



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2023 TMOB 065

**Date of Decision:** 2023-03-31

## **IN THE MATTER OF AN OPPOSITION**

**Opponent:** ATP Athlétique et Thérapeutique Pharma Inc.

**Applicant:** ATP Institute Pty Ltd

**Application:** 1,838,527 for ATP SCIENCE & Design

## **INTRODUCTION**

[1] ATP Institute Pty Ltd (the Applicant) has applied to register the trademark ATP SCIENCE & Design reproduced below (the Mark) for use in association with various herbal, dietary, and nutritional supplements.



[2] The Mark consists of the acronym ATP in a thick, angular font above the word SCIENCE in small, widely-spaced lettering, above all of which is a large, circular vortex motif resembling a four-pointed knot of interwoven ribbon strips.

[3] ATP Athlétique et Thérapeutique Pharma Inc. (the Opponent) opposes application no. 1,838,527 for the Mark (the Application), based primarily on an allegation that the Mark is confusing with the Opponent's own trademarks and trade names consisting of or incorporating the acronym ATP, which are used in association with similar supplements and natural health products. Notably, the Opponent also uses the phrase "athletic • therapeutic • pharma" within its trademarks, and a variation thereof within some of its trade names, and the letters "ATP" are the initials of this phrase.

[4] The acronym ATP also has a scientific meaning: it is the accepted abbreviation for *adenosine triphosphate*, an important biological molecule that transfers the energy derived from food to various physiological processes. ATP is formed naturally within the human body and is also used as an ingredient in dietary supplements. The average consumer's familiarity with the term is at issue in this case and the parties' positions in this regard will be discussed in some detail in considering the likelihood of confusion.

[5] Ultimately, for the reasons that follow, the opposition is successful.

### **THE RECORD**

[6] The Application was filed on May 19, 2017, based on proposed use of the Mark in Canada in association with the following goods (the Goods):

Dietary supplements for general health and well-being; dietary supplements for promoting weight loss; herbal and dietary supplements for promoting faster muscle recovery after exercise; herbal supplements for general health and well-being; mineral supplements; nutritional supplement meal replacement bars for boosting energy; nutritional supplements for building body mass; nutritional supplements for general health and well-being; protein powders for meal replacement; vitamin supplements.

[7] The Application was advertised for opposition purposes on July 18, 2018, and opposed on December 5, 2018, when the Opponent filed a statement of opposition

pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Applicant filed a counter statement contesting each of the grounds of opposition.

[8] The grounds of opposition allege that the Application does not comply with the filing requirements set out in sections 30(e) and (i) of the Act; that the Applicant is not entitled to registration of the Mark under sections 16(1)(a) and (c) of the Act; and that the Mark is not distinctive within the meaning of section 2 of the Act. Numerous amendments to the Act came into force on June 17, 2019. Pursuant to the transitional provisions in section 70 of the Act for applications advertised before June 17, 2019, the grounds of opposition will be assessed based on the Act as it read immediately before amendment, an exception being that the definition of confusion in sections 6(2) to 6(4) of the Act as it currently reads will be applied.

[9] In support of its opposition, the Opponent filed the statutory declaration (the Declaration) of its President, Robert Légaré, which is dated May 27, 2019. Mr. Légaré describes the Opponent's business and its use and promotion of trademarks and trade names consisting of or incorporating the acronym ATP.

[10] In support of the Application, the Applicant filed two affidavits of D. Jill Roberts, a law clerk employed by the Applicant's agent, whose affidavits are both dated July 30, 2020. Ms. Roberts provides the results of various searches she conducted in reference works and over the Internet in July 2020, regarding the occurrence of the letters "ATP" in trademarks and trade names and regarding the definition of the term. Her first affidavit (DJR No.1) provides the results of her searches of the Canadian and U.S. online trademark registries and certain printed reference works, which she conducted on July 28, 2020; her second affidavit (DJR No.2) provides the results of her earlier searches using the *google.ca* online search engine, which she conducted from July 2, 2020 to July 22, 2020.

[11] Both Mr. Légaré and Ms. Roberts were cross-examined and the transcripts of their cross-examinations are of record, as are responses to an undertaking made and a request taken under advisement during their respective cross-examinations.

[12] Only the Applicant filed written representations, but both parties were represented at an oral hearing.

### **EVIDENTIAL BURDEN AND LEGAL ONUS**

[13] In an opposition proceeding, the legal onus is on the applicant to show that its application complies with the provisions of the Act. However, for each ground of opposition, 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 that ground of opposition exist. If this initial burden is met, then the applicant must satisfy the Registrar, on a balance of probabilities, that the ground of opposition should not prevent registration of the trademark at issue [*Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB); *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)].

### **GROUND OF OPPOSITION SUMMARILY REJECTED: COMPLIANCE WITH SECTIONS 30(E) AND 30(I)**

[14] The Opponent pleads that the Application does not comply with section 30(e) of the Act in that (i) at the Application's filing date, the Applicant (or its predecessors in title, if any) had already used the Mark in Canada, in whole or in part, in association with the Goods; or (ii) the Applicant never intended to use the Mark in Canada, itself and/or through a licensee, either in the form depicted in the Application or in association with each of the Goods; and (iii) the Mark will not be used within the meaning of section 4 of the Act because it will not be used as a trademark.

[15] The Opponent also pleads that the Application does not comply with section 30(i) of the Act because the Applicant's statement that it was satisfied it was entitled to use the Mark in Canada was false, in view of the facts alleged in the statement of opposition, including the Applicant's knowledge of the Opponent's rights and the unlawfulness of any such use. More specifically, the Opponent pleads the Applicant made the prescribed statement in bad faith, given its awareness or deemed awareness of the Opponent's trademarks or trade names and knowledge that the Mark would be confusing with them.

[16] At the oral hearing, the Opponent conceded that the evidence of record is insufficient for it to meet its initial burden in respect of these particular grounds of opposition. Indeed, the Opponent has not furnished any evidence or made any written or oral representations in support of these allegations. Accordingly, the foregoing grounds of opposition are rejected.

**GROUND OF OPPOSITION BASED ON ENTITLEMENT TO REGISTRATION UNDER SECTIONS 16(3)(A) AND (C)**

[17] The Opponent pleads that the Applicant is not the person entitled to registration of the Mark because, at the Application's filing date and all material dates, the Mark was confusing with the Opponent's trademarks and trade names consisting of or incorporating the term ATP, which have been used and, in the case of the trademarks, made known in Canada by the Opponent or its predecessors in title or, for their benefit, by licensees, in association with the following:

- since at least 2011, the goods covered by the Opponent's trademark applications nos. 1857937 for ATP, 1857938 for ATP LAB, and 1857939 for ATP & Design—I note that the latter consists of the word ATP in a tubular font with an undulating stream of multi-sized dots extending across and past the top of the letter P, as reproduced below, and that each of the applications covers the goods set out at Schedule A to this decision, being various supplements and other health and cosmetic products:



(ATP & Design)

- the Applicant's Goods, as well as goods that are similar or of the same nature; and
- other goods or services of the Opponent, namely a range of natural health products.

[18] I note at the outset that the statement of opposition is somewhat vague in that it does not specify on which trademarks and trade names incorporating the term ATP the Opponent relies; instead, the pleadings merely indicate that these trademarks *include* ATP LAB and LABORATOIRES ATP and that the trade names *include* ATP LAB, LABORATOIRES ATP, and ATP Athlétique et Thérapeutique Pharma Inc. In the absence of an interlocutory ruling or any limitation by the Opponent at the oral hearing, it remains necessary to determine the scope of the pleadings. Once evidence is filed, this determination must be made by considering both the pleadings and the evidence [see *Novopharm Ltd v AstraZeneca AB*, 2002 FCA 387].

[19] I will therefore begin by determining what trademarks and trade names incorporating ATP are in evidence and whether the Opponent is able to meet its initial burden for each of these. However, the Opponent's evidence in this respect is also imprecise, in that Mr. Légaré refers in his Declaration only to [TRANSLATIONS] "the trademark ATP" ("*la marque ATP*"), "the trade name ATP or ATP LAB" ("*le nom commercial ATP ou ATP LAB*"), and "the trademark and the name ATP" ("*la marque et le nom ATP*")—even when the reference is to documentation of a design mark or trade name that merely *incorporates* "ATP" or "ATP LAB". Under cross-examination, Mr. Légaré simply confirmed that "ATP" can be found on all of the Opponent's goods ("Q—*Et par ailleurs, sur tous les produits, je vais retrouver ATP? R—Oui.*" [transcript page 47]) and that the Opponent also uses the "ATP LAB" trademark ("Q—*Vous utilisez la marque ATP Lab, si je ne me trompe? R—On utilise les deux (2).*" [transcript page 10]). It is therefore necessary to review Mr. Légaré's documentary evidence in some detail.

