



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2023 TMOB 120

**Date of Decision:** 2023-07-14

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

**Opponent:** JBX Pty Ltd

**Applicant:** Amare Global Holdings, Inc. (a Utah Corporation)

**Application:** 1,963,388 for GBX

### **INTRODUCTION**

[1] On May 16, 2019, M3 Ventures West, Inc. filed application No. 1,963,388 (the Application) to register the trademark GBX (the Mark). The Application is based on proposed use in association with the following goods (the Goods):

(1) Dietary and nutritional supplements for general health and well-being; Dietary and nutritional supplements for stomach health; Dietary and nutritional supplements for digestion; Dietary and nutritional supplements for brain health; Dietary and nutritional supplements for improving mood and for improving focus

[2] As the result of a merger recorded by the Registrar on December 12, 2022, the Application now stands in the name of Amare Global Holdings, Inc. (a Utah Corporation) (the Applicant).

[3] JBX Pty Ltd (the Opponent) owns registrations for the trademarks JBX BIO ISLAND and BIO ISLAND JBX. The opposition is primarily based on an allegation that the Mark is confusing with the Opponent's registered trademarks.

[4] For the reasons that follow, the opposition is rejected.

### **THE RECORD**

[5] The Application was filed on May 16, 2019, and was advertised for opposition purposes in the *Trademarks Journal* of December 22, 2021. On February 16, 2022, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The statement of opposition pleads grounds of opposition based on registrability under section 12(1)(d), entitlement under sections 16(1)(a) and 16(1)(c), and distinctiveness under section 2 of the Act.

[6] The Applicant filed a counter statement denying the grounds of opposition. The Opponent filed as its evidence the affidavit of Robyn Benmore, a trademark searcher and owner of Robyn Benmore Trademarked, a business which conducts searches of the trademark records of the Canadian Intellectual Property Office. The Applicant elected not to file evidence. Both parties filed written representations and no hearing was held.

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

[7] The Opponent has the initial evidential burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once that burden is met, the Applicant bears the legal onus of establishing, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*John Labatt Ltd v Molson Companies Ltd*, 1990 CanLII 11059 (FC), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155]. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant.

## **ANALYSIS OF THE GROUNDS OF OPPOSITION**

### ***Section 12(1)(d) ground of opposition***

[8] The Opponent has pleaded that the Mark is not registrable because, contrary to section 12(1)(d) of the Act, the Mark is confusing with the Opponent's registrations for the trademarks JBX BIO ISLAND (TMA1,113,239; TMA1,113,241) and BIO ISLAND JBX (TMA1,113,240; 1,113,242).

[9] The material date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[10] I have exercised my discretion to check the Register and confirm that these registrations are extant [*Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden for this ground of opposition. As a result, the Applicant bears the legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and any of the Opponent's registered trademarks.

[11] In considering the issue of confusion, I will focus on the Opponent's registration No. TMA1,113,241 for JBX BIO ISLAND as in my view this represents the Opponent's strongest case because this trademark is closer in appearance to the Mark, and is associated with the directly overlapping goods "dietary supplements for general health and well-being" and "nutritional supplements for general health and well-being". The particulars of this registration are set out in Schedule A of this decision. If the Opponent does not succeed with respect to its pleading that there is a likelihood of confusion between the Mark and this registration, it would not succeed with respect to the remaining trademarks pleaded in the statement of opposition.

### **Test for confusion**

[12] In determining whether two trademarks are confusing, all the surrounding circumstances should be considered, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have

become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, [2006] 1 SCR 772 at para 54; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27, 92 CPR (4th) 361 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the marks, will often have the greatest effect on the confusion analysis.

[13] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when they have no more than an imperfect recollection of the opponent's trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

#### Inherent distinctiveness of the trademarks

[14] The Applicant's Mark holds a limited degree of inherent distinctiveness as trademarks consisting of a simple combination of letters or initials are generally considered to be weak marks with a low degree of inherent distinctiveness [*GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD) at 163-164; *Alfred Grass Gesellschaft mbH Metallwarenfabrik v Grant Industries Inc.* (1991), 47 FTR 231 (FCTD)].

