



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 011

Date of Decision: 2024-01-22

IN THE MATTER OF OPPOSITIONS

Opponent: NutriAg Ltd.

Applicant: Nutrien Ltd. (formerly 10263664 Canada Inc.)

Applications: 1,841,262 for NUTRIEN, and
1,886,896 for NUTRIEN AG SOLUTIONS
1,886,897 for NUTRIEN AG SOLUTIONS & Design

INTRODUCTION

[1] NutriAg Ltd. (the Opponent) is a long standing Canadian agricultural chemicals business that has a reputation in the specialized fertilizer and plant nutrition trade. Nutrien Ltd. (the Applicant) is the world's largest provider of crop inputs and services.

[2] The Applicant has applied for the trademarks NUTRIEN, NUTRIEN AG SOLUTIONS, and NUTRIEN AG SOLUTIONS & Design, shown below, in association with various agricultural fertilizers and plant nutrients and related services.

Nutrien
Ag Solutions

[3] The Opponent opposes these applications primarily based on an allegation that each of the applied for trademarks is confusing with the Opponent's prior use and registration of its trademark and trade name NUTRIAG, registration No. TMA778,481, which has been used in association with a number of plant and crop protection agents, including specialized proprietary products, such as micronutrients and supplements.

[4] For the reasons that follow, the application for the trademark NUTRIEN is refused with respect to the Applicant's overlapping goods (which will be defined below) and the opposition is rejected with respect to the remaining goods and services. The applications for the trademarks NUTRIEN AG SOLUTIONS and NUTRIEN SOLUTIONS & Design are refused in their entireties.

ORGANIZATION OF THE DECISION

[5] I will begin by providing the relevant details of the file history of each application. Next, I will provide a summary of the evidence, which is the same in each case. Finally, I will assess the grounds of opposition with respect to the NUTRIEN application (the NUTRIEN Mark) first, followed by the grounds of opposition with respect to the NUTRIEN AG SOLUTIONS and NUTRIEN AG SOLUTIONS & Design applications (the NUTRIEN AG SOLUTIONS Marks).

THE RECORD

[6] The application for the NUTRIEN Mark was filed on June 7, 2017. The applications for the NUTRIEN AG SOLUTIONS Marks were filed on March 8, 2018.

[7] On July 20, 2020, the Applicant requested that each of the above applications be divided into separate applications for various goods. As this request was granted prior to advertisement, and no statements of opposition were filed against these divisional applications, they each proceeded to registration for these various goods and services on December 8, 2020.

[8] Attached as Schedule A to this decision is the statement of goods for the trademark NUTRIEN, along with the corresponding Nice Classification, at the time of advertisement (the NUTRIEN Goods and Services). The statement of goods and

services for the NUTRIEN AG SOLUTIONS Marks is reproduced below, together with the associated Nice classes (CI):

CI 1 (1) Fertilizers and plant nutrients for agricultural use

CI 35 (1) Retail stores and on-line retail stores in the field of agricultural chemicals, seeds, and fertilizers; distributorship services in the field of agricultural chemicals, seeds, and fertilizers (the NUTRIEN AG SOLUTIONS Goods and Services)

[9] The Opponent filed a statement of opposition against each application on May 17, 2021, under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Act was amended on June 17, 2019. As the applications were advertised after June 17, 2019, the Act as amended applies (see section 69.1 of the Act).

[10] The statement of opposition raises grounds of opposition based on registrability under section 12(1)(d), entitlement under sections 16(1)(a) and 16(1)(c), distinctiveness under section 2, and non-compliance with section 38(2)(f) of the Act. For the grounds of opposition based on an alleged likelihood of confusion, the Opponent relies primarily on its registration and use of the Opponent's NUTRIAG trademark and trade name.

[11] The Applicant filed and served a counter statement in each case denying the grounds of opposition.

[12] In support of each opposition, the Opponent filed the affidavit of Martin Bloomberg, President of the Opponent, dated October 20, 2021. Mr. Bloomberg was cross-examined on his affidavit and the cross-examination transcript and exhibits form part of the record.

[13] In support of each application, the Applicant filed the affidavit of Rachel Barker, an employee of an outside investigation firm. The Applicant also filed certified copies of the following registrations: NUTRIEN FINANCIAL (TMA1,080,840), NUTRIEN AG SOLUTIONS & Design (TMA1,089,296), NUTRIEN (TMA1,089,298), and NUTRIEN AG SOLUTIONS (TMA1,089,299).

[14] As its evidence in reply, the Opponent filed a second affidavit of Mr. Bloomberg, dated February 28, 2023 (Bloomberg Reply). He was not cross-examined on this affidavit.

[15] Both parties filed written representations. All three opposition proceedings were heard together.

OVERVIEW OF THE EVIDENCE

Opponent's Evidence

[16] Mr. Bloomberg is the President of the Opponent. He has held this position since 1995.

[17] I will summarize all of Mr. Bloomberg's evidence into three subsections: the Opponent's goods and services, the relationship between the parties and the sales and promotion of the Opponent's NUTRIAG trademark and trade name.