### ***The Opponent's initial burden***

[20] With respect to the grounds based on making known, I note at the outset that the Opponent has not met its initial burden, since it has not met the requirements set out in section 5 of the Act. In particular, although Mr. Légaré mentioned during cross-examination that the Opponent's goods are distributed worldwide, he did not provide any specific evidence of trademark use in another country prior to the material date.

[21] With respect to the grounds based on prior use, section 16 of the Act does not require an opponent to demonstrate any particular level of use or reputation. If the opponent demonstrates that its trademark or trade name functions as such, that its use meets the requirements of section 4 of the Act, that such use occurred prior to the application's filing date, and that the trademark or trade name was not abandoned at the date of advertisement of the application, then the opponent will meet its burden, even if such use is limited to a single sale or event [*JC Penney Co v Gaberdine Clothing Co*, 2001 FCT 1333; see also *Olive Me Inc, et al v 1887150 Ontario Inc*, 2020 TMOB 26].

[22] With respect to trade names, the principles in sections 2 and 4 of the Act have been held to apply such that use must be in the normal course of a functioning business and in relation to the class or classes of persons with whom such business is to be conducted; display of a trade name in the performance or advertising of services available in Canada will suffice to demonstrate such use [see *Carbon Trust Inc v Pacific Carbon Trust*, 2013 FC 946; and *Mr Goodwrench Inc v General Motors Corp* (1994), 55 CPR (3d) 508 (FCTD)].

[23] As will emerge from my analysis, I am only satisfied that the Opponent has met its initial burden in respect of the composite trademark reproduced below (the Opponent's Logo), which is a variation of the Opponent's trademark ATP & Design wherein (i) most of the dots are in a lighter shade and (ii) the phrase "athletic • therapeutic • pharma", in small print of a lighter shade, is displayed below the acronym (the only evidence provided in colour (a 2019 catalog) has the lighter dots in orange and the lighter text in grey):



(Opponent's Logo)

### The Opponent's business and trade

[24] The Opponent's business conducted under the pleaded trademarks and trade names specializes in the development, production, and marketing of natural health products, which are distributed across Canada and worldwide through a network of international distributors [para 5; transcript pages 11,18]. Mr. Légaré notes the following products in particular (the Opponent's Products), which all correlate to ones covered by the Opponent's applications:

[TRANSLATION] cosmetic preparations for slimming purposes, dietary supplements for general health and well-being, for promoting weight loss, botanical supplements for general health and well-being, calcium supplements, vitamin supplements, mineral supplements, as well as nutritional supplements for building body mass and for general health and well-being.

[25] To illustrate the range of products offered in Canada, Mr. Légaré attaches to his Declaration an undated printout from the Opponent's homepage as well as partial photocopies from the English-language version of a 2018 product catalog distributed to the Opponent's retailers [Exhibit RL-3; transcript page 29 ]. An original French-language version of the 2019 catalog was furnished pursuant to an undertaking made during cross-examination. Mr. Légaré confirms that the 2018 catalog is representative of those distributed in Canada since 2010, clarifying under cross-examination that they were originally published as product sheets, with actual catalogs starting in 2013 as the product line grew [para 14; transcript page 28].

### The Opponent's Logo

[26] Mr. Légaré states that the Opponent has, since its inception in January 2010, used [TRANSLATION] "the trademark ATP" in the normal course of business in Canada [paras 6, 11]. He explains that "ATP" in this context represents the Opponent's invented phrase [TRANSLATION] "Athletic. Therapeutic. Pharma." ("*Athlétique. Thérapeutique. Pharma*") [para 7]. In support, he attaches to his Declaration a product photograph representative of how the trademark has been displayed on the Opponent's Products since 2010 [Exhibit RL-2] and over a dozen invoices representative of certain transactions [Exhibit RL-1; see also transcript pages 13-18]. The Opponent is identified on the invoices by the trade name "Athletic-Therapeutic-Pharma", which is abbreviated



as “atp” in the e-mail and website addresses *info@atp-lab.com*, *sales@atp-lab.com*, and *www.atp-lab.com*, and the Opponent’s Logo is displayed at the top of the invoices. The product packaging, which features a variation of the logo incorporating the phrase “ATP LAB”, will be discussed in a subsequent section.

[27] The invoices, which date from January 2011 to May 2013, are addressed to various health product retailers and gyms in Ontario and Quebec and cover a range of dietary and nutritional supplements. With the exception of one 2013 invoice at no charge, the total amount of each invoice ranges from just over \$200 to over \$2,000. The individual supplements are generally identified only by a product name, which Mr. Légaré explains is designed to give customers an indication of the supplement’s objective, for example, T-ANDRO for increasing androgen/testosterone or ESTRO CONTROL for detoxification from xenoestrogen [transcript page 13]. One exception is the 2013 invoice for a selection of products at no charge, which has “ATP” in the product description “ATP NzW Sample Packs – New Zealand Whey”.

[28] I note that some of the invoices include promotional items and accessories at no charge—namely, shaker cups, lanyards, T-shirts, and brochures—and that a third-party trademark, XPN, appears in the product descriptions for the shaker cups, the lanyards, and some of the T-shirts. Under cross-examination, Mr. Légaré explained that the Opponent was at that time also distributing an acquaintance’s XPN-brand products, and he noted that one of the invoices actually includes two other such products, identified on the invoice simply as “THERMO SLIM” and “RIPPED XTREM” [transcript pages 17–18]. Mr. Légaré did not specify when the distribution arrangement ended, but confirmed that the Opponent currently sells only its own products.

[29] Given the prominence of the Opponent’s Logo on the invoices, and Mr. Légaré’s confirmation that they accompanied the products at the time property transferred to the purchaser [para 12], I am satisfied that a notice of association was given between the Opponent’s Logo and the individual products listed in the invoices at the time of transfer, thus meeting the requirements of section 4 of the Act [per *Tint King of*

*California Inc v Canada (Registrar of Trade Marks)*, 2006 FC 1440, 56 CPR (4th) 223; and *Hortilux Schreder BV v Iwasaki Electric Co*, 2012 FCA 321].

[30] I find that this notice of association would not have been seriously undermined by the “ATP” and “XPN” notations on certain invoices, as these additional notations do not detract from what appears to be the Opponent’s general practice of displaying its trademark for all of the invoiced products only once, at the top of the invoice. Indeed, the entries for actual sales of New Zealand Whey (as opposed to free sample packs) identify this product simply as “NzW Vanille” or “NzW Chocolat” (referring to their respective flavours). As for “XPN”, although Mr. Légaré’s evidence regarding the former distribution arrangement and associated branding is not as clear as it could have been, distributing third-party products does not appear to be the Opponent’s general practice and at least some of the exhibited invoices are for only the Opponent’s own goods.

[31] The invoiced products include the following:

- TA 2.0 T-Andro: Mr. Légaré confirms [at transcript page 26] that this is the former name of the product identified in the catalog as T-Alpha, a supplement that promotes hormonal balance in men, with objectives that include increasing strength and energy, and ingredients that include fenugreek and panax ginseng.
- Es 1.0 Estro Control: According to the catalog, this product promotes hormonal balance in women, provides a good source of antioxidants, and maintains good health, with ingredients that include turmeric, green tea extracts, and calcium.
- IBCAA (lime): The catalog indicates that this product contains instantly-dissolving branched chain amino acids, and is ideal preparation for fitness contests, with objectives that include increasing energy and endurance, developing muscle mass (by decreasing exercise-induced muscle breakdown), improving athletic performance and training, and aiding recovery after training.
- NzW Vanille; NzW Chocolat: The catalog indicates that these flavoured protein powders provide sodium and potassium, with objectives that include facilitating muscle recovery.

- CS Cortisom: Mr. Légaré explains that this product improves sleep and recuperation by diminishing cortisol [transcript page 15].
- HD Hepatik Defence: The catalog indicates that this product's objectives include helping to support liver function and promoting weight loss.

[32] I am satisfied that the Opponent has demonstrated use of the Opponent's Logo at the material date in association with each of the foregoing products, which I find correlate to the following pleaded goods (the Opponent's Goods):

- dietary supplements for general health and well-being;
- dietary supplements for promoting weight loss;
- botanical supplements for general health and well-being;
- calcium supplements;
- mineral supplements;
- nutritional supplements for building body mass;
- nutritional supplements for general health and well-being;
- dietary supplements for promoting faster muscle recovery after exercise;
- herbal supplements for general health and well-being;
- a range of natural health products.

[33] Furthermore, I am satisfied that display of the Opponent's Logo on the covers and several inner pages of the 2018 and 2019 versions of the catalog establishes that this trademark had not been abandoned when the Application was advertised on December 5, 2018.

