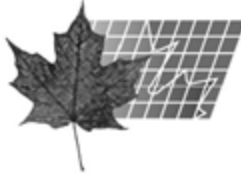


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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2022 TMOB 026**

**Date of Decision: 2022-02-17**

**IN THE MATTER OF AN OPPOSITION**

**Sun Ming Hong (Canada) Ltd.**

**Opponent**

**and**

**Arctica Food Group Canada Inc.**

**Applicant**

**1,852,814 for shuang shen wang in  
chinese design**

**Application**

OVERVIEW

[1] Sun Ming Hong (Canada) Ltd. (the Opponent) opposes registration of the trademark shuang shen wang in chinese design (the Mark), shown below, which is the subject of application No. 1,852,814 by Arctica Food Group Canada Inc. (the Applicant).

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[2] As submitted by the Applicant, the Chinese characters in the Mark transliterate to SHUANG SHEN WANG and the Chinese words SHUANG SHEN WANG translate to DOUBLE, GINSENG and *ROI* [the French for KING].

[3] Filed on August 16, 2017, the application is based on proposed use in Canada in association with “[n]utraceutical products namely: sea cucumber and ginseng in the form of powder to maintain healthy glucose levels, to help relieve nervousness as a mild sedative, to help digestion in cases of nervousness and/or stress”.

[4] The application was advertised for opposition purposes in the *Trademarks Journal* of December 12, 2018.

[5] On February 5, 2019, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). All references in this decision are to the Act as amended on June 17, 2019, with the exception of references to the grounds of opposition, which refer to the Act before it was amended. The grounds of opposition are based on registrability under section 12(1)(d), entitlement under section 16, and distinctiveness under section 2 of the Act, all of which turn on the issue of a likelihood of confusion between the applied for Mark and the Opponent’s trademark GINSENG KING & DESIGN (sometimes referred to as the Opponent’s Registered Trademark).

[6] The Applicant filed and served a counter statement denying all of the allegations contained in the statement of opposition.

[7] Both parties submitted evidence, which is briefly summarized below. Both parties filed written representations. No hearing was held.

#### PARTIES’ EVIDENCE

[8] In support of its opposition, the Opponent filed a certified copy of its relied upon registration.

[9] In support of its application, the Applicant filed the affidavit of Zhi Lory Wang, CEO of the Applicant, along with Exhibits A to C thereto (the Wang affidavit). Ms. Wang provides the

particulars of the application for the Mark dated August 21, 2017 [para 2, Exhibit A], the particulars of the registration relied upon by the Opponent [para 3, Exhibit B], as well as a copy of a Wikipedia article titled “Simplified Chinese characters” [paras 6-7, Exhibit C] and essentially comments on consumer perception and the likelihood of confusion, including on the differences between the marks at issue [paras 5-13].

[10] In its written representations, the Opponent submits that the Wang affidavit is improper and should be omitted from evidence as there is no attestation clause including the date the affidavit was made.

[11] I note that the Wang affidavit contains no indication of where and the exact day in December of 2019 when it was sworn. However, I also note that the Applicant subsequently sought and was granted leave to file additional evidence in the form of the affidavit of Béatrice Paradis-Létourneau, commissioner of oaths, explaining those deficiencies. In particular, Ms. Paradis-Létourneau asserts that the Wang affidavit was sworn before her on December 20, 2019 in Brossard, which information she omitted to specify by mistake [paras 1-3]. I am therefore prepared to accept the Wang affidavit as admissible. That being said, I find that no weight ought to be given to any opinion or conclusion statements made by Ms. Wang on issues of fact and law that are to be determined by the Registrar in the present proceeding.

#### PARTIES’ RESPECTIVE BURDEN OR ONUS

[12] 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. If this burden is met, the Applicant then bears the legal onus of establishing, on a balance of probabilities, that the grounds of opposition pleaded should not prevent the registration of its Mark [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29].

REGISTRABILITY GROUND OF OPPOSITION

[13] The Opponent has pleaded that the Mark is not registrable having regard to section 12(1)(d) of the Act because it is confusing with the Opponent's trademark GINSENG KING & DESIGN (shown below), registered under No. TMA529,366 in association with "[g]inseng, ginseng products, namely extracts sold as liquids, tablets, and capsules, and ginseng tea" (the Opponent's Goods).



