



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 98

Date of Decision: 2021-05-21

IN THE MATTER OF AN OPPOSITION

PowerRich Corporation

Opponent

and

ATP Nutrition Ltd.

Applicant

1,678,151 for POWERPLANT

Application

OVERVIEW

[1] ATP Nutrition Ltd. (the Applicant) has filed application No. 1,678,151 (the Application) to register POWERPLANT (the Mark) in association with fertilizer for agricultural use.

[2] PowerRich Corporation (the Opponent) is a family owned company which has matched crop nutritional requirements to soil type for over a decade. It opposes the Application primarily on the basis that the Mark is confusing with the Opponent's trademarks POWERPAK, POWERROOT, and POWERFOL, all registered in association with agricultural fertilizer, and POWERRICH CORPORATION & Design, registered in association with the manufacture and distribution of agricultural fertilizers.

[3] For the reasons that follow, the Applicant has not satisfied its legal burden to demonstrate that there is no reasonable likelihood of confusion. The Application is therefore refused.

FILE RECORD

[4] The Application was filed on May 23, 2014, and is based on proposed use in association with fertilizer for agricultural use.

[5] The Application was advertised for opposition purposes in the *Trademarks Journal* on October 18, 2017. On March 6, 2018, the Opponent filed a statement of opposition against the Application pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Act was amended on June 17, 2019, and pursuant to section 70 of the Act, the grounds of opposition in this proceeding will be assessed based on the Act as it read prior to June 17, 2019.

[6] The Opponent raises grounds of opposition based on non-conformance under section 30(i), non-registrability under section 12(1)(d), non-entitlement under section 16(3)(a) and 16(3)(c) and non-distinctiveness under section 2 of the Act. Except for the section 30(i) ground, each of the grounds of opposition is based on an allegation of confusion with the Opponent's registration Nos. TMA904,009 (POWERFOL), TMA913,039 (POWERPAK), TMA903,997 (POWERROOT) (the Opponent's Word marks), TMA450,293 (POWERRICH CORPORATION & Design) (the Opponent's Design mark, shown below) and/or the Opponent's PowerRich Corporation trade name.



[7] As evidence in support of its opposition, the Opponent filed the affidavit of Gregory Frank Grant. In support of its application, the Applicant filed the affidavit of Elizabeth Czynryj. Neither affiant was cross-examined.

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

ONUS

[9] The Applicant bears the legal onus of establishing on a balance of probabilities that its Application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Limited v The Molson Companies Limited*, 1990 CanLII 11059 (FC) at 298].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 30(i) – Non-conformance

[10] The Opponent alleges in its statement of opposition that the Applicant could not have been satisfied that it was entitled to use the Mark in Canada, because, as a competitor, it was aware of the Opponent's PowerRich Corporation trade name and POWER family of trademarks.

[11] The material date for this ground of opposition is the date of filing the application [*Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB)].

[12] Section 30(i) of the Act merely requires that an applicant declare in its application that it is satisfied that it is entitled to use its trademark. Where an applicant has provided the requisite statement, a section 30(i) ground should only succeed in exceptional cases, such as where there is evidence of bad faith on the part of an applicant [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. 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 the mark [*Axa Assurances Inc v Charles Schwab & Co* (2005), 49 CPR (4th) 47 (TMOB); *Woot, Inc v WootRestaurants Inc Les Restaurants Woot Inc* 2012 TMOB 197].

[13] In the present case, the Applicant has provided the necessary statement and there is no evidence of bad faith or exceptional circumstances. This ground of opposition is therefore rejected.

Section 12(1)(d) – Non-registrability

[14] The Opponent pleads that the Mark is not registrable because it is confusing with at least one of its registered Word marks or its registered Design mark.

[15] The material date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks*, 1991 CanLII 11769 (FCA), *Simmons Ltd v A to Z Comfort Beddings Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[16] In considering the issue of confusion, I will focus on each of the Opponent's Word trademarks as I consider them to represent the Opponent's best chance of success.

[17] Each of the Opponent's Word marks is registered in association with agricultural fertilizers. I have exercised my discretion and checked the Register to confirm that each of these registrations is extant [*Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)].