The Opponent's goods and services

[18] The Opponent is a Canadian agricultural chemicals business. Its reputation is in association with a distinct part of the fertilizer and plant nutrition trade that comprises specialized proprietary nutrients and supplements registered under the *Fertilizers Act* with the Canada Food Inspection Agency (CFIA). According to the Opponent, these proprietary products are different in kind from exempt fertilizers for basic nutrition.

[19] The Opponent also provides agronomic consulting services to growers.

[20] The Opponent's products are distributed through distributors or dealers and used by farmers. The Opponent's services which relate to educating farmers about how to use the products, are provided to the farmers themselves.

[21] In his reply affidavit, Mr. Bloomberg explains how these specialized micronutrient and supplement products that incorporate proprietary technologies are different from exempt or "primary" fertilizer and supplement materials for basic nutrition taken up by plants through the soil, such as nitrogen (N), phosphorus (P) and potassium (K)

produced using well known processes and that exist in well-known chemical forms (Bloomberg Reply, paras. 11-12). Mr. Bloomberg also explains that these micronutrient and supplement products are marketed, distributed and sold differently from the way in which exempt fertilizers for basic nutrition are marketed and sold. Consumers require education to understand the role, and benefits, of micronutrient and supplement application. This helps them understand how micronutrient and supplement products are different in kind from exempt fertilizers for basic nutrition.

Relationship between the parties

[22] The relationship between the parties is somewhat complicated. I summarize below the relevant facts as set out in the various press releases from the Applicant's website set out in the Bloomberg affidavit and cross-examination. I will note here that I find the evidence of the Applicant's website admissible even though it is hearsay for the following two reasons. First, it was necessary for the Opponent to file it in support of its opposition; and second, I consider it reliable since the Applicant, being a party, had the opportunity to refute the evidence [*Reliant Web Hostings Inc v Tensing Holding BV*; 2012 TMOB 48 (CanLII) at para 35].

[23] The relevant facts about the Applicant's businesses are as follows:

- January 2, 2018 – press release announcing the merger of Agrium Inc. and Potash Corporation of Saskatchewan to form **Nutrien Ltd.** (referred to throughout this decision as the Applicant) (Bloomberg, Exhibit T);
- April 5, 2018 – press release announcing the launch of the Applicant's newly branded retail business **Nutrien Ag Solutions**. This new retail business is the result of the rebranding of three companies (Crop Production Services, Agroservicios Pampeanos and Utilfertil); the Opponent has sold its products through the retail stores of Crop Protection Services in the United States (Bloomberg, Exhibit U);
- February 5, 2019 – press release announcing that the Applicant acquired **Actagro, LLC**, (a U.S. based company which is also a competitor of the

Opponent) (Actagro), whose products are distributed across global agricultural markets through numerous retailers and distributors including the Applicant's retail business, Nutrien Ag Solutions; and

- July 4, 2019 – as a result of the acquisition of Crop Production Services, the Applicant became the parent of **Loveland Products Inc** (Loveland), which is the Opponent's competitor; attached as Exhibit V is a "story" about the Applicant, which states that Loveland is part of the Applicant's retail business (Bloomberg, Exhibits V and W).

[24] It was also revealed on the cross-examination of Mr. Bloomberg, that the Applicant's retail business, Nutrien Ag Solutions, is one of the Opponent's dealers which sells the Opponent's products in Canada (Bloomberg Cross-ex., Qs. 32, 57-58).

[25] Mr. Bloomberg further explains in his affidavit and attaches exhibits showing how the merger that resulted in the Applicant has put the Applicant into direct competition with the Opponent in that, through the Nutrien Ag Solutions division of the Applicant, the Applicant owns the Loveland and Actagro companies that have proprietary products that compete with the Opponent's proprietary products (Bloomberg, paras. 41-47). Exhibits X1 and X2 to Mr. Bloomberg's affidavit, which comprise CFIA Registered Product lists, show companies (including Loveland and Actagro) that have micronutrient products and supplements approved for sale in Canada by the CFIA.

[26] When asked how other products of the Opponent compete with products that the Applicant sells, Mr. Bloomberg stated that it "was a difficult question to answer", although he could envisage the Applicant and its retail business Nutrien Ag Solutions having competing products – apart from those sold by the Actagro and Loveland subsidiaries. He further elaborated that the Opponent and the Applicant were "not directly" competing (Bloomberg Cross-ex., Qs. 49-51).

Sales and promotion of the Opponent's NUTRIAG trademark and trade name

[27] The evidence of Mr. Bloomberg with respect to the Opponent's sales and promotion of its NUTRIAG products is voluminous.