[34] In view of the foregoing, I am satisfied that the Opponent has met its initial burden to show prior use and non-abandonment of the Opponent's Logo in association with the Opponent's Goods.

The trademark ATP on its own

[35] The Opponent submits that the Opponent's Logo also provides a notice of association between the trademark ATP *per se* and the Opponent's Goods; however, I am unable to reach this conclusion.

[36] Use of a trademark with added words or design features generally qualifies as use of the trademark *per se* if the public, as a matter of first impression, would perceive the trademark *per se* as being used. The issue is a question of fact, dependent upon such factors as whether the trademark stands out from the additional material, for example, by the use of different lettering or sizing, and whether the additional material would be perceived as purely descriptive matter or as a separate trademark or trade name [*Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)].

[37] In the present case, the additional phrase "athletic • therapeutic • pharma" is displayed on a separate line from ATP, is printed in a much smaller size, and is suggestive of certain qualities that may be associated with the Opponent's Goods. However, I also find that this phrase is significant as an allusion to the Opponent's trade name and as creating a distinctive play on words with the scientific meaning of the term ATP. I therefore find that this phrase is an integral feature of the Opponent's Logo, not likely to be discounted by consumers to a sufficient extent for "ATP" to be perceived as a separate trademark.

[38] I would also note that, on the evidence before me, I do not consider the notation "ATP" in the description of the New Zealand Whey sample packs to be likely to have a significant bearing on the perception of the Opponent's Logo. This product is the last of sixteen listed, and none of the other listings includes a similar notation. In the circumstances, I am not satisfied the ATP notation would be perceived as a standalone brand. Furthermore, even if it could be so perceived, it is not clear whether this particular invoice was issued in the normal course of trade. The unit price of each item listed is a zero dollar amount and Mr. Légaré provides no information on the circumstances in which the Opponent provides products free of charge. Although the provision of samples in anticipation of sales may sometimes constitute a transfer in the

normal course of trade, I am not prepared to infer that the transfer in question was necessarily made in such circumstances. Indeed, the invoice for the free shaker cups, lanyards, and T-shirts indicates that they are provided “for Customer Appreciation Day”, which suggests a purely promotional context.

#### The ATP LAB Logo

[39] As noted above, Mr. Légaré also asserts that the product image attached as Exhibit RL–2 to his Declaration is representative of how the trademark “ATP” has been displayed since 2010. The exhibited photograph depicts a container of the IBCAA supplement on which is displayed the composite trademark reproduced below (the ATP LAB Logo), which is a variation of the Opponent’s Logo wherein “ATP” is followed by the word LAB in slightly smaller lettering of the same font (partially obscured in the image):



(ATP LAB Logo)

[40] However, most of the supplements depicted in the Opponent’s catalog bear labels of a slightly different style and, for the most part, these labels appear to have different content where the ATP LAB Logo would be displayed. For example, the corresponding IBCAA product shows empty space while the NEW ZEALAND WHEY product shows a different pattern of text. Only two products, namely the PURE EAA (essential amino acid) and PreBioFib (prebiotic fibre) supplements, show what appears to be a corresponding logo in this area; however, only the leftmost portion is visible, making it unclear whether the Opponent’s Logo or the ATP LAB Logo is displayed.

[41] Accordingly, it appears that the representative image at Exhibit RL–2 is only a general representation as opposed to a precise one. In the circumstances, and in the absence of cross-examination on this specific point, I am prepared to accept that a logo incorporating “ATP” has been displayed in a generally similar manner at least

somewhere on product containers since 2010. However, since Mr. Légaré does not distinguish between different trademarks incorporating “ATP”, the image does not establish whether this logo has always been the ATP LAB Logo. Indeed, the photograph at Exhibit RL–2 is the only piece of evidence where the ATP LAB Logo appears instead of the Opponent’s Logo and Mr. Légaré does not explain the reason for this deviation.

[42] In any event, I do not find that the Opponent’s position would be any stronger if the confusion analysis were to be conducted in respect of the less similar ATP LAB Logo rather than the Opponent’s Logo.

#### The trade name ATP Athletic and Therapeutic Pharma

[43] With respect to trade name use, Mr. Légaré states that the Opponent does business under [TRANSLATION] “the trade name ATP or ATP LAB” and that the product photograph attached as Exhibit RL–2 to his Declaration is representative of how [TRANSLATION] “the trademark and the name ATP” have been displayed on the Opponent’s Products since 2010 [paras 6, 13]. Although the fine print on the product container is difficult to make out from the photograph, a block of text above the ATP LAB Logo appears to contain the trade name “ATP Athletic and Therapeutic Pharma” and the website address *www.atplab.com*.

[44] Again, however, Mr. Légaré does not distinguish between different trade names incorporating “ATP”, and it is therefore not clear whether he is attesting that product packaging has always displayed the specific trade name “ATP Athletic and Therapeutic Pharma” or whether different names may have been displayed in this manner at different times. For example, I note that the only trade name displayed on the exhibited invoices from 2011 to 2013 is Athletic-Therapeutic-Pharma, and Mr. Légaré does not specify whether the trade name on the container is different because the Opponent’s practice is to display different trade names in different contexts or because the Opponent’s name changed in the interim—or for some other reason. In the absence of confirmation from Mr. Légaré as to when use of the specific trade name “ATP Athletic and Therapeutic Pharma” began, I cannot find that the exhibited product image serves as evidence of its use prior to the material date.

### Company logos as trade names

[45] Trademark and trade name usage are not necessarily mutually exclusive; a trademark may be incorporated into a trade name and vice versa [see *Consumers Distributing Co v Toy World Ltd*, 1990 CarswellNat 1398 (TMOB)]. However, in the present case, I am not satisfied that either the Opponent's Logo on the exhibited invoices or the ATP LAB Logo on the product container would be perceived as a company logo functioning as a trade name.

[46] With respect to the Opponent's Logo, Mr. Légaré characterizes the exhibited invoices only as showing use of the *trademark* "ATP". Unlike in the case of the product image, he does not claim that the invoices show use of "ATP" as both a trademark and a trade name. Indeed, the trade name displayed next to the Opponent's address on the exhibited invoices is "Athletic-Therapeutic-Pharma", which does not incorporate "ATP". Furthermore, the phrase "athletic • therapeutic • pharma" in the Opponent's Logo, while reminiscent of the trade name, is presented instead as a series of three concepts. In this context, I find it likely that the Opponent's Logo would be interpreted not as a second trade name but as a trademark merely inspired by the adjacent trade name.

[47] I reach a similar conclusion with respect to the ATP LAB Logo, which is displayed on the exhibited product container next to the trade name "ATP Athletic and Therapeutic Pharma", which does not incorporate the phrase "ATP LAB" and which combines the three separate elements "athletic", "therapeutic", and "pharma" into a single unitary expression suggesting the idea of pharmaceuticals for both athletics and therapy.

### The trade names ATP, ATP LAB, ATP LABS, LABORATOIRES ATP, and ATP LABORATORIES

[48] With respect to other trade names used by the Opponent, I first note that both versions of the catalog refer to the Opponent as "ATP".

[49] The 2019 version also contains references to "*laboratoires ATP*" (on pages 2, 10, and 27) and "ATP laboratories" (on the back cover); however, the initial letter in "*laboratoires*" and "laboratories" is not capitalized, and it is unclear from the context

whether these references are meant as trade names or simply as references to the Opponent's laboratory rooms and the people who work there. The corresponding references in the 2018 version are mostly cut off in the exhibit and do not lend any more clarity.

[50] In addition, although the printout of the Opponent's homepage at Exhibit RL-3 does not display any trademarks or trade names, two individual webpages from this site are introduced as exhibits to Mr. Légaré's cross-examination and they each reference "ATP LAB" in their title. One of them also refers to a product "by ATP labs" and includes posts by "ATP Manager", who is identified by Mr. Légaré as the Opponent's website manager [transcript page 39].

[51] However, Mr. Légaré does not state when the catalogs were published; nor is this date indicated in the catalogs themselves. Although I find it plausible that a 2018 catalog may have already been published in late 2017, I am not prepared to speculate as to whether the exhibited catalog would have been published as early as May 2017. As for the webpages, one contains a blog entry from 2018, and they were both printed in 2019. Accordingly, neither the catalogs nor the webpages establish trade name use prior to the material date.

[52] I would also note that, although Mr. Légaré states the 2018 catalog is representative of those distributed since 2010 [para 14], he does not specify that it is representative of trademark and trade name display, like he did for the exhibited product photograph. His introduction of the catalog exhibit only specifies that it illustrates the *product range* offered under the trademark "ATP" [para 14]. Although Mr. Légaré's full statement is that the exhibit illustrates this product range [TRANSLATION] "among other things" ("*entre autres*"), I am not prepared to find, in the absence of any precision regarding the "other things", that the catalog serves as evidence of use of any *specific* trade names prior to the material date.



