit of Camille Pelletier. Ms. Pelletier was not cross-examined.

[9] Both parties filed written arguments and participated in a hearing.

[10] As the Applicant has failed to prove on a balance of probabilities that there is no reasonable likelihood of confusion with its Mark and the Opponent's APPEAL trademark, the application is refused for the reasons that follow.

THE PARTIES' RESPECTIVE BURDEN OR ONUS

[11] The Applicant bears the legal onus of establishing, on a balance of probabilities that the application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. 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 CPR (3d) 293 (FCTD) at 298].

OPPONENT'S EVIDENCE OF USE OF ITS MARKS

[12] Mr. Boyle, Director of Operations at Nu Skin Canada Inc., deposes that that the APPEAL trademark has been used in Canada since at least as early as February 21, 1992. To corroborate this assertion, he attaches as exhibits to his affidavit an excerpt from a promotional newsletter dated May/June 1991 announcing the introduction of APPEAL products in Canada; a product order form from Nu Skin's Canadian business dated 1991 which includes reference to APPEAL products, and a tri fold product brochure dated from 1991 which shows the APPEAL products and packaging for those products in the manner in which they would have been sold in Canada at the time [Boyle, paras 28-31; Exh. 4-6].

[13] Mr. Boyle explains that the products sold in Canada in association with the APPEAL trademark are manufactured by the Opponent and sold to Nu Skin Canada Inc. for distribution in Canada. Since its introduction, the APPEAL trademark has been prominently featured on the products or their packaging as well as product literature and sales invoices. Specimens showing the manner in which the APPEAL trademark has been used in Canada are attached to his affidavit as Exhibits 7 – 10, including images of beverage mix products and labels sold in association with the APPEAL trademark in Canada.

[14] Sales revenues in Canada for the APPEAL products have been in excess of \$2.4 million for the period between 2000 and 2017. Mr. Boyle also attached to his affidavit representative sales invoices which accompanied the APPEAL products at the time of transfer issued by the Opponent to its distributor Nu Skin Canada Inc [Boyle, Exh. 11].

OBJECTION TO THE EVIDENCE OF MR. BOYLE

[15] On cross-examination, Mr. Boyle did not appear to understand the corporate relationship between the Nu Skin International (NSI), Nu Skin Enterprises, the Opponent and his company Nu Skin Canada (collectively Nu Skin). The Applicant's agent submits that since Mr. Boyle did

not understand whose trademarks were being used, it is not clear whether any use shown has enured to the benefit of the Opponent pursuant to section 50 of the Act.

[16] As stated by the Federal Court, there are three main methods by which a trademark owner can demonstrate the requisite control pursuant to section 50(1) of the Act: first, by clearly attesting to the fact that it exerts the requisite control; second, by providing evidence demonstrating that it exerts the requisite control; or third, by providing a copy of the license agreement that provides for the requisite control [*Empresa Cubana Del Tobacco Trading v Shapiro Cohen*, 2011 FC 102 at para 84].

[17] The Opponent's agent submits that while Mr. Boyle's testimony on cross-examination may have appeared inconsistent, he clarified any inconsistencies with his replies to undertakings which did explain the corporate structure of the Opponent more clearly, as well as the relationship between his business and the Nu Skin group of companies.

[18] Given Mr. Boyle's position with his company, and the fact that he was able to clarify the relationship between the Nu Skin group of companies in an answer to undertaking, I am prepared to give some weight to his evidence. As explained in Mr. Boyle's affidavit and answers to undertakings, the corporate structure and business of the Opponent can be explained as follows:

- The Opponent is a member of the Nu Skin group of companies;
- The Nu Skin group of companies is a direct selling business that develops and markets premium quality consumer nutrition and personal care products through a global network of approximately 1 million individual distributors in over 50 markets worldwide including Canada and the U.S.;
- The Nu Skin group of companies uses person to person marketing to promote and sell its products. In this model, each individual distributor purchases Nu Skin products which they in turn market and sell directly to existing and potential customers;
- In addition to direct-selling distribution channels, the APPEAL products are also sold through Nu Skin's own online store to Canadian customers for purchase directly from Nu Skin [Boyle, para 39].

- NSI's rights and title in and to the APPEAL trademark was assigned to NSE Products (the Opponent), by way of an assignment dated July 1, 2005;
- The APPEAL products are manufactured by the Opponent, and sold to Nu Skin Canada for distribution to Canadian consumers;
- Nu Skin Canada imports and distributes the Opponent's products in Canada; Nu Skin Canada also prepares advertising and promotional materials to advertise and promote the Opponent's products; and
- Any use of the APPEAL trademark by Nu Skin Canada is licensed pursuant to the terms of an Amended and Restated Trademark Licensing Agreement between the parties.