[28] The sales and marketing evidence of Mr. Bloomberg establish that the Opponent's NUTRIAG trademark and trade name have been used in association with the Opponent's proprietary products, including micronutrients and supplements registered under the *Fertilizers Act*, since prior to June 7, 2017. Examples of its logos used over time are shown below:



[29] The most pertinent parts of the remainder of Mr. Bloomberg's evidence may be summarized as follows:

- The Opponent has operated its business in association with the tradename "NUTRIAG LTD" and sold products and provided related services in Canada in association with the NUTRIAG trademark in Canada continuously since 2000;
- The Opponent's products are sold to end consumers in Canada through local and multinational dealers, dealer groups, co-ops and distributors;
- Since 2000, sales of the NUTRIAG products, including micronutrients and specialty crop nutrition products, in association with the NUTRIAG trademark and trade name have generated millions of dollars of revenue in Canada, representing many hundreds of thousands of units sold; invoices representative

of invoices issued by the Opponent in connection with sales of the NUTRIAG products in Canada are attached as Exhibit J;

- The Opponent has spent many hundreds of thousands of dollars each year since 2000 marketing its products, services and business associated with its NUTRIAG trademark and trade name in Canada;
- NutriAg advertises and promotes the NutriAg Products, services, and business in association with the NUTRIAG trademark and tradename in Canada through the following methods:
 - a. Product catalogues, manuals, guides, information sheets, and use aids;
 - b. Print and digital display advertisements in industry trade publications, and such publications' related newsletters, websites, and social media accounts;
 - c. Digital advertising on third-party websites and platforms;
 - d. Field signs;
 - e. Exhibitor and vendor booths at industry trade shows;
 - f. Online, through the NutriAg Website, and NutriAg's branded social media accounts;
 - g. Emails to NutriAg's existing and prospective customers sent by NutriAg and third party service providers;
 - h. Sponsorships opportunities and contests; and
 - i. Promotional material

[30] Images of representations of the above examples are attached as exhibits K-1 through exhibit S to his affidavit.

Applicant's Evidence

[31] Ms. Barker is a licensed private investigator with Integra Investigation Services Ltd. In addition to providing the results from a search of the trademark database of applications or registrations that start with the component NUTRI for fertilizers, herbicides, fungicides, pesticides, adjuvants and agriculture, she provided search results for products registered in Canada under the *Fertilizers Act* for any product names that include the component NUTRI.

[32] Ms. Barker also provides printouts of various information and material available from the Internet, including the “financials” and “annual report” of the Applicant for 2021 (Exhibit V), Google search results for the term NUTRIEN (Exhibit T), and the results of the search of newspaper databases for articles that mention NUTRIEN from the years 2017 to the date of her affidavit (August 2, 2022). While the Applicant relies on some of these materials for the truth of their contents, most notably the sales and operations data/information contained in the Applicant’s annual report and income statements, as well as articles about the Applicant’s reputation, I am not prepared to do so given the underlying hearsay issue. As an investigator for the Applicant, rather than an employee of the Applicant itself, Ms. Barker has no personal knowledge of the contents of the annual report, finances, or other activities of the Applicant.

LEGAL ONUS AND EVIDENTIAL BURDEN

[33] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the application complies with the requirements of the Act. 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. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

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[34] The parties agree that each of the grounds of opposition in each case turn on the issue of the likelihood of confusion between the Applicant's Mark and the Opponent's NUTRIAG trademark. While the material dates for the remaining grounds of opposition are different, I do not believe that anything turns on whether the issue of confusion is determined at any particular material date. I will assess the likelihood of confusion between the Mark and the Opponent's trademark NUTRIAG, as registered under No.TMA778,481, under the section 12(1)(d) ground of opposition as that represents the Opponent's strongest case. The goods associated with this registration are set out below (the Opponent's Registered Goods):

(1) Water conditioners and spray adjuvants for spraying crops; non-pesticidal chemical additives for use with pesticides in agriculture, horticulture and forestry; preparations and chemical additives for killing weeds and destroying vermin for agricultural use; plant and crop nutrition agents, plant and crop protection agents, namely, fertilizers; fungicides, plant nutrients, plant fertilizers, plant stimulators; plant activators, agricultural spray adjuvant, namely, a wetter spreader.

Section 12(1)(d) Ground of Opposition

[35] The material date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd*, 1991 CanLII 11769 (FCA)].

[36] I have exercised my discretion to check the Register and confirm that the Opponent's registration for NUTRIAG remains 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 each of its NUTRIEN Mark and the Opponent's NUTRIAG trademark.

Test for confusion

[37] Two trademarks will be considered confusing if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated

with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or in the same class of the international Nice Classification system [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 or services either come from the opponent or are approved, licensed, or sponsored by the opponent, it follows that the trademarks are confusing [*Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD)].

[38] 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 section 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]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 where the Supreme Court of Canada states at para 49 that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis.

Inherent distinctiveness of the trademarks and the extent to which they have become known

[39] The parties concede that the first component of each of their marks, the component NUTRI, is descriptive as it suggests the word "nutrients". Indeed, Mr. Bloomberg testified on cross-examination that he developed the trademark NUTRIAG in order to evoke the idea of "nutrients for agriculture" [Bloomberg cross-ex., Qs. 19-21]. Therefore, while the Opponent's mark is a coined word, it is still a relatively weak mark given its suggestive connotation in the context of the Opponent's registered goods.

[40] I also find that although the Applicant's NUTRIEN Mark is a coined word, when viewed as a whole it also is suggestive of the word "nutrients" and therefore also suggestive of a character or quality of the applied for goods. I therefore find the inherent distinctiveness of the parties marks to be about the same.