### Internet addresses

[53] Finally, I note that I am not prepared to find that the addresses *www.atp-lab.com*, *info@atp-lab.com*, or *sales@atp-lab.com* within the invoices' contact information function as either trademarks or trade names. Given the lack of prominence of these notations, I am not satisfied that they would be perceived as trademarks associated with the individual invoiced products or as trade names. I reach a similar conclusion in respect of the reference to *www.atplab.com* on the product container and catalog.

### ***Conclusion regarding the Opponent's initial burden and rejection of the section 16(3)(c) ground***

[54] In view of the foregoing, I am only satisfied that the Opponent has met its initial burden under section 16(3)(a) of the Act, in respect of the Opponent's Logo, in association with the Opponent's Goods.

[55] For the reasons discussed above, I am not satisfied that the Opponent has met its initial burden in respect of any pleaded trade names. Accordingly, the non-entitlement ground of opposition based on prior trade name use under section 16(3)(c) of the Act is rejected.

### ***The test for confusion***

[56] The Opponent having met its initial burden with respect to the Opponent's Logo under section 16(3)(a) of the Act, the onus is now on the Applicant to establish, on a balance of probabilities, that at the Application's filing date the Mark was not likely to cause confusion with the Opponent's Logo, previously used by the Opponent in association with the Opponent's Goods.

[57] The use of a trademark causes confusion with another trademark if the use of both in the same area would be likely to lead to the inference that the goods or services associated with the applicant's trademark and those associated with the opponent's trademark are manufactured, sold, leased, hired or performed by the same person [section 6(2) of the Act]. Thus, the test for confusion does not concern confusion of the trademarks themselves but rather confusion as to whether the goods and services

associated with each party's trademark come from the same source. Where it is likely to be assumed that the applicant's goods either come from the opponent or are approved, licensed, or sponsored by the opponent, it follows that the trademarks are confusing [see *Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD)].

[58] The test is to be applied as a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applicant's trademark 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 trademarks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23]. Regard must be had to all the surrounding circumstances, including those set out in sections 6(5)(a) to (e) of the Act, but these criteria are not exhaustive and the weight given to each factor will vary in a context-specific analysis [*Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22].

***Section 6(5)(e): Degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them***

[59] The degree of resemblance between the trademarks at issue is often the factor likely to have the greatest effect on the confusion analysis and is thus an appropriate starting point [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27]. Each trademark must be considered as a whole and assessed for its effect on the average consumer as a matter of first impression; it is not the proper approach to set the trademarks side by side and carefully examine them to tease out similarities and differences. However, it is still possible to focus on particular features of each trademark that may have a determinative influence on the public's perception of it [per *United Artists Pictures Inc v Pink Panther Beauty Corp* (1998), 80 CPR (3d) 247 (FCA)]. In this respect, the preferable approach is to begin by determining whether there is an aspect of each trademark that is "particularly striking or unique" [*Masterpiece, supra*, at para 64].

[60] I find the most striking aspect of the Opponent's Logo to be the letters "ATP" with a design above them. Although the remaining text is not as striking, I find it nevertheless constitutes an important element within the trademark as a whole, in light of the unique

play on words it creates. With this addition, the acronym ATP is given a double meaning, standing for both the molecule *adenosine triphosphate* and the phrase “athletic • therapeutic • pharma”. However, as noted above, the parties disagree on whether the average consumer would recognize the first meaning. I will address this issue below.

[61] I find the most striking aspect of the Mark to be the letters “ATP” with the large interwoven ribbon motif above them. Again, although the remaining text is not as striking, I find it still constitutes an important element within the trademark as a whole, since it creates the phrase “ATP SCIENCE”, suggesting either the science of ATP or science practiced using ATP. Again, whether the average consumer would understand ATP to be the *adenosine triphosphate* molecule will be discussed below.

[62] On balance, I find there to be a fair degree of resemblance between the two trademarks.

[63] Visually, both trademarks feature the large acronym ATP in a stylized font, and I agree with the Opponent that this element draws attention in both trademarks. Moreover, although their fonts are different, and the Opponent’s Logo is more elongated horizontally, there is some resemblance in the trademarks’ overall layout, being a stacked arrangement of a design element above the acronym ATP in stylized block lettering, above text in small print.

[64] That said, there is virtually no visual resemblance in the striking design elements of each trademark, even though both feature abstract circular shapes. Furthermore, I agree with the Applicant that the Mark’s large and somewhat intricate design element draws the eye to a greater extent than the Opponent’s smaller and wispiest design element. In terms of visual impression, I find the Mark’s design element slightly dominant over the word elements owing to its sheer size, whereas in the Opponent’s Logo, I find the larger ATP element to be slightly dominant over the design. Nevertheless, the ATP element remains very prominent in the Mark as well.

[65] Phonetically, there is a point of resemblance in that both trademarks begin with the sound of the letters A, T, P. Moreover, the first portion of a trademark is generally considered to be the most important for the purpose of distinction [see *Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 (FCTD)]. However, to the extent that the words in small print would also be sounded, the marks as a whole differ phonetically.

[66] As for ideas suggested, I find them to be similar. The verbal portion of both trademarks is dominated by the acronym ATP, and in both cases this acronym is followed by descriptive text of a scientific character—the words THERAPEUTIC and PHARMA being suggestive of medical science; the word ATHLETIC in this combination being suggestive of sports science; and the word SCIENCE explicitly denoting science in general.

[67] The design elements primarily suggest different ideas: a wave of different sized dots in the Opponent's Logo and a fancy vortex- or knot-like design in the Mark. However, in the context of the trademarks as a whole—which end with descriptive text of a scientific character and are for use with nutritional supplements—I also find there to be a slight similarity in the ideas suggested by the respective designs, to the extent that both are abstract designs with a somewhat scientific look and feel. For example, the Opponent's Logo might suggest a stream of chemical particles, droplets, or bubbles, while the Mark might suggest an abstract representation of some sort of biological structure.

[68] As for the scientific connotation of "ATP", as noted above, the parties disagree on what meaning the average consumer would ascribe to this acronym. The Applicant submits that it would be recognized as standing for *adenosine triphosphate*, the molecule that delivers the body's energy, including to the muscles. The Applicant notes numerous dictionary definitions and reference sources showcasing the molecule's major role in the human body and, on cross-examination, Mr. Légaré confirmed that "ATP" is a very basic molecule, produced when you eat and breathe [pages 33–34]. Conversely, the Opponent argues that the evidence fails to establish the average consumer would

know this scientific meaning. In this respect, the Opponent notes Mr. Légaré's evidence on cross-examination to the effect that he has only spoken with a few clients who demonstrated this knowledge [page 45].

[69] The Registrar may take judicial notice of the dictionary definitions of words found in trademarks [*Tradall SA v Devil's Martini Inc*, 2011 TMOB 645]. However, in assessing what consumers would understand from a combination of ordinary words, the Registrar must not only consider the evidence but also apply common sense [see *Candrug Health Solutions Inc v Thorkelson*, 2008 FCA 100; and *Neptune SA v Attorney General of Canada*, 2003 FCT 715]. Furthermore, the Registrar is not entitled to take judicial notice that a word has only a single meaning without evidence to that effect [*McDowell v Laverana GmbH & Co KG*, 2017 FC 327; *Caterpillar Inc v Puma SE*, 2021 FC 974].

[70] I find that the reference sources cited by the Applicant, considered together with Mr. Légaré's evidence confirming the molecule's fundamental nature, provide a basis for the inference that at least some consumers would recognize the acronym "ATP" as denoting a molecule involved in energy metabolism, and thus a potential ingredient for dietary supplements. I find that these consumers would in turn recognize the play on words in the Opponent's trademark and would perceive the Mark as suggesting either the science of ATP or science practiced using ATP. Thus there would be a point of resemblance in the choice of the ATP molecule as the basis for the trademarks. On the other hand, there would be a point of difference in that the Opponent incorporates ATP in a play on words whereas the Applicant uses it in a more descriptive phrase.

[71] From the perspective of those consumers who are unfamiliar with *adenosine triphosphate*, there would be a point of resemblance in that both trademarks feature the same acronym or combination of letters in a scientific context. There would also be a point of difference in that the Opponent ties the acronym to a matching phrase whereas the Applicant adds only the general qualifier "SCIENCE".

[72] It has often been held that, when a portion of a trademark is a common descriptive or suggestive word, its importance diminishes [see *Park Avenue*, *supra*; and *Vancouver Sushiman Ltd v Sushiboy Foods Co* (2002), 22 CPR (4th) 107 (TMOB)].