When are trademarks confusing?

[18] Trademarks are confusing when there is a reasonable likelihood of confusion within the meaning of section 6(2) of the Act:

The use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold . . . or performed by the same person, whether or not the goods or services are of the same general class or appear in the same class of the Nice Classification . . .

[19] Thus, the issue is not confusion between the trademarks themselves, but confusion of goods and/or services from one source as being from another source. In the instant case, the

question posed by section 6(2) is whether purchasers of fertilizer sold in association with the Mark would believe that it was produced, authorized or licensed by the Opponent.

[20] In making such an assessment, I must consider all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and/or services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound, or in the ideas suggested by them. In *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 at para 20, the Supreme Court of Canada set out how the test is to be applied:

The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the [mark] at a time when he or she has no more than an imperfect recollection of the [prior] trademarks and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[21] The criteria in section 6(5) are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 (SCC) [*Masterpiece*] at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

Analysis of the Section 6(5) Factors

Inherent Distinctiveness and Extent Known

[22] The section 6(5)(a) factor involves a consideration of the combination of the inherent distinctiveness of a trademark and the extent to which it has become known in Canada.

[23] The Applicant submits that the Mark possesses some degree of inherent distinctiveness because it suggests an electric utility generating station and therefore has no meaning with respect to the applied-for goods. As noted by the Opponent, however, in assessing the inherent distinctiveness of a mark, one must consider the trademark in association with the parties' goods and/or services.

[24] The first component of each mark is the word POWER. As the Registrar can take judicial notice of dictionary definitions [*Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29], I note that the on-line dictionary *www.dictionary.com* defines the word “power” as “to give power to; make powerful”.

[25] The Mark is the combination of two dictionary words, POWER and PLANT. When considered in association with the relevant goods, the Mark is suggestive of a fertilizer that gives power to plants or makes powerful plants. I therefore do not consider the Mark to be inherently strong.

[26] Similarly, I do not consider the Opponent's POWERROOT mark to be inherently strong. In this regard, I consider it to be suggestive of a fertilizer that makes powerful roots.

[27] The Opponent's POWERPAK and POWERFOL marks possess a slightly higher degree of inherent distinctiveness than the Mark because they are coined terms. They are, however, also inherently weak because they are suggestive of a character or quality of their associated goods in the following ways:

- POWERPAK: suggests a pack of fertilizers that will make the plant as a whole more powerful; and
- POWERFOL: suggests that the fertilizer will either make the plant as a whole more powerful, especially because it sounds like the laudatory term “powerful”, or that the fertilizer will give power to the foliage of the plant (if one considers the FOL element to be a play on or suggestive of “foliage”).

[28] Despite having low inherent distinctiveness, each of the Opponent's trademarks have become known in Canada to some extent via their sales and advertising in Canada since at least as early as 2008. The evidence of Mr. Grant, General Manager of the Opponent, may be summarized as follows:

- the Opponent's three main products are POWERPAK, POWERROOT and POWERFOL; each of these products are used in the “crop cycle” and have been part of the PowerRich Fertilizer Program since 1990;
- the POWERPAK blended fertilizer is the pre-plant portion of the PowerRich Fertilizer crop-cycle program;