[19] In view of the foregoing, and in particular the fact that Mr. Boyle has produced a copy of the license agreement which provides for the requisite control, I am satisfied that the evidence of use shown enures to the benefit of the Opponent for the purposes of section 50 of the Act.

GROUND OF OPPOSITION

Non-compliance – Section 30(i)

[20] The Opponent pleads that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada because the Applicant was aware of the Opponent's trademark. The Opponent also pleads under this ground that the Applicant could not have been satisfied that it was entitled to use or register the trademark in association with the applied for goods because such use would be contrary to section 7(b), 19, 20 and 22 of the Act.

[21] The Opponent has not, however, filed any evidence nor made any argument in support of this ground. As the Opponent has not met its evidential burden, this ground is accordingly dismissed.

Non-compliance – Section 30(e)

[22] The Opponent also pleads that the application does not conform to the requirements of section 30(e) of the Act because the Applicant had no intention to use the Mark because it was

already using the Mark in Canada or that it never intended to use the Mark in association with each of the applied for goods and services.

[23] The Opponent did not file any supporting evidence or make any submissions with respect to this ground of opposition. The section 30(e) ground of opposition can therefore also be summarily dismissed on the basis that the Opponent has not met its initial evidentiary burden in respect thereof.

Non-registrability – Section 12(1)(d)

[24] The Opponent pleads that the Mark is not registrable as it is confusing with its APPEAL trademark, registration No. TMA397,727, which is registered in association with the following goods:

(1) Nutritional dietary supplements, namely a food concentrate which may be made into a beverage; and (2) Nutritional and dietary supplements, namely snack bars.

[25] The material date for this ground is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trademarks* (1991), 1991 CanLII 11769 (FCA), 37 CPR (3d) 413 (FCA)].

[26] I have exercised my discretion and have checked the Register to confirm that the Opponent's registration is extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I now have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with this registration.

Test for confusion

[27] The test to determine the issue of confusion is set out in section 6(2) of the Act where it is stipulated that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold or leased by the same person, whether or not the goods or services are of the same general class or appear in the same Nice Class [see also *Obsidian Group Inc v Attorney General of Canada*, 2020 FC 586].

[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 trademarks or trade-names 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 trademarks or trade names in appearance or sound or in the ideas suggested by them. This list of enumerated factors is 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), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée* (2006), 49 CPR (4th) 401 (SCC)].

[29] In *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 (SCC), the Supreme Court of Canada indicated that the most important factor amongst those listed under section 6(5) of the Act is often the degree of resemblance between the marks.

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

[30] Relying on the decisions in *G.F. Pfaff Aktiengesellschaft v Creative Appliance Corp.* (1988), 22 CPR (3d) 340 at 343 (Fed TD), *Budget Blind Service Ltd. v Budget Blinds Inc*, 2007 FC 801 at paras 19 – 21, and *MonSport Inc v Vetements de Sport Bonnie (1978) Ltee* (1988), 22 CPR (3d) 356 at 360-361 (Fed TD), the Applicant’s agent submits that marks comprised of ordinary dictionary words which are suggestive of their associated goods are not inherently strong. I agree. In this case, Ms. Pelletier, a trademark searcher for the Applicant’s agent, performed searches of online dictionaries to obtain definitions for the word “appeal”. One of the definitions she found for the word APPEAL is “the quality that something has that makes people like it or want it” [Pelletier, Exh F – H]. Given this definition, I find that the neither the Mark, nor the Opponent’s APPEAL trademark possess a high degree of inherent distinctiveness. In this regard, the word APPEAL in both parties’ marks lauds the merits, superiority or attractiveness of the parties’ goods [*Mitel Corporation v Registrar of Trademarks* (1984), 79 CPR (2d) 202 (FCTD)].

[31] While the Applicant’s Mark also includes the components “YOU”VE GOT”, I do not find that these additional words add much to the distinctiveness of the Mark as they are laudatory

and/or descriptive when used in association with the word APPEAL [*United Artists Pictures Inc v Pink Panther Beauty Corp*, 1998 CanLII 9052 (FCA)].

