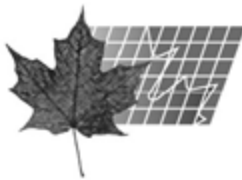


O P I C



C I P O

LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 66**

**Date of Decision: 2021-04-08**

**IN THE MATTER OF AN OPPOSITION**

**Feroz Abdul Razak Allana and Shiraz  
Abdul Razak Allana doing business as  
International Foodstuffs Co.**

**Opponent**

**and**

**ATP Nutrition Ltd.**

**Applicant**

**1,784,305 for ENERGIZE**

**Application**

INTRODUCTION

[1] Feroz Abdul Razak Allana and Shiraz Abdul Razak Allana doing business as International Foodstuffs Co. (the Opponent) opposes registration of the trademark ENERGIZE (the Mark) that is the subject of application No. 1,784,305 that was filed by ATP Nutrition Ltd. (the Applicant).

[2] Filed on May 27, 2016, the application is based on proposed use of the Mark in Canada in association with the following goods:

Fertilizers and nutrients for agricultural use.

[3] The application was advertised in the *Trademarks Journal* of March 29, 2017.

[4] The Opponent opposed the application on May 19, 2017, by filing a statement of opposition under section 38 of the Act.

[5] The Opponent alleges that (i) the application does not conform to the requirements of sections 30(a), (e) and (i) of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Applicant is not the person entitled to the registration of the Mark; (iii) the Mark is not registrable pursuant to section 12(1)(d); and (iv) the Mark is not distinctive under section 2 of the Act. The last three grounds of opposition revolve around the likelihood of confusion between the Mark and the Opponent's trademark ENERGIZER (the Opponent's Mark).

[6] As a preliminary matter, 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).

[7] For the reasons that follow, I reject the opposition.

#### THE RECORD

[8] In support of its opposition, the Opponent filed a certified copy of Canadian trademark registration No. TMA684,080 for the trademark ENERGIZER. In addition, the Opponent requested a section 47(2) extension of time to file the affidavit of Sangeeta Dattaram Chavan, but was denied, as it did not set forth facts that existed during the time period in question that would justify the extension (per Register's letter dated May 14, 2018). Thus, the Chavan affidavit is not of record.

[9] In support of its application, the Applicant filed the affidavit of Jarrett Chambers, the President of the Applicant, affirmed September 28, 2018, together with exhibits A, B, and C. Mr. Chambers was not cross-examined on his affidavit.

[10] The Opponent did not file reply evidence.

[11] Both parties filed written representations and attended an oral hearing.

## THE PARTIES' RESPECTIVE BURDEN OR ONUS

[12] 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].

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

- Sections 38(2)(a)/s.30 – the date of filing of the application, namely, **May 27, 2016**. [see *Georgia-Pacific Corporation v Scott Paper Ltd* (1984), 3 CPR (3d) 469 at 475 (TMOB) re: section 30(a); *Canadian National Railway Co v Schwauss* (1991), 35 CPR (3d) 90 at 94 (TMOB) re: section 30(e); and *Tower Conference Management Co v Canadian Exhibition Management Inc*, (1990) 28 CPR (3d) 428 (TMOB) at 432 re: section 30(i)];
- Sections 38(2)(b)/12(1)(d) – the date of this decision [see *Park Avenue Furniture Corp v Wickes/Simmons Bedding Ltd* (1981), 37 CPR (3d) 413 (FCA)];
- Sections 38(2)(c)/16(3)(a) – the filing date of the application, namely, **May 27, 2016** [see section 16(3) of the Act; see also *Tradition Fine Foods Ltd v Groupe Tradition l Inc* (2006), 51 CPR (4th) 342 (FCTD); and, *Chlorox Co v El Du Pont de Nemours and Co* (1994), 56 CPR (3d) 567 (TMOB) at 569]; and
- S. 38(2)(d)/s.2 – the date of filing of the statement of opposition, namely, **May 19, 2017** [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

## ANALYSIS

### Section 30(a) Ground

[14] The Opponent pleads that the Application does not conform with the requirements of section 30(a) of the Act as the statement of goods in the Application is not set out in ordinary commercial terms or in sufficient detail to enable the average person or consumer to ascertain the nature of the goods.

[15] While the legal burden is upon an applicant to show that its application complies with section 30 of the Act, there is an initial evidential burden on an opponent to establish the facts relied upon by it in support of its section 30 ground [see *Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB) at 329; and *John Labatt, supra*].

[16] The Applicant correctly notes that the Opponent has filed no evidence nor made submissions regarding its 30(a) ground of opposition. Consequently, the Opponent has failed to meet its burden under this ground of opposition.

[17] Notwithstanding that the Opponent has failed to meet its burden, the Applicant defends its compliance with section 30(a) of the Act, in that the terms used in its statement of goods are listed as acceptable in the Canadian Intellectual Property Office's *Goods and Services Manual* (the Manual). I confirm, as per the Applicant's submissions, that the Manual includes "fertilizer", "fertilizers for agricultural use", "nutrients for plants" and "plant nutrients" [see *Johnson & Johnson v Integra Lifesciences Corp* (2011), 98 CPR (4th) 429 (TMOB) at para 29, which confirms that the Registrar may exercise discretion to check the Manual].

[18] In view of the foregoing, the ground of opposition based on section 30(a) of the Act is dismissed.

