



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2021 TMOB 107**

**Date of Decision: 2021-05-31**

**IN THE MATTER OF AN OPPOSITION**

**Great Northern Growers Inc.**

**Opponent**

**and**

**NewAgco Inc.**

**Applicant**

**1,822,029 for FOXXY**

**Application**

INTRODUCTION

[1] NewAgco Inc. (the Applicant) has filed application No. 1,822,029 (the Application) to register the trademark FOXXY (the Mark) in association with herbicides. The Application was filed on February 8, 2017 based on proposed use of the Mark in Canada.

[2] The Application was advertised for opposition purposes in the *Trademarks Journal* on February 7, 2018. On May 23, 2018, Great Northern Growers Inc. (the Opponent) filed a statement of opposition 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.

[3] The Opponent raises grounds of opposition based on non-distinctiveness under section 2, non-registrability under section 12(1)(d), and non-entitlement under section 16(3)(a) of the Act. Each of the grounds of opposition turns on an allegation of confusion with the trademark FOAX which is registered (TMA897325) and used in Canada in association with “Agriculture herbicide for cereal grains”.

[4] I note that subsequent to the parties’ evidence being filed in this proceeding, registration No. TMA897325 was assigned from the Opponent to Farmer's Business Network, Inc. However, for the purpose of this decision, nothing turns on that assignment, and for ease of reference I will refer to the trademark FOAX as the Opponent’s trademark.

[5] The Applicant filed a counter statement on June 12, 2018 denying the grounds of opposition. Both parties filed evidence and written representations and attended a hearing.

[6] For the reasons set out below, I reject the opposition.

#### EVIDENCE

[7] The parties’ evidence is summarized below and is further discussed in the analysis of the grounds of opposition. No cross-examinations on the affidavits were conducted.

#### **Opponent’s Evidence**

[8] The Opponent filed as its evidence the affidavit of Ashley Skinner sworn October 11, 2018 (the Skinner Affidavit). Mr. Skinner is the President, CEO and Director of the Opponent.

[9] The Opponent is in the business of distributing herbicides for agricultural use. As of the date of the Skinner Affidavit, the Opponent had been selling herbicide under the trademark FOAX since 2014.

[10] At paragraph 6 of his affidavit, Mr. Skinner states that “[t]he trade-mark ‘FOAX’ is phonetically pronounced ‘FOX’”.

[11] Mr. Skinner describes the FOAX herbicide as a Group 1 Herbicide used for controlling wild oats, volunteer oats, green foxtail, yellow foxtail, barnyard grass, Persian dandelion and volunteer canary seed in spring wheat and durum wheat.

[12] Invoices from the Opponent's sale of the FOAX herbicide to customers in Canada in 2014 are attached as Exhibits "C" through "F". Mr. Skinner indicates that the Opponent has continued to sell the FOAX herbicide to its customers and has not abandoned the trademark.

[13] Mr. Skinner indicates that Exhibits "G" and "H" to his affidavit are advertisements produced by the Opponent which promote the FOAX herbicide to the agricultural industry. There is no indication as to how these advertisements were distributed or the scope of their distribution.

[14] Mr. Skinner states that in October 2014, the Opponent purchased and aired advertising on CJWW radio station in Saskatoon, promoting the FOAX product. A transcript of this advertisement is attached as Exhibit "I" to his affidavit.

[15] Mr. Skinner states that in October 2014 the Opponent purchased advertising in local newspapers across Saskatchewan, and Exhibit "J" to the affidavit is a copy of the advertisement promoting the FOAX herbicide, along with other herbicides, which was circulated.

[16] At paragraphs 14 through 16 of the affidavit, Mr. Skinner provides his opinion that the Applicant's Mark will be confusing with the Opponent's trademark FOAX and that the Mark is not distinctive. However, I have given these statements of opinion no weight given that Mr. Skinner has not been qualified as an expert on these issues, and these are instead issues to be determined by the Registrar.

### **Applicant's Evidence**

[17] The Applicant filed as its evidence the affidavit of Jason Mann sworn February 7, 2019 (the Mann Affidavit). Mr. Mann is the founder, President and CEO of the Applicant. He states that he is also the founder, President and CEO of AgraCity Crop and Nutrition Ltd. (AgraCity), which is the exclusive distributor of the Applicant's products.