[32] The distinctiveness of a trademark may be increased by its use or if it has become known in Canada. The Opponent's evidence, as described in more detail above, may be summarized as follows:

- between 2000 and 2017, the Opponent's Canadian sales revenues from products sold in association with the APPEAL trademark totalled in excess of \$2.4 million (US);
- the Opponent's products sold in association with the APPEAL mark are marketed and sold across Canada through the Opponent's distribution network of over 21,000 individual direct selling distributors, as well as through the Opponent's own online stores;
- the Opponent has spent over \$275,000 US on its advertising, promotional and marketing efforts in Canada in relation to the APPEAL trademark and related products between 2006 and 2016 [Boyle, paras 55-60, Exh 12-24].

[33] The Applicant's agent submits that the Opponent's evidence is subject to the following deficiencies:

- It was clear from the cross examination of Mr. Boyle that he did not understand whose trademarks were being used and how the use shown benefits the Opponent;
- When sales volume is broken down on a yearly basis, the Opponent's average sales have been nominal (e.g. 6900 canisters per year) and are not enough to establish a sufficient reputation in Canada in association with the Opponent's mark;
- Mr. Boyle agrees that the APPEAL products are not his company's top performers and that based on the sales revenue and sales volume produced in his affidavit it is possible that more than half of the company's distributors did not sell the APPEAL product during certain years [Boyle cross-ex., p.48-49];

- Mr. Boyle confirms on cross-examination that the APPEAL mark is not used in association with snack bars. [Boyle, cross-ex. Q. 149]; and
- Mr. Boyle confirms that Canadian consumers who purchase the APPEAL products would not be able to distinguish the source of the products in that consumers would not know which Nu Skin entity is the source of the APPEAL products [Boyle, cross-ex. Q. 221].

[34] The Applicant's agent has raised some valid points about the Opponent's sales and the fact that the Opponent has only shown use in association with beverages.

[35] However, with respect to his knowledge about the corporate structure of his company, as noted above, I consider that Mr. Boyle was in a position to have sufficient corporate knowledge about his company to depose the facts he did. Further, Mr. Boyle's answers to undertakings do confirm that he understood the relationship between the various corporate entities. In this regard, his answer to undertaking #2 states as follows:

As stated in paragraph 26 of Mr. Boyle's affidavit, the Opponent's APPEAL products are marketed, distributed and sold in Canada in association with the APPEAL trademark by NSE Products Inc. with the assistance of Nu Skin Canada Inc and other members of the Nu Skin Group of Companies.

The APPEAL products are manufactured by NSE Products, the owner of the APPEAL trademark and sold to Nu Skin Canada for distribution in Canada to Canadian consumers.

...

For clarity, Nu Skin Canada does not manufacture the APPEAL products under license, but rather imports and distributes NSE Products Inc.'s APPEAL products in Canada.

[36] Finally, although Mr. Boyle states on cross-examination that the consumer would not know which Nu Skin entity is the source of the goods, the label attached as Schedule A to Mr. Boyle's answers to undertakings, which is representative of the type of bilingual labelling used for the Opponent's APPEAL products sold in the province of Quebec over the years, shows otherwise. In this regard, the label attached as Schedule A clearly shows that the Opponent's

APPEAL product is manufactured in the U.S. for NSE Products Inc., is imported into Canada by Nu Skin Canada Inc. and is sold exclusively by Nu Skin Enterprises authorized distributors.

[37] In view of the above, I am satisfied that the Opponent has shown that its mark has become known to some extent in Canada, but only in association with beverages. In view that the Applicant has not shown any evidence of use of its Mark, I find that this factor, overall, favours the Opponent.

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

[38] While the Opponent claims use of its mark since at least as early as 1992, I find that the evidence only corroborates use of the Opponent's mark in the normal course of trade since 2000. Regardless, as the Applicant has not shown any use of its Mark, this factor favours the Opponent.

Section 6(5)(c) & (d) – nature of the goods, business and channels of trade

[39] When considering the goods and services of the parties, it is the statement of goods and services in the parties' trademark application and registration that govern in respect of the issue of confusion arising under section 12(1)(d) [see *Mr. Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); *Miss Universe, Inc v Dale Bohna* (1984), 1994 CanLII 3534 (FCA), 58 CPR (3d) 381 (FCA)]. However, those 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. In this regard, evidence of the actual trades of the parties is useful, particularly where there is an ambiguity as to the goods or services covered in the application or registration at issue [*McDonald's Corp v Coffee Hut Stores Ltd* (1996), 1996 CanLII 3963 (FCA), 68 CPR (3d) 168 (FCA)].

[40] The Applicant's nutritional drinks, food bars and ingredients used for meal replacement are essentially identical to the Opponent's nutritional dietary supplements, namely a food concentrate which may be made into a beverage and nutritional dietary supplements namely snack bars. As evidenced by Mr. Boyle, the Opponent's goods are marketed and designated as meal replacement products.