### Section 30(e) Ground

[19] The Opponent pleads that the application does not conform to section 30(e) of the Act as:

- The Applicant had used the Mark in Canada with the goods set out in the Application prior to the May 27, 2016 filing date; and/or
- The Applicant had no intention as of the May 27, 2016 filing date and has no intention to use the Mark in Canada with the goods by itself or through a licensee or by itself and through a licensee.

[20] In the case of a proposed trademark, section 30(e) of the Act requires that the applicant include a statement that “the applicant, by itself or through a licensee, or by itself and through a licensee, intends to use the trademark in Canada”. The subject application includes such a statement by the Applicant.

[21] There is no evidence of record nor has the Opponent made any submissions to suggest that the Mark was either used prior to the filing date or that the Applicant lacked the intention to use the Mark.

[22] Consequently, as the Opponent has failed to meet its initial burden, the ground of opposition based on section 30(e) of the Act is dismissed.

#### Section 30(i) Ground

[23] The Opponent pleads that the application does not conform to section 30(i) of the Act as the Applicant could not have been satisfied that it was entitled to use the Mark in Canada in association with the goods in the Application as the Mark was and is confusing with the Opponent’s Mark that had previously been used and registered in Canada.

[24] In its written submissions, the Opponent further alleges that it has longstanding and extensive use of its ENERGIZER trademark, and that the Applicant knew or ought to have known that its use of the Mark in association with “*fertilizers and nutrients for agricultural use*” would have been confusingly similar to the Opponent’s Mark. The Opponent submits that the Applicant also knew or ought to have known that its use of the Mark in association with such goods would have had the effect of depreciating the goodwill of the Opponent’s Mark. The Opponent submits that despite having this knowledge, the Applicant nevertheless

filed the Application for a confusingly similar mark, which amounts to bad faith on the part of the Applicant.

[25] 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]. In this case, there is no evidence of bad faith or exceptional circumstances. Furthermore, even if the Opponent had shown that the Applicant knew of its trademark at the filing date of its application, I note that it has been held that mere knowledge of the existence of an opponent's trademark does not in and of itself support an allegation that an applicant could not have been satisfied of its entitlement to use a mark at the time that it filed its application [*Woot, Inc v Woot Restaurants Inc Les Restaurants Woot Inc*, 2012 TMOB 197].

[26] The section 30(i) ground of opposition is therefore dismissed for the Opponent's failure to meet its initial evidential burden.

#### Section 12(1)(d) Ground

[27] The Opponent pleads that the Mark is not registrable in association with the goods in the application as the Mark is confusing with the Opponent's Mark, registered under TMA684,080.

[28] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing. The Registrar has the discretion to check the register in order to confirm the existence of any registrations relied upon by an opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. I have exercised the Registrar's discretion and note that the Opponent's registration relied upon has been expunged. As the Opponent's registration relied upon is no longer extant, the Opponent has failed to meet its initial evidential burden as of the date of this decision [per *Park Avenue Furniture Corp, supra*]. In view of the expungement of the Opponent's registration subsequent to the oral hearing, it is not necessary to discuss the submissions of the Opponent regarding this ground.

[29] Accordingly, the section 12(1)(d) ground of opposition is dismissed.

#### Section 16(3)(a) Ground

[30] The Opponent pleads that the Applicant is not the person entitled to the registration of the Mark in association with the applied-for goods since, as of the date of filing of the application and at all relevant times thereafter, the Mark was confusing with the Opponent's Mark ENERGIZER, which has previously been used in Canada.

[31] The Opponent has an initial burden of establishing that its trademarks alleged in support of this ground of opposition was used or made known prior to the date of filing of the application, namely, May 27, 2016, and was not abandoned at the date of advertisement of the application for the Mark (in this case, August 2, 2017) [section 16(5) of the Act].

[32] As there is no evidence of record to establish that the Opponent's trademark relied upon under this ground of opposition was used or made known prior to the date of filing of the Application, the Opponent has failed to meet its initial burden. Moreover, any reference to use in the Opponent's now-expunged registration (*i.e.*, the declaration of use dated February 19, 2007) would not be sufficient to satisfy the Opponent's evidential burden under section 16(3)(a) of the Act [see *Roxxs, Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB)].

[33] Accordingly, the ground of opposition based on section 16(3)(a) is dismissed.

#### Section 2 Ground

[34] The Opponent alleges that the Mark is not distinctive of the Applicant's goods, nor is it adapted to distinguish the Applicant's goods from the goods and services of others, including the goods of the Opponent.

[35] With respect to the ground of opposition based on non-distinctiveness, in order to meet its initial burden, the Opponent must establish that its pleaded mark was known to some extent in Canada as of the filing date of the statement of opposition [see *Bojangles International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC) and *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD)].

[36] Again, the Opponent has not filed any evidence of use of its trademark. Further, while the Opponent's now-expunged registration included a declaration of use dated February 19, 2007, I would only have been able to assume minimal use from the existence of that registration [see *Entre Computer Centers, Inc v Global Upholstery Co* (1992), 40 CPR (3d) 427]. Such use would be insufficient under this ground and the difference in the material date under this ground as opposed to the non-entitlement ground does not change this finding. Thus, the Opponent has not met its evidential burden, and the ground of opposition based on non-distinctiveness is also dismissed.

DISPOSITION

[37] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

---

Kathryn Barnett  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



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

---

**HEARING DATE** 2020-10-09

**APPEARANCES**

Sanjukta Tole	For the Opponent
Robert A. Watchman	For the Applicant

**AGENTS OF RECORD**

Pitblado LLP	For the Opponent
Marks & Clerk	For the Applicant