[14] As indicated above, the Opponent has filed a certified copy of its relied upon registration. Having exercised the Registrar's discretion to check the register, I confirm that registration No. TMA529,366 is extant as of the date of this decision.

[15] The Opponent having met its burden under this ground, the Applicant must in turn establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and the Opponent's Registered Trademark.

**Test for confusion and perspective from which to assess it**

[16] The test to determine if there is a likelihood of confusion between two trademarks is set out in section 6(2) of the Act, where it is stipulated that the use of a mark causes confusion with another 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, regard

must be had to all the relevant surrounding circumstances, including those listed in section 6(5) of the Act, namely: (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. These are not exhaustive and different weight can be assigned to each factor in a context-specific assessment. [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27]

[17] The issue of confusion must be considered as a matter of first impression and imperfect recollection from the perspective of the average consumer of the parties' goods.

[18] Many of the Applicant's submissions—including those with respect to the inherent strength of the parties' marks as well as the aural and conceptual differences between them—hinge on the assumption of the average consumer having an understanding of Chinese characters.

[19] In the surrounding circumstances section of its written representations, while addressing the Applicant's arguments centered on the use of simplified versus traditional Chinese characters, the Opponent for its part submits that the parties' target consumers are Chinese-Canadians who would understand both forms of writing.

[20] However, neither of the parties further detailed their submissions on this point or furnished any evidence to substantiate a finding that the average consumer of the parties' products in the instant case would be familiar with Chinese characters and recognize their meaning. The mere fact that the trademarks at issue include such characters, without more, is insufficient in this regard [*Baycliff Company, Inc v CHENG, Wai Tao*, 2018 TMOB 66 at para 30]. This is therefore not a situation in which it would be appropriate to consider the impression of the average Canadian consumer who can read and understand Chinese characters when determining the likelihood of confusion between the parties' trademarks.

## Degree of resemblance

[21] The Applicant's Mark consists of a stylized depiction of three Chinese characters. The Opponent's trademark consist of a stylized depiction of two Chinese characters and their English translation. The transliteration of the Opponent's trademark, as stated in the registration, is SHENG WANG (to mean GINSENG KING). As indicated above, the transliteration of the Applicant's Mark, as stated in the subject application, is SHUANG SHEN WANG (to mean DOUBLE GINSENG KING).

[22] According to the Opponent, in addition to being very similar in appearance the parties' trademarks also sound similar and suggest overlapping and highly similar ideas. Relying on *Thai President Foods Public Co v Nisshin Seifun Group Inc*, 2012 TMOB 156 at para 31, the Opponent submits that if one considers the average Canadian consumer of the Opponent's Goods to be one who can read and understand Chinese characters, that consumer would refer to the Opponent's trademark as the "GINSENG KING" trademark, the prominent feature of the Applicant's Mark. Similarly, if the consumer could not read or understand Chinese characters, the Opponent contends that that consumer would still recognise the prominent features of the Opponent's Registered Trademark and Applicant's Mark to be the two similar characters that they share. I disagree.

[23] The prominent aspect of the Opponent's Registered Trademark is the two Chinese characters design. It follows that there is visual resemblance between the trademarks to the extent that the Mark incorporates this prominent component, albeit with a different stylization. In my view, however, the Mark does not have one prominent aspect over another. In other words, the striking aspect of the Mark is the three Chinese characters design as a whole.

[24] Further, while there are clearly similarities between the Chinese to English transliterations and translations respectively provided by the parties, as also indicated above, there is no evidence that the average Canadian consumer would be aware of the meaning of the Chinese characters in the Mark. The Mark would therefore likely be viewed as being suggestive of Asian influences [see for example *Shanghai Tobacco (Group) Corporation v Duobaoli Tobacco (HK) Co, Ltd*, 2014 TMOB 242 at para 26] or simply as having a foreign or unknown meaning. I am not convinced that consumers would necessarily have a similar perception of the

Opponent's trademark as, in addition to Chinese characters, it also contains their Latin characters equivalent. As such, the Opponent's trademark may also convey the idea that the Opponent is the "king" of ginseng or that its ginseng products are in some way superior to others.