[41] The Applicant's agent submits that both parties' goods are related to nutritional and dietary products and as such are only purchased by sophisticated clients with care and consideration, given their relative cost and importance as they relate to a person's health and diet. Indeed, Mr. Boyle confirmed on cross-examination that the Opponent's APPEAL products are specialized and part of a niche market. As such, the Applicant's agent submits that the purchase of more specialized goods will be approached with more care and attention than ordinary retail or consumer goods.

[42] While the evidence may show that the Opponent's goods are specialized, there is no evidence that the parties' goods are expensive products and are only sold to sophisticated consumers. Rather, the Opponent's evidence shows that its products are sold to ordinary consumers for consumption at home. In any event, even if it were shown that the parties' average consumers were sophisticated professionals, the test for confusion is one of first impression. Therefore, any additional steps taken by a consumer to exercise due diligence in the purchasing decision are irrelevant [by analogy see paragraphs 68-74 of *Masterpiece, supra*].

[43] The Applicant's agent also submits that the parties' goods only overlap with respect to meal replacement beverages because the Opponent has admitted to not having used its mark in association with bars.

[44] As noted above, as of the date of my decision, the Opponent's mark is still registered in association with both beverages and bars. I must therefore consider the goods in association with the Opponent's mark as registered and the Mark in association with the goods as applied for. I therefore find that all of the parties' goods overlap.

[45] With respect to the parties' channels of trade, Mr. Boyle explained that the Opponent's products are sold through a network of personal distributors operating as independent contractors who use a direct selling method to individual consumers. In addition, the Opponent's goods have been sold through Nu Skin's online store [Boyle, para 36-41]. He also confirms that these have been the Opponent's channels of trade for many years, since at least as early as February 21, 1992.

[46] Neither the Opponent's registration nor the Applicant's application contain any restriction regarding their channels of trade. The parties' channels of trade could therefore overlap. I will say however, that although a possibility, this would not be likely given the actual trade the Opponent has shown to date. In this regard, through the direct selling model, the Opponent's consumers have to purchase their goods directly through one of the Opponent's contact people or directly from its website. This is considerably different from making a purchasing decision after seeing the Opponent's goods on the same shelf as the Applicant's goods in a retail store [see also *Loblaws Inc v Columbia Insurance Company*, 2019 FC 961; upheld FCA].

Section 6(5)(e) - degree of resemblance between the marks

[47] As stated earlier, the degree of resemblance between the trademarks will often have the greatest effect on the confusion analysis. When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality. The appropriate test is not a side by side comparison but an imperfect recollection in the mind of a consumer of an opponent's trademark [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, *supra*, at para 20]. The preferable approach when comparing trademarks is to begin by determining whether there is an aspect of the trademark that is particularly striking or unique [see *Masterpiece* at para 64].

[48] In this case, while I agree with the Applicant's agent that the Mark may be viewed as a unitary phrase, I find that the trademarks have a considerable degree of resemblance in appearance and as sounded due to the shared component APPEAL. The ideas suggested by each mark are also similar in that, as noted above, the word APPEAL in both parties' marks lauds the merits, superiority or attractiveness of the parties' goods. Both marks therefore suggest that the product will make the end user more attractive [*385MKE Limited v The ServiceMaster Company*, 2014 TMOB 258 at paras 47-48].

Surrounding circumstance – state of the register evidence

[49] As a further surrounding circumstance, the Applicant has relied upon the state of the register evidence of Ms. Pelletier. In addition to providing dictionary definitions, Ms. Pelletier provided search results of the Canadian trademarks database for the word "appeal", as well as

dictionary definitions for the word APPEAL. She also conducted a NUANS search for business names and trade names which included the word APPEAL.

[50] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features [*McDowell v Laverana GmbH & Co. KG*, 2017 FC 327 at para 42]. Inferences regarding the state of the marketplace may be drawn from such evidence in two situations: a large number of relevant registrations are located; and/or there is evidence of common use in the marketplace of relevant third party marks [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA); *McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at paras 41-46; and *Cie Gervais Danone v Astro Dairy Products Ltd*, 1999 CanLii 7656 (FC)]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the marks at issue, and (iii) include the component at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197; *Allergan Inc v Lancôme Parfums & Beauté & Cie, société en nom collectif* (2007), 64 CPR (4th) 147 (TMOB) at 169].

[51] While the Pelletier affidavit provides evidence of over 100 trademarks for APPEAL marks, several of these marks have been abandoned. Further, almost all of these registrations and trade names located cover goods or services which appear to be entirely unrelated to the goods, services and trades at issue in the present case. I therefore cannot draw any inference about the state of the marketplace from this state of the register evidence.