- the POWERROOT product is a non-toxic, water soluble, kelp-based seed treatment and transplant solution that can be applied directly to the seed;
- the POWERFOL fertilizer is the third and final part of the PowerRich Fertilizer crop-cycle program; it is a plant food applied to a growing plant;
- the Opponent's three main products are sold to agricultural farmers, primarily through agents based in Alberta, Manitoba and Saskatchewan;
- for each of the ten years prior to the date of Mr. Grant's affidavit (September 14, 2018), annual revenues generated by sales of the PowerRich Fertilizer Program products in Canada have exceeded \$10,000,000;
- packaging labels displaying the POWERPAK and POWERFOL trademarks are used in conjunction with the physical products;
- redacted contracts dated August 3, 2017 and May 21, 2018, displaying the POWERRICH CORPORATION & Design trademark at the top, and the POWERPAK, POWERFOL and/or POWERROOT trademarks in the body of the applicable contract, which accompany each sale and have been used in this manner since the Opponent first started selling the products in its PowerRich Fertilizer Program in 1990, are attached as exhibits;
- for each of the ten years prior to the date of Mr. Grant's affidavit, annual advertising expenditures by the Opponent promoting its PowerRich Fertilizer program and products POWERPAK, POWERROOT, and POWERFOL in Canada have exceeded \$150,000 Canadian dollars; and
- the Opponent has advertised its Word marks and its Design mark in magazines distributed to or consulted by farmers, including *The Western Producer* and *The Book: Prairie Farmers Catalogue*, on signage in farmer's fields, at large trade shows and smaller regional fairs, at seminars, over radio, through sponsorship of sporting teams and events, on its website and through social media.

[29] The Applicant submits that Mr. Grant has not provided any satisfactory evidence of actual use of the Opponent's Word marks used in association with fertilizer. In this regard, the Applicant submits that Mr. Grant did not provide a breakdown of the products sold in association with each of the Opponent's trademarks; did not provide any detail as to how many sales were made, where and in what year; and did not attach any documentary proof such as invoices. The Applicant maintains that there is no evidence that the sample redacted contracts provided were sales made "to arms' length parties". The Applicant asserts that this renders Mr. Grant's evidence ambiguous and that this ambiguity should be resolved against the Opponent.

[30] The Opponent, on the other hand, maintains that Mr. Grant's evidence was unchallenged. The Opponent further submits that Mr. Grant's evidence is sufficient to show use and/or making known of the Opponent's Word marks in Canada since 1990.

[31] I will begin by noting that even though the Applicant could have requested cross-examination of Mr. Grant to clear up areas of evidence where there are ambiguities, it was under no obligation to do so as the Registrar has held that such ambiguities are to be resolved against the party putting forward the evidence in an opposition case [*Power Budd, LLP v Beaudry*, 2006 CanLII 80342 (TMOB); *Ben Sherman Group Limited v Knautz*, 2013 TMOB 122]. Having said that, in this case I agree with the Opponent that Mr. Grant's evidence is sufficient to show that the Opponent has made each of its Word marks known in Canada to at least some extent.

[32] In this regard, the Opponent has evidenced extensive advertising of its Word marks in Canada through various activities for the ten-year period prior to Mr. Grant's affidavit. The Opponent has also evidenced extensive sales of the Opponent's fertilizers sold in association with its Word Marks over the same period, and has corroborated this assertion by providing representative sales contracts of its POWERPAK, POWERFOL and POWERROOT products, dated August 3, 2017 and May 21, 2018. Although the Opponent's commercially sensitive information was redacted from the contracts, I do not consider this by itself to suggest that any of these sales transactions were not sales made in the normal course of trade. Finally, Mr. Grant has also provided representative packaging and labelling of the Opponent's POWERPAK and POWERFOL products.

[33] As there is no evidence that the Mark has become known to any extent in Canada, overall I find that this factor favours the Opponent.

Length of Time in Use

[34] While Mr. Grant asserts that the Opponent has used its Word marks in Canada since as early as 1990, the Opponent's evidence of which Word marks in particular have been used since that date is not clear. I do find, however, that the Opponent has shown use of its POWERPAK mark since at least August 3, 2017 and its POWERROOT and POWERFOL marks since at least

May 21, 2018, based on the representative sales contracts provided. As there is no evidence of use of the Applicant's Mark, this factor favours the Opponent.

Nature of the Goods, Services or Business and Trade

[35] When considering sections 6(5)(c) and (d) of the Act, it is the statement of goods as defined in the registrations relied upon by the Opponent and the statement of goods in the application for the Mark that governs the assessment of the likelihood of confusion under section 12(1)(d) of the Act [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[36] The parties' goods are essentially identical as the Mark has been applied for in association with fertilizer for agricultural use, while each of the Opponent's Word marks are registered for agricultural fertilizer. In the absence of evidence to the contrary, I find that the parties' channels of trade could also overlap. These factors therefore also favour the Opponent.