[25] In my view, the overall visual and conceptual differences between the trademarks at hand outweigh their visual similarities. Accordingly, this factor favours the Applicant.

### **Inherent distinctiveness**

[26] The parties' trademarks being essentially comprised of stylized depictions of Chinese characters they both possess at least some measure of inherent distinctiveness, although slightly less so in the case of the Opponent's trademark. While in both cases GINSENG is descriptive of the parties' goods and KING can take on a laudatory connotation, the inherent distinctiveness of the Opponent's trademark is somewhat further impacted in the circumstances as these English words only appear in the Opponent's Registered Trademark.

[27] Accordingly, this factor also favours the Applicant albeit only slightly.

### **Extent known and length of time in use**

[28] The Applicant has not presented evidence that its Mark has been used or become known to any extent in Canada.

[29] The Opponent has also not filed any evidence of use and, while its registration for the trademark GINSENG KING & DESIGN shows that a declaration of use was filed on May 16, 2000, I can only infer *de minimis* use of this trademark from the certified copy submitted in evidence [*Tokai of Canada v Kingsford Products Company, LLC*, 2018 FC 951 at para 37; *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB) at 430]. Such an inference, however, does not support the finding that the Opponent's trademark was known to any significant extent or that it has been continuously used since the date declared [*Krauss-Maffei Wegmann GmbH & Co KG v Rheinmetall Defence Electronics GmbH*, 2017 TMOB 50 at para 20].

[30] Accordingly, these factors do not favour either party.

### **Nature of the goods, businesses and trade**

[31] To the extent that the subject application covers ginseng in the form of powder and the goods associated with the Opponent's Registered Trademark comprise ginseng, ginseng extracts sold as capsules, and ginseng tea, I agree with the Opponent that there is either direct overlap or a close relation between the parties' goods.

[32] While the parties both appear to have an interest with respect to the provision of ginseng-related products, the specific nature of their businesses and trades is not in evidence. Nevertheless, in the absence of evidence to the contrary and given the connection between the parties' goods, there is no reason to conclude that they could not also potentially overlap.

[33] Accordingly, these factors favour the Opponent.

### **Conclusion on the likelihood of confusion**

[34] Having considered all the surrounding circumstances, I find that the balance of probabilities weighs slightly in favour of the conclusion that the applied-for Mark and the Opponent's Registered Trademark are not confusing. Accordingly, the section 12(1)(d) ground of opposition is rejected.

[35] Had there been evidence that the average consumer is a person who is able to read and understand Chinese characters, my conclusion with respect to the registrability ground of opposition might have been different.

### **NON-ENTITLEMENT AND NON-DISTINCTIVENESS GROUNDS OF OPPOSITION SUMMARILY REJECTED**

[36] With respect to the non-entitlement and non-distinctiveness grounds of opposition, the Opponent has pleaded the following:

Having regard to Subsections 38(2)(c) and 16(4) of the Act, the Applicant is not the person entitled to registration in that as of the date of August 16, 2017, the Applicant's proposed use Mark was confusing with the Opponent's [m]ark GINSENG KING & Design which had been previously registered and used in Canada and continues to be used, by the Opponent in association with [the Opponent's Goods];



Having regard to Subsection 38(2)(d) and Section 2 of the Act, the Applicant's Mark is not distinctive in Canada of the Applicant's goods in that the Applicant's Mark does not distinguish the Applicant's goods from those of others.

[37] Notwithstanding that these grounds are respectively either improperly or insufficiently pleaded, they are summarily rejected on the basis that the Opponent has failed to meet its initial evidential burden. In fact, the Opponent did not provide any evidence to support its ground of opposition alleging non-distinctiveness of the Mark or a non-entitlement ground of opposition alleging confusion with the Opponent's relied upon trademark GINSENG KING & DESIGN.

[38] Accordingly, the sections 16 and 2 grounds of opposition are also rejected.

#### DISPOSITION

[39] 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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Iana Alexova  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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No hearing held

**Agents of record**

Ridout & Maybee LLP

For the Opponent

Richard Tétreault

For the Applicant