Thus, there may be a tendency among consumers familiar with *adenosine triphosphate* to discount somewhat the importance of the prominent ATP element in the parties' respective trademarks, to the extent that it suggests a character or quality of the associate goods, such as a possible ingredient, function, or field of use. For consumers unfamiliar with this term, there may still be a tendency to focus more on the stylization and design features, given that initials and simple letter combinations *per se* are generally considered to be weak elements [see *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)]. However, regardless of which way "ATP" is interpreted, I find the tendency to minimize its importance when recalling the Opponent's Logo would be only slight, given the added layer of meaning created by the "explanatory" phrase in the Opponent's Logo.

[73] In sum, although I find the large ribbon vortex motif in the Mark to be a striking feature, I am not satisfied it outweighs the overall conceptual similarity of the parties' design marks and the resemblance between their lower portions, featuring a large, stylized "ATP" above smaller, scientifically-themed wording. Although the specific design elements differ, and although the word SCIENCE is significantly shorter in length and broader in meaning than "athletic • therapeutic • pharma", the general impression of operating in the field of science remains. On balance, owing to the prominence of the "ATP" element visually, phonetically, and conceptually, as well as the similarity between the trademarks in overall layout and in the general ideas suggested by the trademarks as a whole, I find that the resemblance factor slightly favours the Opponent.

***Section 6(5)(a): Inherent distinctiveness of the trademarks and extent to which they have become known***

[74] Consideration of the section 6(5)(a) factor involves a combination of both inherent and acquired distinctiveness. Trademarks lacking in distinctiveness are only entitled to a narrow ambit of protection, in the sense that a greater degree of discrimination may fairly be expected from the public and relatively small differences between the trademarks may suffice to avert confusion [*GSW, supra*].

### Inherent distinctiveness

[75] The inherent distinctiveness of a trademark refers to its originality. Trademarks consisting wholly or in part of words descriptive of the articles to be sold or of the services to be rendered attract a more limited range of protection than does an invented, unique, or non-descriptive word or an original design [see *General Motors Corp v Bellows*, [1949] SCR 678, citing *Office Cleaning Services Ltd v Westminster Window & General Cleaners, Ltd* (1946), 63 RPC 39 at 41 (HL); and *Fairmount Properties Ltd v Fairmount Management LLP*, 2008 FC 876]. It has also been held that trademarks consisting of a simple combination of letters or initials, without accompanying distinctive indicia, tend to have a low degree of inherent distinctiveness [GSW, *supra*; *ITV Technologies Inc v WIC Television Ltd*, 2003 FC 1056].

[76] The Applicant submits that the Opponent's Logo has little inherent distinctiveness because its dominant element is well known as an acronym for an important molecule that has long been commercially available both as a finished product and as an ingredient. Additionally, the Applicant submits that the phrase "Athletic. Therapeutic. Pharma." is either clearly descriptive or deceptively misdescriptive of the nature and function of the Opponent's products. In the Applicant's submission, the Mark has a higher degree of inherent distinctiveness, owing to its original design element and to the word SCIENCE not providing any clear description of the Goods.

[77] In support of the descriptiveness of "ATP", the Applicant draws attention to the evidence Ms. Roberts provides in her first affidavit, to which she attaches definitions from three French dictionaries dating from 1963 to 1993, three English dictionaries dating from 1986 to 2001, and one science & technology dictionary published in 1992, each of which indicates that "ATP" is an acronym for *adenosine triphosphate* (in English) or *adénosine triphosphate* (in French)—a biochemical serving as a source of energy for physiological processes, noted in several of the dictionaries especially for its importance in muscle contraction [paras 12-19, Exhibits H-N]. Also attached to Ms. Roberts' first affidavit are extracts from a biochemistry textbook published in 1975 and the *Merck Index* chemical encyclopedia published in 1989, providing additional detail on the nature and function of the ATP molecule [paras 9-11, Exhibits F-G].

[78] The Applicant cites *R v Krymowsky*, 2005 SCC 7, for the proposition that dictionaries are to be considered a “source of indisputable accuracy” for taking judicial notice not only of the meanings of words but also that the meanings would be known to the average person. In the Applicant’s submission, anyone may know what is in a regular dictionary, which contains words of common parlance and in the common domain. However, I agree with the Opponent that dictionaries, while accurate records of the meanings of words, do not contain only words that would be known to the average consumer; they also contain archaic and obscure words. Indeed, in *Krymowsky*, dictionaries were proposed only to determine whether a word that had been uttered *could* have a certain meaning; there was no suggestion that dictionaries indicated how extensively that meaning would be known and, indeed, it was held that other factors also had to be considered in determining the speakers’ intentions.

[79] Attached to Ms. Roberts’ second affidavit are the results of the Internet searches she conducted through the Google search engine by entering the phrases “atp as ingredient”, “atp as an ingredient”, and “Adenosine Triphosphate” [Exhibits 1, 14, 17]. These searches located additional reference works, including a Britannica Online Encyclopedia entry [Exhibit 13]; a Wikipedia encyclopedia entry [Exhibit 18]; a Bristol University webpage featuring ATP as its first “Molecule of the Month” in 1998 [Exhibit 2]; and a Science Direct overview of books containing chapters on the ATP molecule, eight of which were published prior to 2017 [Exhibit 31]. The exhibited extracts generally indicate that ATP is a carrier of energy, sometimes described as a form of energy “currency”, transporting the energy derived from food throughout the human body to fuel a large variety of processes, most notably mechanical work (such as muscle movement), transportation of other molecules across membranes, and biosynthesis.

[80] In addition, Ms. Roberts’ search results include entries from database websites describing the ATP molecule’s application within nutritional supplements and cosmetics, including Drug Bank.ca [Exhibit 4], Paula’s Choice Skincare ingredient dictionary [Exhibit 5], and Environmental Working Group’s Skin Deep ingredient profiles [Exhibit 6]. Research articles published in the *Journal of the International Society of Sports Nutrition* (JISSN) in 2012 and 2016, respectively, available through a U.S.



government website, describe studies of supplements designed to directly or indirectly increase the body's concentrations of ATP, noting the molecule's importance as an energy source and its role in myriad processes, including cardiac function, neurotransmission, blood flow, and muscle contraction [paras 11–12, Exhibits 10–11]. An October 26, 2017 article published on William Reed's news and analysis website *Nutra ingredients-usa.com* (Nutra Ingredients), describes a study on ATP supplementation to boost energy and performance in resistance training [Exhibit 7].

[81] Finally, Ms. Roberts' searches located various websites advertising dietary supplements that either contain ATP or are intended to increase the body's own production of it. These references will be discussed in the context of the state of the marketplace as an additional surrounding circumstance that could impact a trademark's distinctiveness. However, I note at this stage that one of the Opponent's own products—the MYOPRIME 1.0 performance enhancing athletic training supplement—contains an ingredient identified as “PEAK ATP”, which Mr. Légaré confirmed under cross-examination is a synthetic version of *adenosine triphosphate* obtained from a third party [transcript page 33]. The MYOPRIME supplement is described in the Opponent's promotional materials as being designed to enhance the body's ability to generate more ATP, with the objectives of increasing energy levels and blood flow during resistance training, thus improving strength, power, performance, endurance, and muscle growth. A PEAK ATP logo is displayed among other logos in the MYOPRIME catalog entry, where it is also partially visible on the depicted bottle, and the corresponding word mark also features in the blog entry titled “What is Peak ATP?” [at transcript Exhibit P–1].

[82] I accept from the above evidence that the term “ATP” would be descriptive of supplements that either contain *adenosine triphosphate* or increase the body's natural production of it, and suggestive of supplements intended to increase energy or muscle performance. However, a question remains as to whether this meaning would come to the mind of an average consumer as a matter of immediate impression. In this respect, I note that only some of the materials located by Ms. Roberts indicate that they were published prior to the material date and none of the evidence indicates to what extent Canadians may have accessed the various websites or otherwise consulted the

referenced articles and books. Furthermore, although I am of the view that the mentions of PEAK ATP on bottles of MYOPRIME would arguably reinforce the descriptive connotation of “ATP” in the Opponent’s Logo, the evidence does not establish whether MYOPRIME was available at the material date. Considering the evidence as a whole, I am prepared to accept that at least consumers with a scientific background, a keen interest in biology, or a special interest in dietary supplements for athletic performance, would likely be familiar with *adenosine triphosphate* and recall it upon seeing the acronym “ATP” in association with a line of dietary supplements.

[83] With respect to the phrase “athletic •therapeutic •pharma.”, the Applicant’s principal argument is that the phrase is deceptively misdescriptive, because Mr. Légaré admitted during cross-examination that the Opponent is not a pharmaceutical company and that the Opponent’s supplements do not have any therapeutic functions [transcript pages 9–10]. At the hearing, the Applicant submitted that such misdescriptiveness should be discouraged and questioned whether consumers would perceive the letters “ATP” as an acronym for a misdescriptive phrase as a matter of first impression.