Degree of Resemblance

[37] When considering the degree of resemblance between trademarks, the trademarks must be considered in their totality; it is not correct to lay the trademarks side by side and compare and observe similarities or differences among the elements or components of the trademarks [*Veuve Clicquot Ponsardin, supra*, at para 20]. While the Supreme Court advises in *Masterpiece, supra*, that the preferable approach when comparing marks is to begin by determining whether there is an aspect of the trademarks that is particularly striking or unique, it has also been held that the first component is often considered more important for the purpose of distinction [*Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)].

[38] In this case, the word POWER happens to be both the first component and the most striking component of the Mark and the Opponent's POWERROOT trademark. I therefore consider there to be a fair degree of resemblance between these marks in appearance and sound. The ideas suggested by these marks are also quite similar as the Mark suggests a fertilizer which

is powerful for the plant itself while the Opponent's POWERROOT mark suggests a fertilizer which is powerful for the root of the plant.

[39] While there is also some resemblance between the Mark and the POWERPAK and POWERFOL marks of the Opponent, I do not consider the degree of resemblance between the Mark and these marks as high as that between the Mark and the Opponent's POWERROOT mark. In this regard, the striking element of the Opponent's POWERPAK and POWERFOL trademarks are the marks as a whole, respectively, given that they are both coined terms. While the ideas suggested between these marks and the Mark are also similar (*i.e.* POWERPAK suggests a pack of fertilizers which are powerful for the plant as a whole while POWERFOL suggests a powerful fertilizer for the plant as a whole), the connection between the ideas suggested between these marks and the Mark is not as obvious as between the Mark and the Opponent's POWERROOT mark.

[40] Overall, this factor favours the Opponent.

Surrounding circumstances – family of trademarks

[41] As an additional surrounding circumstance, the Opponent asserts that it owns a family of trademarks, each of which includes the first word POWER for which significant use and promotional activities have been proven. Relying on the decision in *McDonald's Corp v Yogi Yogurt Ltd* (1982), 66 CPR (2d) 101 (FCTD), the Opponent maintains that the existence of a family of trademarks including the same or similar prefixes increases the likelihood of confusion.

[42] The Opponent further submits that it is significant that it has characterized all of its POWER branding around the crop cycle, which is referenced in some of the Opponent's advertising activities. Mr. Grant also explains that the Opponent's "PowerRich Fertilizer Program" is comprised of the following three products: the POWERPAK fertilizer, which is used for the pre-planting stage; the POWERROOT fertilizer, which is applied directly to the seed; and the POWERFOL fertilizer, which is a plant food applied directly to the plant. I agree that this evidence shows that the Opponent's Word marks form a series of marks.

[43] In any event, the evidence also shows actual use of more than one mark in the Opponent's family of marks. In this regard, even though the Opponent did not provide a breakdown of the sales of each of its fertilizers, the Opponent did provide representative packaging and labeling displaying how each of the Word marks has been used over the years, as well as representative sales contracts which display the quantity and description of each of the fertilizers in the Opponent's family of Word marks being sold in the past. The Opponent has also shown use of its POWERRICH CORPORATION & Design mark in association with the manufacturing and distribution of fertilizer. I therefore find that consumers may come to expect that "POWER" prefixed marks used in association with fertilizer products originate with the Opponent.

[44] In view of the above, I find that this surrounding circumstance enhances the likelihood of confusion with the Applicant's proposed Mark to some extent [see *McDonald's Corp v Yogi Yogurt Ltd* (1982), 66 CPR (2d) 101 (FC)].

Surrounding circumstance – state of the register evidence

[45] The Applicant, on the other hand, submits that the state of the register evidence of Ms. Czynryj, former articling student of the Applicant, shows that the word POWER, which is the common element of all of the marks at issue in this case, is also contained in a number of other marks for similar goods and that such common occurrences on the trademark register reduce the risk of confusion in this case [*Techniquip Limited v Canadian Olympic Association*, 1998 CanLII 7573 (FC)].