[41] Regarding the extent known of the trademarks, I agree with the Opponent that the sales and marketing evidence of Mr. Bloomberg establish that the Opponent's NUTRIAG trademark and trade name have become well known in Canada, and especially in association with the Opponent's proprietary products, including micronutrients and supplements registered under the *Fertilizers Act*. In this regard, and as noted above, the Opponent has had sales in the millions of dollars since 2000 in association with various NUTRIAG products, and has also spent hundreds of thousands of dollars in marketing these products each year since 2000.

[42] Although the Barker affidavit shows annual income statements for the Applicant of billion of dollars in 2017 and 2018, as noted above, I cannot have regard to this evidence because it is hearsay and is neither necessary nor reliable. I therefore cannot conclude that the Mark has become known to any extent in Canada.

[43] Overall, I find that this factor favours the Opponent.

Length of time the trademarks have been in use

[44] The Opponent has shown use of its trademark in association with at least some of its registered goods since at least as early as 2000 while the Applicant has not provided any reliable evidence of use of the Mark. This factor therefore favours the Opponent.

Nature of the goods and channels of trade

[45] When considering the nature of the goods and services, it is the statement of goods and services in the applicant's application and in the opponent's registration that must be assessed, having regard to the channels of trade that would normally be associated with such goods. Further, each statement must be read with a view to determining the probable type of business or trade intended rather than all possible

trades that may be encompassed by the wording, and evidence of the parties' actual trades is useful in this respect.

[46] As previously noted, much of the Opponent's evidence and submissions focus on the use of the Opponent's trademark and trade name in association with a successful line of proprietary nutrients and supplements registered under the *Fertilizers Act* with CFIA (referred to by the Opponent as "proprietary registered products"). As noted by Mr. Bloomberg in his first affidavit, to import or sell certain of the Opponent's products that are micronutrient fertilizers and supplements, the products must be approved by and registered with CFIA, which is an agency of Health Canada. These fertilizers need to be registered under the *Fertilizers Act* because they are proprietary and sold in a distinct sector or "zone of exclusivity" in the marketplace. The Opponent submits that its proprietary registered products are sold ultimately to farmers to provide nutrients to their crops.

[47] The Opponent maintains that certain of the Applicant's NUTRIEN goods overlap with those of the Opponent because they cover fertilizers and plant nutrition products and other crop inputs. In this regard, the Opponent submits that the goods as underlined below cover the proprietary products under the *Fertilizers Act* that the Opponent believes the Applicant "will probably sell" in association with each of the applied for marks given that Nutrien Ag Solutions already owns two brands that sell such products – Loveland and Actagro:

Class 1: Potash; fertilizers; chemicals for use in the manufacture of fertilizers including, nitrogen, ammonia, ammonium, potassium, potash, phosphate, sulphur, potassium nitrate, ammonium nitrate, ammonium phosphate, urea, sulphuric acid and phosphoric acid; chemicals for use in the manufacture of pesticides; agricultural chemicals, namely surfactants, adjuvants, and wetting agents for use in the application of herbicides, insecticides, pesticides, and soil nutrients; adjuvants for use with agricultural chemicals; oil spray adjuvant for use with agricultural insecticides and fungicides; active chemical ingredients for use in the manufacture of fertilizer, pesticides, herbicides, fungicides, insecticides and rodenticides; soil conditioners for agricultural use; nutritive additive chemicals to enhance the biological activity of water and soil for purposes of fertilization, improvement of soil pH and irrigation water pH,

improvement of soil penetrability, and enhancement of pesticide and fertilizer performance; chemical preparations for use in agriculture, namely, chemical preparations for seed treatment; soil surfactant used to promote uniform movement of water in soil; soil inoculants for application to seeds used in agriculture; chemical additives for fertilizers; wetting agent, spreading agent, penetrant and surfactant for use in connection with pesticides, herbicides, desiccants, defoliant, insecticides, fungicides, acaricides, plant growth regulators and foliar nutrients; water conditioners, namely, phosphates for potable water treatment; agricultural anti foamer and defoamer; amino acids for use with water soluble plant nutritional products; amino acids as a nitrogen source for use with water soluble plant nutritional products and amino acids as a nitrogen sources for use in combination with water soluble plant nutritional products formulated for foliar or drip irrigation application; plant growth nutrients; plant food; water treatment chemicals for use in golf course turf management; high purity urea solution for the treatment and control of diesel exhaust, nitric oxide and nitrogen dioxide emissions, namely, chemical additives for fuel exhaust (the Applicant's overlapping goods)

[48] The Opponent also confirmed at the hearing that the Applicant's overlapping goods underlined above (as well as in the schedule A attached to the Opponent's written representations) were the applied for goods that were objected to.