[15] While the Opponent's mark similarly includes an element comprised of a combination of letters (JBX), it also contains the words BIO ISLAND. In my view, this term would not be perceived as the name of an actual place but rather a coined or invented term suggesting some sort of biological activity or involvement. As a result of the inclusion of this term, the Opponent's trademark holds a greater degree of inherent distinctiveness.

Extent known and length of time the trademarks have been in use

[16] There is no evidence that the Opponent or Applicant have used or promoted their respective trademarks.

Nature of the goods, services or business; and nature of the trade

[17] The Opponent's registered goods include dietary supplements for general health and well-being and nutritional supplements for general health and well-being, as does the Application. The remaining Goods in the Application are related to the Opponent's goods as they are also dietary and nutritional supplements, albeit for specific areas of health.

[18] Considering the overlap in the nature of the parties' goods, and in the absence of evidence to the contrary, I find it reasonable to conclude that the parties' goods could travel through the same channels of trade [*Atlantic Promotions Inc v Warimex Waren-Import Export Handels GmbH*, 2016 TMOB 179 at paras 44-46]. Accordingly, these factors favour the Opponent.

Degree of resemblance

[19] The Opponent submits that the first word of a mark is most important for the purposes of assessing the degree of resemblance, and that GBX is highly similar in appearance and sound to the first word of the Opponent's JBX BIO ISLAND since both consist of three letters, the latter two (BX) being visually and phonetically identical. The Opponent further submits that: "[t]he letter 'J', when pronounced by a French-speaking person, is very similar in sound to the letter 'G' as pronounced by an English-speaking person. Consequently, it is conceivable that the average bilingual person could pronounce the opposed mark, GBX, from a French perspective and pronounce the first element of the Opponent's registered mark, JBX, from an English perspective resulting in an identical first sounding first syllable, i.e., 'GEE'." (reproduced from paragraph 22 of the Opponent's written representations. I have also considered that the Opponent may have meant to refer to the letters G and J sounded from a French and English perspective, respectively, resulting in a similar sounding first syllable 'JAY').

[20] While in some cases the first word of a trademark will be considered the most important, a preferable approach in assessing the degree of resemblance is to first consider whether there is an aspect of the trademark that is particularly striking or unique [*Masterpiece, supra*, at para 64]. With this in mind, even though JBX is the first element of the Opponent's trademark, I do not consider it to be particularly striking. Rather, I find the words "BIO ISLAND" to be the most striking aspect of the Opponent's trademark. The Applicant's Mark is comprised solely of the letters GBX; I do not consider this combination of letters to be particularly striking.

[21] There is a degree of resemblance between the trademarks in appearance given the common presence of the letters BX at the end of the Applicant's three-letter Mark and at the end of the first element of the Opponent's mark, which is also made up of three letters. However, this is reduced by the different first letters in each combination of letters (J instead of G), and more significantly, by the addition of the words BIO ISLAND to the Opponent's mark. For the same reasons, I find the degree of resemblance in the ideas conveyed by the marks to be quite low.

[22] As for the degree of resemblance in sound, I acknowledge that, when spoken, the letter "J" in English sounds almost like the letter "G" in French, and the letter "G" in French sounds almost like the letter "J" in English. That being said, I find the overall degree of similarity between the marks when sounded to be reduced given the inclusion of the words BIO ISLAND in the Opponent's mark.

[23] Taking into account the degree of resemblance between the parties' marks in terms of appearance, sound, and ideas suggested, I find that this factor favours the Applicant.

#### Surrounding circumstance – state of the register evidence

[24] The Opponent filed the affidavit of Robyn Benmore (sworn August 5, 2022). Ms. Benmore performed an online search of the Canadian Trademarks register for all active applications and registrations consisting of or containing the two-letter combination "BX", and covering goods in Nice Class 5.