[46] In the *Techniquip* decision, the Court stated the following at para. 19:

It is a recognized principle that when considering the possibility of confusion between two marks, the Registrar must determine if the common element of the two marks is also contained in a number of other marks, since such a commonality tends to dissipate the risk of confusion and distinguish the compared trade-marks from each other by characteristics other than the common feature. In this respect, Harold G. Fox, in *The Canadian Law of Trade-marks and Unfair Competition*, states at p. 174-175:

[unregistered and registered trade-marks] If those marks are all registered in the name of the proprietor, the presumption, when the application is before the Registrar, is that those marks form a series of marks used by one owner, thus

amounting to a single conflicting registration, and that registration of the mark offered for registration ought prima facie to be refused. If, on the other hand, they are registered in the names of several different owners, the presumption is that the common characteristic is a common feature in the trade and therefore registration ought to be allowed. [...] When the question arises in opposition proceedings, the Registrar is not in a position to make any presumption as regards the surrounding circumstances. Before he can draw the suggested inference, based upon the use of other marks either in the applicant's or the opponent's favour, any such use must be established by evidence.

[47] Ms. Czyrnyj's evidence is that there are at least 20 POWER marks on the trademark register for 18 different owners, all either registered or applied for in association with goods similar to those of the parties at issue. I do not find many of the results located by Ms. Czyrnyj to be relevant, however, because they do not include the word POWER in a material way, *i.e.* as the first component or prefix of the mark. In my view, the most relevant marks located by Ms. Czyrnyj are those that include the word POWER as their first component, which include the following marks:

- POWER TO GROW, Registration No. TMA103,295
- POWER PILLS, Registration No. TMA461,220
- POWER BLOOM, Registration No. TMA567,542
- POWERPLUS, Registration No. TMA819,112
- POWERGROWER, Registration No. TMA633,997
- POWERBLOX, Application No. 1,753,437

[48] The Opponent, however, submits that a small amount of relevant registrations and applications such as this, without any evidence of use of these marks in the marketplace, is not sufficient for me to draw a meaningful inference about the state of the marketplace. I agree.

[49] While the word POWER may not be an uncommon component for trademarks for goods and/or services related to fertilizer, in my view there is not a sufficient number of trademarks which have the word POWER as their first component or prefix which would allow me to conclude that such marks for similar goods and/or services are common in the marketplace [see *Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)]. I also

refer to the decision in *McDowell v The Body Shop International PLC*, 2017 FC 581, where the Court found that the lack of evidence that the marks were used in relation to goods that were similar to those of the parties was enough to conclude that the Board had erred in drawing a negative inference merely from the state of the register.

[50] In view of the above, I do not find that this surrounding circumstance assists the Applicant.

Conclusion

[51] The legal onus is on the Applicant to show that, on a balance of probabilities, there is no reasonable likelihood of confusion between the marks. Considering the factors in section 6(5) of the Act, and in particular the overlap in the parties' goods, and the resemblance between the Mark and the Opponent's POWERROOT mark in particular, as well as the Opponent's evidence that its Word marks and its Design mark form a family of trademarks, I conclude that the Applicant has not met its burden to show that there is no reasonable likelihood of confusion between the Mark and the Opponent's POWERROOT trademark. In other words, the Applicant has not satisfied me that, on a balance of probabilities, a Canadian who has an imperfect recollection of the Opponent's POWERROOT mark associated with fertilizers would not, as a matter of first impression, assume that the Applicant's fertilizer originates from the same source or is otherwise related or associated with the Opponent's goods.

[52] With respect to the Opponent's POWERPAK and POWERFOL marks, I find that the balance of probabilities regarding the likelihood of confusion as to the source of the parties' goods to be evenly balanced. I reach this conclusion largely for the same reasons above, albeit considering that the degree of resemblance factor does not favour the Opponent with respect to these marks as strongly as with respect to its POWERROOT mark. As the onus is on the Applicant to show, on a balance of probabilities, that there is no reasonable likelihood of confusion, I must find against the Applicant.

[53] The section 12(1)(d) ground of opposition therefore succeeds.