[49] The Applicant, on the other hand, submits that the nature of the parties' goods and channels of trade militate strongly against any likelihood of confusion. In this regard, the Applicant points to Mr. Bloomberg's testimony that the Opponent has always marketed, distributed, and sold its registered micronutrient and supplements different from the way in which exempt fertilizers for basic nutrition are marketed and sold (Bloomberg Reply, para 13). Further, the Applicant does not "currently make or sell registered fertilizers in Canada" (Bloomberg Reply, para. 9). Rather, on cross-examination, Mr. Bloomberg acknowledged that the Opponent's competitors are the Applicant's subsidiaries, Loveland and Actagro (Bloomberg Cross-ex, Q. 49) and that the Opponent and the Applicant are "not directly" competing (Bloomberg Cross-ex., Q. 50).

[50] While it may be that to date, there has been no actual overlap in the parties' overlapping goods or channels of trade, absent any restrictions in the Applicant's

statement of goods, or evidence from the Applicant that its overlapping goods only refer to those types of primary fertilizer materials that cannot be registered under the *Fertilizers Act*, I do not find the Applicant's submissions sufficient to infer that the Applicant's overlapping goods refer to exempt fertilizer materials only.

[51] As the Supreme Court stated in *Masterpiece* at para 53, the focus must be on the terms set out in the application for the trademarks and on what the "the registration would authorize the [applicant] to do, not what the [applicant] happens to be doing at the moment." The Court added at para 59 that while actual use is not irrelevant, "it should not be considered to the exclusion of potential uses within the registration".

[52] In view of the above, I find that the goods of the parties are related to the extent that the Opponent's Registered Goods and the Applicant's overlapping goods both comprise fertilizers and related goods. I therefore also conclude that the parties' channels of trade could overlap. This factor therefore favours the Opponent with respect to the Applicant's overlapping goods.

Degree of resemblance

[53] The marks do resemble each other in appearance and sound to the extent that they both begin with the suggestive component NUTRI. While the ideas suggested by the marks are not identical, they are fairly similar in that the Applicant's NUTRIEN Mark suggests "nutrients" while the Opponent's mark evokes the idea of "nutrients for agriculture".

[54] I therefore find that this factor also favours the Opponent.

Surrounding circumstance: jurisprudence concerning weak trademarks

[55] The jurisprudence on weak trademarks supports the Applicant's position that the trademarks are not likely to be confused. It is well accepted that comparatively small differences will suffice to distinguish between weak marks [*Boston Pizza International Inc v Boston Chicken Inc*, 2001 FCT 1024 at para 66]. In *Provigo Distribution Inc v Max Mara Fashion Group SRL*, 2005 FC 1550 at para 31(FCTD), de Montigny J. explains:

The two marks being inherently weak, it is fair to say that even small differences will be sufficient to distinguish among them. Were it otherwise, first user of words in common use would be unfairly allowed to monopolize these words. A further justification given by courts in coming to this conclusion is that the public is expected to be more on its guard when such weak trade names are used ...

Surrounding circumstances – state of the register evidence

[56] The Applicant has furnished evidence on the state of the register in an effort to establish that trademarks including the element NUTRI are common in the parties' industry.

[57] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features, therefore decreasing the likelihood of confusion [*McDowell v Laverana GmbH & Co. KG*, 2017 FC 327 at para 42 (the first *McDowell* case)]. 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].

[58] Where a large number of relevant trademarks are identified on the register, at least some use of the common element may be inferred [see, for example, *Kellogg Salada Canada Inc v Maximum Nutrition Ltd*, 1992 CanLii 14792 (FCA) where the evidence showed at least 47 trademarks and 42 trade names as of the filing date of the application that contained the component NUTRI as part of the mark]. Where the number of relevant trademarks identified is not large, evidence of such use needs to be furnished [see the first *McDowell* case, *supra*, and *Canada Bread Company, Limited v Dr Smood APS*, 2019 FC 306 (*Dr. Smood*)].

[59] The Applicant cites cases where as few as 20 registrations were found to be sufficient to draw an inference that the prefix in that case was commonly used in the trade and as such the average hurried consumer was used to distinguish them *PepsiCo, Inc v 100777 Canada Inc*, 2006 CanLII 80488. The Applicant also cited

Wyeth-Ayerst Canada Inc v Sunny Crunch Foods Limited, 1999 CanLII 19475, where the trademark opposition board concluded that 35 NUTRI-prefixed trademarks registered for similar goods was sufficient.

[60] However, as observed by Member Osadchuk in *Specialty Program Group Canada Inc. (predecessor-in-title Can-Sure Underwriting Ltd) v Cannasure Insurance Services, LLC*, 2023 TMOB 201, cases predating the Federal Court's guidance in the first *McDowell* case must be approached with caution. In the first *McDowell* case the Court found that, absent evidence of actual use, having 10 registered trademarks featuring the word HONEY, in the names of seven different owners, was insufficient for a finding that HONEY was common to the trade. Subsequently, in *McDowell v The Body Shop International PLC*, 2017 FC 581, rev'g 2016 TMOB 150, the Federal Court found that evidence of at least 13 relevant registrations did not justify drawing an inference that the shared element was common.