[18] Mr. Mann describes the Applicant as a generic pesticide company that is building products in the agricultural sector, specifically crop protection products, including insecticides, fungicides and herbicides.

[19] Mr. Mann states that prior to filing an application for the Mark, a preliminary search of the trademarks database was conducted. Exhibit “A” to the Mann Affidavit is a copy of search results and analysis from a third party provider (whose name is redacted) relating to the freedom to use and register the trademark FOXXY in association with herbicides. I have afforded the evidence in Exhibit “A” no weight, as I consider it hearsay as well as improper opinion evidence from an unidentified source.

[20] Mr. Mann states that the Mark is used in association with a herbicide. Photographs of the packaging for the FOXXY herbicide are attached as Exhibit “C” to his affidavit. The packaging prominently bears the Mark. Mr. Mann explains that the Mark is depicted in conjunction with the registered trademark MPOWER (TMA772932), the latter trademark being owned by a company named Farms and Families of North America Inc., which Mr. Mann describes as “an affiliated company that manages the membership of our clients”.

[21] Mr. Mann states that the FOXXY herbicide has been available in Canada since November 29, 2017. Exhibit “E” is a copy of an invoice showing the first sale of the FOXXY herbicide on that date, and Exhibit “F” includes copies of invoices from subsequent sales of the FOXXY herbicide in 2018 and 2019. The invoices identify the product vendor as AgraCity. Exhibit “G” is a copy of the FOXXY herbicide product label and Exhibit “H” is a copy of the Safety Data Sheet for the product.

[22] Exhibit “I” to the Mann Affidavit is a printout of a marketing campaign from May 2018 used to promote various types of FOXXY herbicides. No information is provided regarding the means or scope of distribution of these advertising materials.

[23] Paragraphs 18 and 19 of the Mann Affidavit include descriptions of Mr. Mann’s online research to try to determine the pronunciation of the word “Foax”, including contacting private persons and companies having that name which he located on Facebook. Exhibits “J” and “K” relate to the results of Mr. Mann’s online research. I have afforded no weight to the evidence

contained in paragraphs 18 and 19 of the Mann Affidavit and the related Exhibits “J” and “K”, as it is hearsay that I consider neither necessary nor reliable.

#### ONUS AND MATERIAL DATES

[24] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the 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), 30 CPR (3d) 293 (FCTD) at 298].

[25] The material dates for the grounds of opposition are set out below.

- Sections 38(2)(b)/12(1)(d) of the Act – the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)]
- Sections 38(2)(c)/16(3)(a) – the filing date of the application; and
- Sections 38(2)(d)/2 of the Act - the filing date of the opposition [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185, 34 CPR (4th) 317].

#### ANALYSIS OF THE GROUNDS OF OPPOSITION

##### **Section 12(1)(d) Ground of Opposition**

[26] I have exercised my discretion to check the register and confirm that registration TMA897325 remains extant [see *Quaker Oats Co of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden for the section 12(1)(d) ground of opposition.

##### Test for Confusion

[27] The test for confusion is set out in section 6(2) of the Act which provides 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, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time the trademarks have been in use; (c) the nature of the goods and services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them.

[28] These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [see *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401; *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 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.

[29] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, 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 inherent distinctiveness of the trademarks and the extent to which they have become known*

[30] The Opponent's trademark FOAX is inherently distinctive as it is a coined term with no dictionary meaning. With respect to the extent to which the Opponent's trademark has become known, the Opponent has provided limited evidence with which to make that assessment. The Opponent's evidence indicates that the trademark has been continually used in Canada since 2014, and the Skinner Affidavit includes four invoices from the sale of the FOAX herbicide in 2014. However, no annual or total sales figures are provided. The Skinner Affidavit also includes examples of advertising in association with the trademark from 2014, but no data or distribution

figures for that advertising are provided. Consequently, at best for the Opponent, I can conclude that the Opponent's trademark has become known to a limited extent.