[25] The Opponent notes that Ms. Benmore's search results show that other than the Opponent's registered marks, the (Applicant's) opposed mark and another pending application owned by the Applicant, there are no other marks on the register comprising a three-letter word wherein the last two letters are "BX", as a standalone component of the mark, for use in association with dietary and nutritional supplements. The Opponent submits that "[O]ne can infer from the Register that such marks are also uncommon in the marketplace, a factor which enhances the inherent distinctiveness of the Opponent's registered marks and favours the Opponent in the confusion analysis" (paragraph 24 of the Opponent's written representations).

[26] I do not agree that Ms. Benmore's evidence assists the Opponent. I cannot infer that the Opponent and the Applicant are the only parties using a mark comprising a three-letter word with the last two letters BX, as a standalone component of the mark, with supplements just because no other parties have applied to register one [see *Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB) which discusses that state of the Register evidence is only useful to the extent that one can make an inference about the state of the marketplace].

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

[27] Having considered all of the surrounding circumstances, I conclude that the Applicant has satisfied its legal burden to show that there is no reasonable likelihood of confusion between the parties' trademarks. Notwithstanding the overlap in the goods and the corresponding potential for overlap in the channels of trade, and taking into account that the Opponent's trademark is more inherently distinctive, I do not consider the degree of resemblance between the trademarks to be sufficiently high as to give rise to a likelihood of confusion. Therefore, the section 12(1)(d) ground of opposition is rejected.

#### ***Remaining grounds of opposition – sections 16(1)(a), 16(1)(c) and 2***

[28] In its written representations (at paragraph 10), the Opponent gave notice that it was relying solely on the ground of opposition under section 12(1)(d) of the Act. I note that even if the Opponent had pursued the remaining grounds of opposition, they would

all have been rejected on the basis that the Opponent failed to meet its initial evidentiary burden since the Opponent filed no evidence of use or reputation of its trademarks or trade names.

**DISPOSITION**

[29] In view of the above, 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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Jennifer Galeano  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



**SCHEDULE A**

Particulars of the Opponent's registration No. TMA1,113,241 for JBX BIO ISLAND

Trademark	Claims	Goods
<p>JBX BIO ISLAND</p>	<p>Priority Filing Date: March 13, 2018, Country or Office: AUSTRALIA, Application No. 1912863 in association with the same kind of goods Proposed Use in CANADA</p>	<p>(1) Cosmetics; cosmetic preparations for skin care; beauty care cosmetics; skin care preparations; body care soap; body scrubs; bubble bath preparations; soap and soap products, namely, cosmetic soaps; bath essences, bath foams, bath gels and bath oils (all non-medicated); deodorants and antiperspirants for personal use; essences for skin care; facial care products (cosmetics); after-shave creams and lotions; fragrances for personal use; hair care preparations; hand care preparations, namely, hand lotions; hand cream; incense; joss sticks; liquid soaps; make-up; perfumes; essential oils for cosmetic purposes; toiletries, namely, shampoos, hair conditioners, hair masks and toothpaste; non-medicated hand, face and body creams, lotions and balms for cosmetic purposes; non-medicated mouth rinses, mouth washes and breath freshening sprays; potpourri; room fragrances; air fragrancing preparations; body sprays for use as personal deodorants and fragrances.</p> <p>(2) Dietary supplements for general health and well-being, nutritional supplements for general health and well-being, nutritional meal replacement bars for boosting energy, and dietetic substances consisting of vitamins, minerals, amino acids and trace elements for medicinal use; vitamins, vitamin tablets, vitamin powders, vitamin preparations and vitamin supplements; baby food; sanitary preparations for personal hygiene, other than toiletries, namely, disinfectant soaps, disinfecting hand wash, hand sanitizing preparations, sanitizing wipes.</p> <p>(3) Honey.</p>

# Appearances and Agents of Record

No hearing held

## **AGENTS OF RECORD**

**For the Opponent:** Cassan Maclean IP Agency Inc.

**For the Applicant:** Mark W. Timmis