[61] In this case, the Applicant provided state of the register evidence through the affidavit of Ms. Barker. From my review of the most relevant NUTRI formative registrations set out in Schedule B to the Applicant's written submissions, there are at least 21 relevant trademarks which were registered prior to June 7, 2017 (the earliest material date in this proceeding) and at least 27 by the material date for this ground (the date of my decision) registered in association with similar goods and/or services. There is no evidence, however, of any use in the marketplace of these marks or others with the component NUTRI for similar goods or services.

[62] While it has been held that the exact number of trademarks needed to establish the common adoption of a component likely depends on the facts of a given case [*Hawke & Company Outfitters LLC v Retail Royalty Company*, 2012 FC 1539], it has also been held that it is "not the quantity or sheer numbers that count but rather the quality of evidence showing actual use of the common [element] in the relevant industry in Canada" [*Eclectic Edge Inc v Gildan Apparel (Canada) LP*, 2015 FC 1332 at para 92; *Dr. Smood, supra*, at para 61].

[63] In this case, I do not find that the Applicant's state of the register evidence on its own is sufficient to establish that trademarks including the NUTRI element are common in the fertilizer trade. In the absence of any evidence of use of these marks in the marketplace, I am unable to infer from the existence of between 21 and 27 third party registrations for marks that begin with the component NUTRI (depending which relevant date is applied) that consumers would pay more attention to the other features of the marks in order to distinguish them.

[64] This surrounding circumstance therefore does not favour the Applicant to any significant extent.

Surrounding circumstance – sophisticated customers

[65] The Applicant also submits that the fact that the Opponent's products are specialized and its customers have to be educated about them prior to purchase is a relevant factor which militates against a finding of confusion. For ease of reference, I reproduce below those parts of the Opponent's evidence the Applicant relies on in support of this argument:

- The Opponent has always marketed, distributed and sold its registered micronutrients and supplements differently from the way in which exempt fertilizers for basic nutrition are marketed and sold [Bloomberg Reply Affidavit, para 13];
- There is a complex education process required to explain the role and benefits of the Opponent's products [Bloomberg Reply Affidavit, para 14]; and
- The marketing of the Opponent's goods requires a significant amount of added expense and effort because the Opponent's goods are so specialized and customers need to be educated about the benefits of the Opponent's goods [Bloomberg Reply Affidavit, para 14].

[66] I accept that the Opponent's average consumers are sophisticated and may take significant time in the purchase decision of the Opponent's specialized products.

However, the test for confusion is one of first impression. As stated by Rothstein, J. in *Masterpiece, supra*, at para 72,

“It is confusion when they encounter the trade-marks that is relevant. Careful research which may later remedy confusion does not mean that no confusion ever existed or that it will not continue to exist in the minds of consumers who did not carry out that research.”

[67] I therefore do not consider this surrounding circumstance to assist the Applicant.

Surrounding circumstance – incidents of confusion

[68] The Opponent submits that section 6(2) of the Act is broad enough to encompass reverse confusion in which consumers seeing the trademark of the senior user (the Opponent in this case) believe it to come from the junior user (the Applicant) [*A & W Food Services of Canada Inc v McDonald's Restaurants of Canada Ltd*, 2005 FC 406, paras 23-33]. I agree. However, while Mr. Bloomberg relayed four different incidents of confusion between 2018 and 2020, it was later revealed on cross-examination that only one of these incidents occurred in Canada.

[69] In this regard, on March 9, 2018, the Opponent received an electronic funds transfer for over U.S. \$1.13 million from Edberg Crop Management Inc. that was intended for Nutrien Ag Solutions.

[70] As this incident of confusion regards the Applicant's NUTRIEN AG SOLUTIONS trademark as opposed to its NUTRIEN trademark, I do not consider that it assists the Opponent as a surrounding circumstance with respect to its opposition against the NUTRIEN trademark to any significant extent.

Surrounding circumstance – family of marks

[71] While the Opponent's written representations do not refer to the Opponent's family of marks, such a reference is made in the Opponent's pleading. In this regard, the Opponent has pleaded that the NUTRIEN Mark is not registrable because, contrary to section 12(1)(d), the Mark is confusing with the Opponent's family of NUTRIAG registrations, including registration No. TMA778,481 for NUTRIAG, registration No.

TMA984,017 for NUTRIANALYTICS, registration No. TMA998,376 for NUTRIBALANCE and registration No. TMA848,407 for NUTRILAB.

[72] Where there is a family of trademarks, there may be a greater likelihood that the public would consider a trademark that is similar to be another trademark in the family and consequently, assume that the product or service that is associated with that trademark is manufactured or performed by the same person [*Everex Systems Inc v Everdata Computer Inc*, (1992), 44 CPR (3d) 175 at 183 (FCTD)]. However, there can be no presumption of the existence of a family of marks in opposition proceedings. A party seeking to establish a family of marks must establish that it is using more than one or two trademarks within the alleged family (a registration or application does not establish use) and that such use must be sufficient to establish that consumers would recognize a family of marks [*Arterra Wines Canada, Inc v Diageo North America Inc.*, 2020 (FC) 508].

[73] In this case, the Opponent relies primarily on its sales figures and promotional information attributable to the NUTRIAG trademark and trade name, making it difficult to ascertain the extent of consumer familiarity with any of the Opponent's trademarks except NUTRIAG.