[31] With respect to the Applicant's Mark, in my view, it is likely to be perceived as an intentional misspelling of the dictionary word "foxy", and on that basis I consider it to have slightly less inherent distinctiveness than the Opponent's trademark which is a coined term. However, the Applicant's Mark still possesses inherent distinctiveness given its unconventional spelling and the fact that neither FOXXY nor the dictionary word "foxy" have a descriptive connotation in association with herbicides. The Applicant's evidence indicates that the Mark has been used in Canada since November 2017, and the Applicant's evidence includes additional invoices from 2018 and 2019 as well as advertising from 2018. As with the Opponent's evidence, I have no annual or total sales figures or advertising distribution figures from the Applicant. Thus, I similarly conclude that the Applicant's Mark has only become known to a limited extent.

[32] Given that both parties' trademarks possess inherent distinctiveness and are known to only a limited extent, in this case I do not consider this factor to favour either party to any meaningful degree.

*The length of time the trademarks have been in use*

[33] The Opponent's trademark has been in use in Canada since 2014. The Applicant's Mark has been in use since 2017. This factor favours the Opponent.

*The nature of the goods, services or business; and the nature of the trade*

[34] When considering the goods and services of the parties, it is the statements of goods and services in the parties' trademark application and registration that ultimately govern the issue of confusion [see *Miss Universe Inc v Bohna* (1994), 58 CPR (3d) 381 (FCA)].

[35] In the present case, the Opponent's registration covers "Agriculture herbicide for cereal grains" and the Opponent's evidence of use of the trademark FOAX is consistent with that description.

[36] The Application is in association with “Herbicides”. In its written representations, the Applicant takes the position that the specific type of herbicide being sold by Applicant in the Canadian marketplace in association with the Mark is different than that of the Opponent, in terms of the active ingredient and types of weeds targeted. However, there is no limitation in the Application as to the particular type of herbicide.

[37] In short, there is direct overlap between the parties’ goods as described in the Application and the Opponent’s registration, and the likely channels of trade appear to be similar as the products are sold to farms. This factor favours the Opponent.

#### *Degree of resemblance*

[38] As noted above, the degree of resemblance is often the most significant factor in the confusion analysis. When considering this factor, it is preferable to first consider whether there is an aspect of the trademark that is “particularly striking or unique” [*Masterpiece, supra*, at para 64].

[39] With the Opponent’s trademark, the striking and unique aspect is clearly “FOAX”, given it is a coined term. In my view, the striking aspect of the Applicant’s Mark is the term “FOXXY” as a whole.

[40] There is a degree of resemblance between the trademarks in appearance, given the common presence of the letters “F”, “O” and “X”. However, this is reduced by the three letter combination “XXY” in the Mark, which in my view gives the Mark a somewhat different visual appearance.

[41] There is little resemblance between the trademarks in terms of idea conveyed, since the Opponent’s trademark is a coined term with no meaning, while the Applicant’s Mark will likely be understood as a misspelling of the dictionary word “foxy”.

[42] With respect to the degree of resemblance when sounded, the Opponent’s affiant has stated that the Opponent’s trademark FOAX is pronounced “fox”. The Applicant did not cross-examine on that evidence and there is no evidence of record contradicting that this is how the Opponent pronounces its trademark. However, when assessing the degree of resemblance with a



coined term, I do not think that evidence of how an opponent pronounces its trademark necessarily ends the inquiry as to how the typical consumer would likely understand the opponent's trademark to sound, particularly in the absence of evidence that consumers have previously heard the opponent's pronunciation of the coined term.

[43] In this case, as a starting point, I am skeptical of the proposition that a typical consumer upon reading the trademark FOAX would think that term was pronounced "fox". I am not aware of (nor was the Opponent able to provide at the hearing) another dictionary word in which the two letter combination "OA" would be sounded in the manner contented by the Opponent. In contrast, there are numerous dictionary words wherein the two letter combination "OA" is consistently pronounced in a manner *different* from that argued by the Opponent, including "oat", "boat", "coat", "coach", "coax" and "hoax". This suggests to me that a typical consumer upon seeing the trademark FOAX would pronounce the "OA" in that trademark in the same manner as the aforementioned dictionary words.

[44] Taking the above into consideration, in the absence of evidence from the Opponent that a substantial number of relevant consumers understand its coined trademark FOAX to be pronounced as "fox", I consider the degree of resemblance between the trademarks when sounded to be low.