[84] However, I find that the above phrase is merely suggestive. In this respect, Mr. Légaré states that the Opponent has always produced its natural health products with quality control and manufacturing standards approaching those of the *pharmaceutical* industry [paras 8–9]. He also explained under cross-examination that certain *therapists* use the Opponent’s products, even if he cannot claim direct therapeutic benefits [transcript pages 9, 30]. Indeed, although the Opponent’s catalog contains disclaimers to the effect that the products do not aim to diagnose, treat, cure, or prevent illness, the catalog references “pharmaceutical grade” ingredients in the GLUTAMED, New Zealand Whey, and New Zealand Isolate supplements, and it mentions the Omega-3 triglyceride’s therapeutic power (“*puissance thérapeutique*”) and the Omega-3 oil’s “incredible therapeutic benefits”. Finally, as admitted by the Applicant, the Opponent’s supplements are sold to gyms and advertised for use in *athletic* training and for improving *athletic* performance.

[85] Overall, I find that the Opponent's Logo has a moderate level of inherent distinctiveness. Although its largest element is an acronym that may be suggestive if not descriptive in the context of dietary supplements, I find that this acronym is also part of an invented play on words. Moreover, the trademark as a whole features a design element that is more than a simple geometric pattern and, in my view, provides sufficient visual interest to be a key feature.

[86] I reach this conclusion also bearing in mind that the Opponent's Logo is used as a house mark for a range of supplements, and not as a product name like MYOPRIME or as an ingredient name like PEAK ATP. I will return to this distinction in my consideration of the state of the marketplace.

[87] I find that the Mark has a similar level of inherent distinctiveness. In this case, the acronym ATP is equally suggestive if not descriptive. Moreover, the added word SCIENCE evokes the idea of supplements having scientific formulations, and I do not find the combination "ATP SCIENCE" to be as inventive as the Opponent's play on words. However, I find that the larger and more intricate design element in the Mark imparts a certain level of inherent distinctiveness.

#### Extent to which the trademarks have become known

[88] A trademark's distinctiveness can be enhanced through use and promotion in the marketplace [see *Sarah Coventry Inc v Abrahamian* (1984), 1 CPR (3d) 238 (FCTD)].

[89] The Applicant submits that, regardless of any acquired distinctiveness, where a party chooses to use a suggestive, non-distinctive trademark, it must "accept a certain amount of confusion without sanction" [*Man & His Home Ltd v Mansour Electronics* (1999), 87 CPR (3d) 218 (FCTD), citing *Molson Co v John Labatt Ltd./John Labatt Ltée* (1994), 58 C.P.R. (3d) 527 (FCA) at 529-530]. However, while I agree that acquired distinctiveness is not a trump card, I do not find that this principle, expressed in the context of an infringement action, detracts from the guidance provided by the Supreme Court of Canada to the effect that *all* of the surrounding circumstances must be

considered when assessing likelihood of confusion under the Act, with the weight given to each factor depending on the specific context of the case [*Mattel, supra*].

[90] The Mark was applied for based on proposed use and there is no evidence of it having been promoted prior to the material date. Conversely, Mr. Légaré has established use of the Opponent's Logo in association with various natural health supplements in Canada dating back to 2011. However, the extent of its use and promotion in Canada prior to the material date is unclear.

[91] With respect to use, Mr. Légaré attests that the Opponent's annual sales of products [TRANSLATION] "bearing the mark and name ATP" ("*portant la marque et le nom ATP*") have never fallen below \$100,000 since 2011 or below \$4 million since 2015 [para 16]; however, he does not state whether these figures relate exclusively to Canada. Since Mr. Légaré stated during cross-examination that the Opponent's products are distributed both across Canada and worldwide, through a network of international distributors [transcript pages 11,18], I am not prepared to infer that the annual sales figures provided would necessarily relate only to Canada.

[92] Furthermore, Mr. Légaré advised during cross-examination that the Opponent also manufactures products for other companies, to which it applies *those companies'* brands [transcript pages 18–19], and he does not specify whether his sales figures include such third-party branded goods. Although he later confirmed that "ATP" can be found on *all* of the Opponent's products [transcript page 47], this is not equivalent to saying that the Opponent's Logo can be found on all of them.

[93] Concerning promotion, the exhibited catalogs post-date the material date, as do the two webpages displaying the Opponent's Logo introduced as exhibits to Mr. Légaré's cross-examination. The Opponent's Logo is also displayed on five advertisements Mr. Légaré attaches as Exhibit RL–4 to his Declaration to show how the Opponent's ATP branded products are advertised in Canada; however, I find that these too are likely from after the material date. In this respect, I note the advertisement for the "new and improved" men's health supplement ALPHA JACK, which Mr. Légaré explained under cross-examination is a reformulation of the product previously offered

as T-ALPHA [pages 31–32]. Presumably, this advertisement would have been published subsequent to the 2018 and 2019 catalogs, which still advertise T-ALPHA. I reach the same conclusion regarding the advertisement for OPTISOM 3.0, since the catalogs advertise what appears to be an earlier version, OPTISOM 2.0. The remaining three advertisements are in a similar style and two of these likewise feature what appear to be new products not in the catalogs: ADIPOSLIM (“new weight loss supplement”), and KIK 2.0 (“new and improved pre-workout nootropic supplement”).

[94] Mr. Légaré provides annual advertising expenditures for products bearing the trademark and the trade name ATP between 2011 and 2018, which increase from over \$30,000 in 2011 to over \$250,000 in 2016 [para 17]. Since he attests that the 2018 catalog and the advertisements are representative of the catalogs and advertising distributed since 2010 [paras 14–15], it may well be that the Opponent’s Logo has been displayed on similar advertising over the years. Unlike the evidence of trade name use, the evidence with respect to the Opponent’s design marks consistently shows only the Opponent’s Logo on documentation (the ATP LAB Logo being on product packaging instead). Again, however, Mr. Légaré does not specify whether the advertising figures represent only the *Canadian* portion of the Opponent’s advertising.

[95] In the circumstances, and in the absence of any information on the relative size of the Opponent’s Canadian and international markets, it is not possible to determine whether the Opponent’s Logo has been used and promoted in Canada to anything more than a limited extent.

#### Conclusion with respect to inherent and acquired distinctiveness

[96] On balance, I find that the evidence is inconclusive regarding the extent to which the average consumer would consider the ATP element in the parties’ trademarks to be an everyday dictionary word. However, regardless of whether “ATP” is seen as being descriptive of the products’ composition or function, as a skillful allusion to desired results, or merely as an initialism, the level of inherent distinctiveness of each of the parties’ trademarks as a whole would be similar, and relatively low. The Mark’s level of inherent distinctiveness is slightly enhanced by the more striking design feature;

however, the inherent distinctiveness of the Opponent's Logo is also slightly enhanced, by the play on words. Only the Opponent filed evidence of use and promotion; however, given its lack of precision, I cannot conclude that the Opponent's Logo had become known at the material date to more than a limited extent. Overall, I find that the section 6(5)(a) factor favours the Opponent, but only slightly.

***Section 6(5)(b): Length of time the trademarks have been in use***

[97] As noted by the Federal Court of Appeal, “[a] mark that has been in use a long time, versus one newly arrived on the scene, is presumed to have made a certain impression which must be given some weight” [*United Artists Pictures Inc v Pink Panther Beauty Corp*, [1998] 3 FC 534]. In the present case, at the material date, the Opponent's Logo was an established brand used for over six years, as demonstrated by the Opponent's evidence of sales to various Canadian retailers dating back to January 2011. Conversely, the Application is based on proposed use. Accordingly, this factor favours the Opponent.

***Sections 6(5)(c) & (d): Nature of the parties' goods, businesses, and trades***

[98] It appears that the nature of the parties' goods in this case is largely the same. The Opponent's Goods are either the same as or directly overlapping with the Goods. In addition, the invoiced products supplied at no charge in 2013 include a vitamin D3 spray, showing that aspects of the Opponent's available product line also came within the ambit of the Good “vitamin supplements” since prior to the material date.

[99] There appears to be no evidence of use of the Opponent's Logo in association with “herbal supplements for promoting faster muscle recovery after exercise”, “protein powders for meal replacement”, or “nutritional supplement meal replacement bars for boosting energy”. However, I find significant overlap between such Goods and the Opponent's invoiced pure beef and New Zealand whey protein powders for promoting muscle recovery and its various invoiced dietary supplements for boosting energy, notably those providing amino acids (IBCAA) or essential fatty acids (LIPIDRIUM).