[74] Accordingly this is not a surrounding circumstance that assists the Opponent in this case.

Surrounding circumstance – co-existing registrations owned by the Applicant

[75] In its written representations, the Applicant submits that the co-existence of its NUTRIEN AG SOLUTIONS, NUTRIEN AG SOLUTIONS & Design, and NUTRIEN registered trademarks with the Opponent's registered trademark must, by necessity, mean that the parties' trademarks in this case can likewise co-exist. For example, if NUTRIEN AG SOLUTIONS can co-exist in association with the delivery of fertilizer and the custom application of fertilizer, there is no reason why that that mark, and the other applied for trademarks, cannot likewise co-exist in association with fertilizer and other plant nutrients.

[76] The Applicant further submits that a certified copy is evidence of the facts set out in the registrations. Relying on the decision in *Entre Computer Centers, Inc v Global Upholstery Co* (1992), 40 CPR (3d) 427 (TMOB)], the Applicant maintains that the Registrar is permitted to assume at least *de minimus* use of the trademarks which are the subject of the certified registrations in Canada since the date of registration.

[77] I respectfully disagree with the Applicant's submissions. In this regard, it has been established that an applicant's ownership of one or more other trademarks does not give it the automatic right to obtain a further registration [*Coronet-Werke Heinrich Schlerf GmbH v Produits Ménagers Coronet Inc* (1984), 4 CPR (3d) 108 at 115 (TMOB); *385229 Ontario Limited v ServiceMaster Company*, 2012 TMOB 59 at para 47].

[78] Further, I note that all of the registered trademarks relied upon by the Applicant issued to registration in 2020. In the past, assumptions of "*de minimus* use" were based in part on the fact that applicants had to provide information on use in order for their trademarks to proceed to registration. Considering that amendments to the Act in 2019 removed the requirements for applications to provide any information on use in order to proceed to registration, and in the absence of evidence of actual use of the Applicant's registered trademarks in Canada, I am not prepared to infer *de minimus* use of the Applicant's registered trademarks. I also refer to the following statement made by Justice de Montigny in *Hawke & Company Outfitters LLC v Retail Royalty Co*, 2012 FC 1539 at para. 40:

"the fact that a mark appears on the Register does not establish that it is currently in use, or that it was in use as at the relevant material dates. Nor does it establish that the mark is used in relation to wares or services that are similar to those of the parties, or the extent of any such use."

[79] Accordingly, notwithstanding the Applicant's registrations for the NUTRIEN, NUTRIEN AG SOLUTIONS and NUTRIEN AG SOLUTIONS & Design trademarks, and again given that there is no evidence of use of any of these trademarks with any of the registered goods or services, I am of the view that the circumstances in this case do not

support a finding that the existence of any of the Applicant's prior registrations should be considered to be a relevant surrounding circumstance

Surrounding circumstance – use of products more similar to those of the Opponent by companies related to the Applicant

[80] The Opponent submits that if Loveland and Actagro sold the same type of specialized products as the Opponent but with the Applicant's NUTRIEN mark, which the Opponent submits they would be entitled to do, this would create confusion in the marketplace.

[81] As explained above, Actagro and Loveland are part of the Applicant's retail business Nutrien Ag Solutions and Nutrien Ag Solutions is a dealer or otherwise offers for sale the Opponent's products in Canada. In his affidavit at para. 46, Mr. Bloomberg states the following:

Both Loveland Products, Inc. and Actagro, LLC are direct competitors of NutriAg in the micronutrient and specialty crop nutrition products space. In particular, both Loveland Products, Inc. (which in Canada, operates through its Canadian company, Loveland Products Canada Inc.) and Actagro, LLC have products registered on the Canada Food Inspection Agency's Registered Products List, specifically the Registered Micronutrients list. Attached hereto as Exhibit X-1 is a printout of the CFIA's Registered Products List that shows all of the companies that have micronutrient products approved for sale in Canada by the CFIA. Attached hereto as Exhibit X-2 is a printout of the CFIA's Registered Products List that shows all of the companies that have supplements approved for sale in Canada by the CFIA. Both lists include products of Actagro LLC, of Loveland Products Canada, Inc. and of NutriAg.

[82] It appears from Mr. Bloomberg's statement above that only Actagro and Loveland have the same type of proprietary products registered on CFIA's Registered Products list as those of the Opponent. There is no evidence, however, that Actagro or Loveland use the NUTRIEN trademark in the normal course of trade in association with these products. In this regard, Mr. Bloomberg stated the following on cross-examination when asked about these two companies:

61 Q. To your knowledge does Actagro sell any plant inputs under the name Nutrien?

A. I'm not sure if they sell it under that name, and the reason for that is you will appreciate we are coming out of winter now so there's been no sales for the last six months or so really in the industry. So I'm thinking back, you know, six months ago or so and it's a bit vague for me.

64. Q. To your knowledge, does Loveland Products sell any plant inputs or other products under the name Nutrien?

A. I'm not sure about that but I am thinking that their sales and their technical people carry Nutrien --- the name Nutrien on their business cards.