Sections 16(3)(a) & (c) – Non-entitlement

[54] The Opponent also pleads that the Applicant is not the person entitled to the Mark because it is confusing with at least one of the Opponent's registered marks under section 16(3)(a) of the Act and/or the Opponent's trade name PowerRich Corporation under section 16(3)(c) of the Act. The material date for these grounds of opposition is the filing date of the Application, *i.e.* May 23, 2014.

[55] In order to meet its initial burden under section 16, the Opponent must evidence use of at least one of its registered trademarks or its trade name in Canada prior to May 23, 2014, and non-abandonment as of October 18, 2017, the date of advertisement of the subject application [section 16(5) of the Act].

[56] I agree with the Applicant that the Opponent has not met its burden under this ground with respect to any of its Word marks. In this regard, while Mr. Grant has testified to significant annual sales of each of the three PowerRich Fertilizer Program products including its POWERPAK, POWERROOT and POWERFOL products for each of the last ten years preceding the date of his affidavit, the primary documentary evidence provided to corroborate this statement (*i.e.* the representative sales contracts), are dated after the relevant date for this ground.

[57] I do find, however, that the Opponent has met its burden under these grounds with respect to its Design mark and its trade name. In this regard, even though the Opponent's evidence shows variations of this mark in some of its advertising, I am satisfied from the evidence as a whole that the Opponent has shown use of its Design mark and trade name in association with the manufacturing and distribution of fertilizer prior to the filing date of the application, and non-abandonment of this mark and trade name as of the date of advertisement. The remainder of this ground therefore turns on an assessment of the likelihood of confusion between the Mark and the Opponent's Design mark and PowerRich Corporation trade name.

[58] Neither the Mark nor the Opponent's Design mark or trade name are inherently strong. The length of time the marks and trade name have been in use favours the Opponent as the Opponent has shown use of its Design mark and trade name since at least 2009, mostly through the evidence of the Opponent's various advertising activities, whereas the Applicant has not

shown any use of its Mark. The Applicant's goods are also related to the Opponent's services and, in the absence of evidence to the contrary, I would expect that the parties' channels of trade would also overlap.

[59] However, as noted above, the degree of resemblance, although the last factor listed in section 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis [see *Masterpiece, supra*]. In this case, the additional differences in appearance, sound and idea suggested between the Mark and the Opponent's Design mark and trade name is sufficient to tip the balance of probabilities in the Applicant's favour. While both marks and the Opponent's trade name start with the component POWER, the Opponent's trade name also has other components including the separate word CORPORATION, and its Design mark has both the separate word CORPORATION as well as the design of a plant. Further, I consider the ideas suggested by the Mark and the Opponent's Design mark and trade name are not as closely related as between the Mark and the Opponent's Word marks. In this regard, the Mark suggests a fertilizer which will give plants power to grow whereas the idea suggested by the Opponent's Design mark and trade name is that of a corporation that is rich in power.

[60] In view of the above, I am satisfied that the Applicant has met its onus to show that there would be no reasonable likelihood of confusion between the Mark and the Opponent's Design mark or trade name. These grounds of opposition are therefore rejected.

Section 2 – Non-distinctiveness

[61] The Opponent also pleads that the Mark is not distinctive of the Applicant.

[62] In order to meet its evidential burden with respect to this ground, the Opponent must show that as of the filing of the opposition, it had acquired a sufficient reputation in at least one of its trademarks or its trade name to negate the distinctiveness of the Mark [*Bojangles' International LLC v Bojangles Café Ltd* (2006) and *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 412 at 424 (FCA)].

[63] From the evidence furnished, I only find that the Opponent has met its burden under this ground with respect to its Design mark and trade name. In my view, the differences in material

dates between this ground and the section 16(3)(a) ground would not have had any significant impact on the determination of the issue of confusion between the Mark and the Opponent's Design mark or trade name. Thus, my findings above also apply to this ground of opposition.

[64] Accordingly this ground of opposition is also rejected.

DISPOSITION

[65] In view of all of the foregoing, 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 2021-04-21

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