[100] With respect to the channels of trade, the evidence shows that, at the material date, the Opponent's products were sold through health product retailers and gyms to consumers of dietary supplements [see Mr. Légaré's Declaration at para 20]. Under cross-examination, Mr. Légaré mentioned that the Opponent has an international distribution network that includes specialist trainers, medical doctors, and naturopaths; however, he did not specify whether the Opponent's Goods travelled through such channels in Canada at the material date.

[101] The Applicant furnished no evidence of its channels of trade. Ms. Roberts' Internet searches located an *atpscience.com* website—which appears to reference a product targeting muscle energy and an online store for nutritional supplements and protein [DJR No.2 Exhibit 1]—however, Ms. Roberts did not furnish any printouts from this site or mention whether it is affiliated with the Applicant.

[102] In any event, the Goods must be assessed having regard to the channels of trade that would normally be associated with such goods [per *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); and *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export* (1986), 12 CPR (3d) 110 (FCA)]. Given the similarities between the Goods and the Opponent's Goods, and in the absence of evidence to the contrary, I consider it reasonable to infer that the parties' channels of trade would likely be the same or similar.

[103] Overall, these two factors favour the Opponent.

***Additional surrounding circumstance: State of the register and marketplace***

[104] The Applicant submits that the acronym ATP is not unique to the Opponent but is rather in use by other manufacturers of products consisting of or containing ATP as a reagent, ingredient, or nutritional supplement.

[105] When trademarks owned by different persons have a common characteristic, its proprietorial significance tends to be negated. The common occurrence of a certain element in trademarks tends to cause purchasers to pay more attention to the other

features of the trademarks and to distinguish between them by those other features. However, this principle requires that the trademarks comprising the common element be in fairly extensive use in the relevant market [*Maximum Nutrition Ltd v Kellogg Salada Canada Inc* (1992), 43 CPR (3d) 349 (FCA)].

[106] Where a large number of relevant trademarks are identified on the register, the Registrar can infer that the element they all have in common is used in the marketplace [see *Maximum Nutrition, supra*; *McDowell v Laverana GmbH & Co KG*, 2017 FC 327; and *Canada Bread Company, Limited v Dr Smood APS*, 2019 FC 306]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the trademarks at issue, and (iii) include the element at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197, aff'd 2017 FC 38]. Where the number of relevant trademarks identified on the register is not large, evidence of use needs to be furnished.

[107] Ms. Roberts attaches to her first affidavit the results of her online searches of the Canadian Trademarks Database for active trademarks containing the term “ATP” in association with supplements and nutrients [paras 2–6, Exhibits A–D]. Besides the parties’ trademarks, these searches located registrations for the trademarks ATP Nutrition & Design (TMA820,190) and ATP NRG (TMA918,736), both owned by ATP Nutrition Limited for use in association with “plant growth nutrients and supplements”, and application no. 1,957,188 in the name of VDF FutureCeuticals, Inc. for the trademark ELEVATP for use in association with “dietary and nutritional supplements”, which has not yet been examined. Two registrations in a different field (preparations for growing plants) and an application that has not yet been allowed does not enable me to draw any meaningful inferences regarding the state of the marketplace for natural health products in Canada, or consumers’ ability to distinguish between trademarks containing the acronym ATP in association with dietary and nutritional supplements.

[108] The results of Ms. Roberts’ searches of the online marketplace are set out in her second affidavit. In particular, her aforementioned Google searches for “atp as ingredient” and “atp as an ingredient” found the following websites referencing branded



supplements that either contain ATP as an ingredient or are designed to enhance the body's natural ATP production:

- XtendLife, regarding its XtendLife branded Total Balance Children's, Total Balance Men's, and Total Balance Men's Premium comprehensive supplements containing ATP for benefits that include increasing physical energy and supporting various physiological processes (the website includes a blog entry on the history and health benefits of ATP) [Exhibit 3];
- Deerland Probiotics & Enzymes, regarding its ATPPrime digestive supplement, which both provides ATP and enhances its natural production for processes like digestion and metabolism [Exhibit 8];
- MaxGSLCanada.ca, regarding Max International's MaxATP energy drink to support the cellular production of ATP [Exhibit 12];
- Mary Ross MD Supplements, regarding a Researched Nutritionals branded ATP 360 supplement to support natural ATP generation and enhance cellular energy production, available for shipment to Canada [para 16, Exhibit 15];
- West Clinic Online, regarding a NATURES NX branded ATP TORCH supplement to support ATP synthesis and healthy energy levels [Exhibit 16]; and
- The aforementioned Nutra Ingredients website, whose October 2017 article on ATP supplementation for energy and performance referenced a commercial product from PromoMera containing the PEAK ATP form of ATP [Exhibit 7].

[109] These searches also located a website advertising branded formulations for use in manufacturing, namely Formulator Sample Shop, which advertises an FSS ATP combination of ATP with collagen amino acids designed to increase energy levels in aging cells and to support the biosynthesis of proteins that revitalize aging skin [Exhibit 9]. However, since this website targets manufacturers, I find it unlikely to come to the attention of consumers in the market for supplements.

[110] Ms. Roberts also conducted Google searches specifically for "Peak ATP" and "Peak ATP Canada" [Exhibit 19]. PEAK ATP was registered in the United States in 2005

as both a word mark and a design mark by Technical Sourcing International, Inc. (TSI), for use in association with “dietary aid, namely, an adenosine triphosphate ingredient used in dietary and/or nutritional supplements, as well as food products and beverages” [DJR No.1 paras 7–8, Exhibit E]. Websites of the TSI group of companies describe the key benefits of this ingredient as including increased blood flow and increased muscle power, muscle recovery, and muscle growth [DJR No.2 Exhibits 21–22]. Ms. Roberts’ searches located the following websites either advertising supplements containing the PEAK ATP ingredient or reporting on studies of supplementation with this product:

- Muscle Tech, *Amazon.ca*, and *Supplementsource.ca*, advertising Muscle Tech branded PEAK ATP supplements [Exhibits 24, 27, 29];
- *Amazon.com*, advertising Swanson brand PEAK ATP supplements for physical energy and healthy circulation [Exhibit 25];
- *Supersmart.com*, advertising Super Smart brand supplements containing PEAK ATP [Exhibit 26];
- *Evitamins.com* and *Amazon.ca*, advertising LifeExtension brand PEAK ATP supplements [Exhibits 28, 29];
- Natural Healthy Concept, advertising KLEAN brand supplements containing PEAK ATP and branched chain amino acids [Exhibit 30];
- The aforementioned website for the JISSN, with a 2012 report on the effect of supplementation with PEAK ATP on muscle strength and fatigue during repeated high intensity exercise [Exhibit 20]; and
- The aforementioned Nutra Ingredients website, with a May 3, 2017 article regarding a study on the effect of supplementation with PEAK ATP on blood sugar and heart health [Exhibit 23].

[111] I note that the *Amazon.com* site at Exhibit 25 also lists other brands of ATP supplements, namely a Dr. Dale’s brand ATP MAX supplement, an ATP Cofactors supplement from Optimox, an “A.T.P.” supplement from Montiff, a NutraBio brand ATP Evolution supplement, and an ATP Boost supplement whose house brand is unclear.

[112] Finally, Ms. Roberts' Google search for "ATP Purchase" located various websites offering preparations of the ATP molecule for sale for research purposes, including the websites of Thermo Fisher Scientific, SigmaAldrich, Selleck Chemical, AdooQ Bioscience, and New England BioLabs (all of which indicate availability in Canada) and BOC Sciences [Exhibits 32-38]. However, as these ATP products are for scientific research rather than supplementation, I find them unlikely to come to the attention of consumers in the market for supplements.

[113] The results of Internet searches are generally considered hearsay and cannot be relied upon for the truth of their contents. At best, they show how the webpages in question appeared at the time they were printed. In the present case, all of the pages were printed in 2020 and, with the exception of the 2012 report and May 3, 2017 article, there is no indication that these pages would have reflected the same information, or even been in existence, at the material date. Even if I were prepared to infer that at least *some* of the websites were accessible in Canada at the material date, this fact in itself does not establish how long the sites have been operating in Canada, the extent of their operations, or the extent to which Canadians have accessed the sites.

[114] Furthermore, I note that the vendors located by Ms. Roberts appear to use the acronym ATP either as a generic reference to *adenosine triphosphate* or as part of a suggestive product name signaling that the product contains or stimulates production of *adenosine triphosphate*. In almost every case, the product is also branded or associated with a house mark or trade name (underlined in the examples above), and I note that none of these house marks or trade names include the element "ATP". I would be unable to infer from such evidence that the average consumer is accustomed to seeing the letters "ATP" in corporate logos or house brands for a full range of supplements.