[45] I note that my findings regarding the degree of resemblance between the trademarks when sounded might have been different if the Opponent had provided evidence demonstrating the scope of its use and advertising of the trademark FOAX in ways that suggest that consumers understand the trademark to be sounded as "fox". However, in my view, the evidence of record does not permit me to make such a finding. For example, while the Skinner Affidavit included the transcript of a radio advertisement promoting the Opponent's FOAX product, it did not include an audio recording of that advertisement, nor did it include any evidence as to the number of listeners that might have heard the advertisement.

[46] On balance, taking into account the degree of resemblance between the parties' trademarks in terms of appearance, sound, and idea, I find that this factor favours the Applicant.

### Conclusion regarding the section 12(1)(d) ground

[47] Having considered all of the surrounding circumstances, I conclude that the Applicant has satisfied its legal burden to show that there is no reasonable likelihood of confusion between the parties' trademarks. Based on the evidence of record, in my view, the differences between the parties' trademarks in terms of appearance, sound and idea are sufficient to outweigh the factors favouring the Opponent and avoid a likelihood of confusion.

[48] Consequently, I reject the section 12(1)(d) ground of opposition.

### **Section 16(3)(a) Ground of Opposition**

[49] The Opponent has met its initial evidential burden for the section 16(3)(a) ground of opposition, given the Opponent's evidence of its use of the trademark FOAX prior to the filing date of the Application and that the Opponent has not abandoned its trademark.

[50] I note that the Applicant argued that the Opponent's provision of invoices solely from 2014 suggests that the Opponent's trademark has been abandoned. However, I disagree with the Applicant on this point. The Skinner Affidavit expressly states at paragraph 10 that the Opponent's trademark has been continually used and not abandoned, and that evidence is uncontested since the Applicant chose not to cross-examine and did not file any contrary evidence.

[51] The Opponent having met its initial evidential burden for the section 16(3)(a) ground of opposition, the analysis of confusion is essentially identical to that set out above for the section 12(1)(d) ground. The earlier material date for the non-entitlement ground does not have any impact on the outcome of the analysis. Therefore, I reject the section 16(3)(a) ground of opposition.

### **Section 2 Ground of Opposition**

[52] In order to meet its evidential burden with respect to the section 2 ground, the Opponent had to show that its trademark had a substantial, significant or sufficient reputation in Canada in association with the relevant goods as of the filing date of the opposition [see *Bojangles'*

*International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 at para 34].

[53] In this case, even if I were to find that the Opponent had met its initial evidential burden, since this ground ultimately turns on the allegation of confusion with the Opponent's trademark FOAX, I would come to the same conclusions as above with respect to the sections 12(1)(d) and 16(3)(a) grounds. Therefore, I reject the section 2 ground on that basis.

[54] I note that at paragraph 26 of the Opponent's written representations relating to distinctiveness, the Opponent questions whether any use of the Mark shown in the Applicant's evidence constituted use by the Applicant, given that the sales of the FOXXY herbicide were by AgraCity rather than the Applicant, and there is no evidence of a license agreement between those two entities pursuant to section 50(1) of the Act. To the extent that the Opponent is arguing that this impugns the distinctiveness of the Mark, I reject that assertion for two reasons. First, the Opponent in its statement of opposition did not plead non-distinctiveness on that basis, and thus is precluded from raising that allegation now [see *Imperial Developments Ltd v Imperial Oil Ltd* (1984), 79 CPR (2d) 12 (FCTD) for the general proposition that an opponent cannot rely on a ground of opposition which it has not plead]. Second, in any event, the Mann Affidavit describes AgraCity as a "distributor" of the Applicant's products, and the Opponent did not cross-examine on that evidence or file any evidence to contradict that description. Use of a trademark by a distributor is generally considered to be use of the mark by the owner such that section 50(1) is not relevant [see *Advance Magazine Publishers Inc v Vogue Sculptured Nail Systems Inc*, 2010 TMOB 129 at para 28; and *BCF SENCRL v Anton Riemerschmid Weinbrennerei und Likörfabrik GmbH & Co KG* (2008), 72 CPR (4th) 226 (TMOB) at para 10].

[55] In sum, I reject the section 2 ground of opposition.

#### DISPOSITION

[56] 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.

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Timothy Stevenson  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** 2021-04-28

**APPEARANCES**

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**AGENTS OF RECORD**

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