Surrounding circumstance – section 45 proceeding

[52] The Applicant's agent has submitted that a further surrounding circumstance to consider is the fact that although the Applicant's application and the Opponent's registration cover snack bars, the Opponent has not furnished any evidence of use in this proceeding of its mark in association with snack bars. Further, the Applicant's agent submits that in a recent section 45 proceeding, the Opponent did not produce any evidence of use in connection with these goods.

[53] The Opponent has acknowledged that it has not shown use of its mark in association with snack bars in this proceeding. I am not aware of the evidence that was filed in the section 45

proceeding. In any case, as pointed out by the Opponent, when final, the section 45 decision could be subject to appeal. Therefore, until such time as either the appeal period has passed and the opponent has not started an appeal, or the appeal has been decided, the goods remain in the Opponent's registration and must be taken into account in my assessment of these factors.

Surrounding circumstance – likelihood of confusion identified by the Registrar

[54] The Opponent's agent submits that the fact that the Registrar previously identified a risk of confusion between the parties' trademarks (first at prosecution and then by issuing a section 37(3) notice to the opponent) is a relevant surrounding circumstance which weighs in favour of a finding of confusion in this proceeding.

[55] The onus and evidence that was before the Examiner in the prosecution of the file is different, however, from what it is in an opposition proceeding [*Thomas J Lipton Inc v Boyd Coffee Co* (1991), 40 CPR (3d) 272 (TMOB) at 277 and *Procter & Gamble Inc v Morlee Corp* (1993), 48 CPR (3d) 377 (TMOB) at 386]. I must come to a decision based on the evidence of record in the subject opposition proceeding. Accordingly, I do not consider either the examination history, nor the issuance of a section 37(3) notice, to be a relevant surrounding circumstance.

Conclusion

[56] As indicated above, section 6(2) of the Act is not concerned with the confusion of the marks themselves, but confusion of goods from one source as being from another source. The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees YOU'VE GOT APPEAL on the Applicant's nutritional drinks, food bars and ingredients used for meal replacement rinks, at a time when he or she has no more than an imperfect recollection of the Opponent's mark used in association with similar goods, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20]. The question posed is whether this individual would be likely to conclude that the Applicant's goods are manufactured, sold, or otherwise authorized by the Opponent.

[57] Even though the Opponent's registered mark is not inherently strong, the Applicant has not adopted a mark that is sufficiently different from the Opponent's mark. The most crucial or dominant factor in determining the issue of confusion is the degree of resemblance between the trademarks and the resemblance here is high [see *Beverley Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145 (FCTD) at 149, affirmed 60 CPR (2d) 70]. The presence of the onus on the Applicant means that if a determinate conclusion cannot be reached, then the issue must be decided against the Applicant [see *John Labatt, supra*].

[58] Therefore, in view that the parties' goods are identical and the fact that the Mark incorporates the whole of the registered APPEAL trademark, and notwithstanding that the Opponent's mark has only become known in association with meal replacement drinks and has primarily been sold through a direct selling model, I find that the probabilities of confusion between the marks at issue are evenly balanced between a finding of confusion and of no confusion. As the legal burden is on the Applicant to establish, on a balance of probabilities, that there was no likelihood of confusion between the Mark and the Opponent's mark, the ground of opposition based on section 12(1)(d) of the Act is successful.

Non-entitlement – section 16(3)(a)

[59] The Opponent also pleads that the Applicant is not the party entitled to registration of the mark pursuant to section 16(3)(a) of the Act. The material date for this ground is the filing date of the application.

[60] The evidence of use of the APPEAL trademark in association with meal replacement beverages, discussed above with respect to the section 12(1)(d) ground of opposition, is sufficient to meet the Opponent's burden of proving that this trademark was being used in association with these goods at the Applicant's filing date and had not been abandoned at the date of advertisement of the application [section 16(5) of the Act]. For the reasons set out with respect to the section 12(1)(d) ground of opposition, the Applicant has failed to meet its legal onus of proving that there is no likelihood of confusion between the Mark and the APPEAL trademark for these goods. This ground of opposition therefore succeeds, but with respect to meal replacement beverages only, as the Opponent did not show any use of its mark in association with snack bars.

REMAINING GROUNDS OF OPPOSITION

[61] Having already refused the application under two grounds, I will not discuss the remaining grounds of opposition with respect to this application.

DISPOSITION

[62] In view of the above and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act

Cindy R. Folz
Member,
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2020-11-25

APPEARANCES

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