[115] At best, I find that the use of ATP in such descriptions and product names is relevant in that it tends to corroborate the dictionary definitions provided by Ms. Roberts and supports the Applicant's argument that "ATP" has a descriptive meaning. In this case, although the evidence is largely from after the material date, I consider it likely to reflect the general meaning "ATP" had at the material date [see *Speedo Knitting Mills*

*Pty Ltd v Beaver Knitwear (1975) Ltd (1985)*, CPR (3d) 176 (TMOB) re drawing inferences about the general situation at the material date from subsequent evidence]. However, in the absence of evidence regarding how well these third-party references would have been known to the average Canadian consumer, I am only prepared to give them minimal weight.

[116] In sum, I find that the evidence concerning the state of the marketplace favours the Applicant, but only slightly.

***Conclusion with respect to non-entitlement based on prior trademark use under section 16(3)(a)***

[117] In an opposition proceeding, the onus is not on the Opponent to show that confusion is likely but rather on the Applicant to satisfy the Registrar, on a balance of probabilities, that there is no reasonable likelihood of confusion. The presence of a legal onus on the applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against the applicant.

[118] Having considered all the surrounding circumstances, I find that the probabilities are evenly balanced between a finding of confusion with the Opponent's Logo and a finding of no confusion. I reach this conclusion considering the fair degree of resemblance between the parties' trademarks and the near identity in the nature of the goods and probable channels of trades. Although the inherent distinctiveness of the Opponent's Logo is only moderate and, on the available evidence, I am unable to conclude that it has become known to more than a limited extent, it was nevertheless an established brand by the material date, with use in Canada going back over six years. Conversely, the Application is based on proposed use. In my view, a casual consumer encountering the Mark with only a general recollection of the Opponent's Logo might well assume, as a matter of first impression, that the Goods associated with the Mark come from the Opponent. I find the evidence concerning the state of the marketplace insufficient to tip the even balance in the Applicant's favour, in light of the limitations discussed above.

[119] Based on all the foregoing, I find that the Applicant has not met its legal onus to demonstrate, on a balance of probabilities, that there was no reasonable likelihood of confusion between the Mark and the Opponent's Logo at the material date. The non-entitlement ground of opposition based on prior trademark use under section 16(3)(a) of the Act is therefore successful.

### **GROUND OF OPPOSITION BASED ON DISTINCTIVENESS UNDER SECTION 2**

[120] The Opponent pleads that the Mark is not and cannot be distinctive of the Goods within the meaning of section 2 of the Act, because the Mark does not distinguish the Goods from the Opponent's goods or services, having regard to the facts alleged in the statement of opposition. In the absence of further details, this pleading is restricted to an allegation of confusion with the Opponent's trademarks and trade names consisting of or incorporating the term ATP, including those discussed under the previous grounds.

[121] The material date for the distinctiveness ground is December 5, 2018, the date the statement of opposition was filed [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185]. To succeed, an opponent relying on its own trademark or trade name must establish that the mark or name had become sufficiently known in Canada as of this date to negate the distinctiveness of an applicant's trademark. In this respect, an opponent has the initial burden to show that its trademark or trade name was known in Canada to some extent at least, *i.e.* that its reputation was "substantial, significant or sufficient", or else that it was well known in a specific area of Canada [*Motel 6 Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657]. In either case, an opponent cannot simply assert that its trademark or trade name was known; there must be clear evidence of the extent to which it was known [*Bojangles, supra*; *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10].

[122] For the reasons discussed under the entitlement grounds, I find the evidence falls short of establishing that the Opponent's Logo—and/or any of the other trademarks and trade names identified in my analysis—were known in Canada to a sufficient extent to negate the distinctiveness of the Mark, even at the later material date.

[123] Although the evidence shows that some sales were made to retailers in Canada under the Opponent's Logo, the limited evidence of sales ends in 2013. Furthermore, the sales figures for 2011, 2015 and 2018 do not establish the extent to which any particular trademark or trade name would have become known in Canada, since the figures are not broken down by geographic market, trademark, or trade name.

[124] The advertising figures for the years 2011 to 2018 are similarly inconclusive, and Mr. Légaré provides no details regarding the extent of distribution of any of the Opponent's promotional materials. For example, I find it reasonable to infer that the 2018 catalog, which invites readers to "be the first to get our brand new 2018 products", would have been published prior to December 5, 2018, and thus constitutes evidence of use of the trade name "ATP" by the material date. However, although Mr. Légaré specified under cross-examination that such catalogs are distributed to retailers, he gave no indication of the extent to which retailers would then make the catalogs available more widely, to consumers [see transcript pages 28–29]. One is left to speculate on such points, which the Federal Court has indicated should be resisted [*1648074 Ontario Inc v Akbar Brothers (PVT) Ltd*, 2019 FC 1305].

[125] In view of the foregoing, the non-distinctiveness ground of opposition is rejected, as the Opponent has failed to meet its evidential burden.

### **DISPOSITION**

[126] In view of all the foregoing, pursuant to the authority delegated to me under section 63(3)(a) of the Act, I refuse the Application pursuant to section 38(12) of the Act.

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Oksana Osadchuk  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

## **SCHEDULE A: GOODS IN OPPONENT'S APPLICATIONS (NICE CLASS & STATEMENT)**

3(1) *Préparations cosmétiques pour l'amincissement.*

[TRANSLATION] Cosmetic preparations for slimming purposes.

5(2) *Acide folique; capsules de ginseng pour la santé et le bien-être; compléments alimentaires d'acides aminés, d'albumine, d'huile de graines de lin, de caséine; de germes de blé, de graines de lin, de levure, de pollen, de propolis; compléments diététiques à base de protéines de soja; coupe-faim; eau additionnée de minéraux; eau additionnée de vitamines; ginkgo biloba; hamamélis; huile d'onagre; huile de foie de morue; huile de ricin à usage médical; huiles d'amande à usage pharmaceutique; jus de fruits enrichi de vitamines; jus de fruits enrichis de calcium; lécithine comme supplément alimentaire; mélanges protéiques à boire; millepertuis homéopathique; minéraux; multivitamines; pilules amaigrissantes; pilules antioxydantes; poudre de perle pour utilisation comme un supplément de calcium; poudres protéinées de substituts de repas; préparations de vitamines; préparations de vitamines sous forme de boissons et poudres pour remplacer les repas; préparations multivitaminiques; préparations vitaminées; supplément de bêta-carotène; suppléments à base de plantes pour l'état général de la santé et le bien-être, pour la stimulation de la fonction hépatique, pour le traitement de l'arthrite; suppléments alimentaires d'armoise; suppléments alimentaires pour l'état général de la santé et le bien-être, pour stimuler la perte de poids; suppléments botaniques pour l'état général de la santé et le bien-être; suppléments de calcium; suppléments de vitamines; suppléments minéraux; suppléments nutritionnels pour développer la masse musculaire, pour l'état général de la santé et le bien-être; vitamines; vitamines en bonbons gélifiés; vitamines en comprimés; vitamines et préparations vitaminiques; vitamines gélifiées à saveurs de fruits; vitamines sous forme de comprimés effervescents.*

[TRANSLATION] Folic acid; ginseng capsules for general health and well-being; dietary supplements of amino acids, of albumin, of linseed oil, of casein; of wheat germ, of linseed, of yeast, of pollen, of propolis; soy protein dietary supplements; appetite suppressants; mineral enhanced water; vitamin enhanced water; ginkgo biloba; witch hazel; evening primrose oil; cod liver oil, castor oil for medical purposes; almond oils for pharmaceutical purposes; vitamin enriched fruit juice; calcium-enriched fruit juice; lecithin for use as a dietary supplement; protein shakes; St. John's wort; minerals; multivitamins; slimming pills; antioxidant pills; pearl powder for use as a calcium supplement; protein powders for meal replacement; vitamin preparations; vitamin preparations in the form of meal replacement drinks and powders; multivitamin preparations; vitamin preparations; beta carotene supplements; herbal supplements for general health and well-being, for the promotion of healthy liver function, for treatment of arthritis; mugwort dietary supplements; dietary supplements for general health and well-being, for promoting weight loss; botanical supplements for general health and well-being, calcium supplements; vitamin supplements; mineral supplements; nutritional supplements for building body mass, for general health and well-being; vitamins; gummy vitamins; vitamin tablets; vitamins and vitamin preparations; fruit-flavoured gummy vitamins; effervescent vitamin tablets.

16(3) *Cartes cadeaux; certificats-cadeaux.*

[TRANSLATION] Gift cards; gift certificates.

21(4) *Shakers; boîtes à pilules.*

[TRANSLATION] Shakers, pill boxes.

25(5) *T-shirts.*

[TRANSLATION] T-shirts.

# Appearances and Agents of Record

**HEARING DATE:** 2023-01-24

## **APPEARANCES**

**For the Opponent:** Barry Gamache

**For the Applicant:** Adele Finlayson

## **AGENTS OF RECORD**

**For the Opponent:** ROBIC

**For the Applicant:** Moffat & Co.