[83] I acknowledge that 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. In this case, however, it seems that the Opponent is arguing that consumers who see the same type of goods as those of the Opponent being sold by Actagro or Loveland, will be confused that the source of those goods is the Opponent. But without evidence that Actagro or Loveland use the Mark in association with their products, I do not see how this could be the case. Further, there is no evidence that Loveland or Actagro would even be licensed to use the Mark in association with the NUTRIEN Goods and Services pursuant to section 50(1).

[84] In my view, the fact that a consumer could encounter the same type of specialized fertilizer as the Opponent through these related companies, presumably under different trademarks, is not enough for me to conclude that the average consumer would infer that the Applicant's overlapping goods sold in association with the NUTRIEN Mark is somehow associated with the Opponent. I therefore do not consider this to be a surrounding circumstance that would favour a determination of the likelihood of confusion in this case.

Conclusion

[85] Having considered all of the surrounding circumstances and applying the test of confusion as a matter of first impression and imperfect recollection, I find that at best for the Applicant the probability of confusion between the NUTRIEN Mark and the Opponent's trademark is evenly balanced between a finding of confusion and no

confusion. I reach this conclusion because, notwithstanding the inherent weakness of the parties' marks, the Opponent's trademark has become known to a considerable extent in Canada, the Applicant has not established any use or reputation of its NUTRIEN Mark, certain of the parties' goods could overlap and there is some degree of resemblance between the marks. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the trademarks, I must therefore find against the Applicant.

[86] As an aside, with the benefit of reliable evidence from the Applicant, I may have found that the Applicant had met its legal burden and reached a different conclusion.

[87] Accordingly, the section 12(1)(d) ground of opposition succeeds with respect to the overlapping goods but is otherwise rejected.

SECTION 16(1)(A) & (C) GROUNDS OF OPPOSITION – NON-ENTITLEMENT TO REGISTRATION

[88] The Opponent pleads that the Applicant is not the person entitled to registration of the NUTRIEN Mark pursuant to sections 16(1)(a) and (c) of the Act because, as of the material date, the NUTRIEN Mark was confusing with the Opponent's NUTRIAG trademark and/or trade name, which the Opponent had previously used and/or made known in Canada, in association with, *inter alia*, the Opponent's micronutrient and specialty crop nutrition products.

[89] The material date to assess these grounds of opposition is the filing date of the application or the date of first use of the NUTRIEN Mark in Canada, whichever is earlier. As the Applicant has not filed any reliable evidence of use of the NUTRIEN Mark, the relevant material date under these grounds is the filing date of the application.

[90] For both of these grounds of opposition, there is an initial burden on the Opponent to show use and/or making known of its trademark and/or trade name prior to June 7, 2017 (the date of filing of the application), and that it had not abandoned its trademark and/or trade name as of April 7, 2021, the date of advertisement of the application [section 16(3) of the Act].

[91] While there is no definition in the *Trademarks Act* of "use" in relation to trade names, I am satisfied that consistent with the purposes of the Act such "use" would have to be in the normal course of trade and in relation to the class or classes of persons with whom such trade is to be conducted.

[92] The Opponent's evidence of its use and/or making known of the NUTRIAG trademark and trade name in Canada since 2000, set out above, is sufficient for the Opponent to meet its evidential burden for this ground of opposition. However, even though the material date for these grounds of opposition is earlier than the material date for the section 12(1)(d) ground, the differences in material dates do not have any significant impact on the determination of the issue of confusion between the trademarks and/or trade names of the parties. Thus, my finding above that the trademarks are likely to be confused with respect to the overlapping goods also applies to these grounds of opposition. These grounds therefore also succeeds with respect to the overlapping goods but are otherwise rejected.

REMAINING GROUNDS OF OPPOSITION

[93] Since the Opponent has already succeeded under two grounds of opposition, I do not consider it necessary to review any of the other grounds of opposition.

APPLICATION NOS. 1,886,896 FOR NUTRIEN AG SOLUTIONS AND 1,886,897 FOR NUTRIEN AG SOLUTIONS & DESIGN (THE NUTRIEN AG SOLUTIONS MARKS)

[94] Where applicable, I will have regard to my previous findings with respect to the NUTRIEN Mark.

[95] Each of the grounds of opposition for the NUTRIEN AG SOLUTIONS Marks also turn on the issue of the likelihood of confusion between those trademarks and the Opponent's NUTRIAG trademark. While the material dates for the remaining grounds of opposition are different, in my view nothing turns on whether the issue of confusion is determined at any particular material date. I will assess the likelihood of confusion between the NUTRIEN AG SOLUTIONS Marks and the Opponent's NUTRIAG

trademark under the section 12(1)(d) ground of opposition, as, once again, that ground and that registered mark of the Opponent represent the Opponent's strongest case.

Section 12(1)(d) ground of opposition

Inherent distinctiveness of the trademarks and the extent to which they have become known

[96] My findings above with respect to the inherent and acquired distinctiveness of the Opponent's NUTRIAG mark are the same for this factor.

[97] When viewed as a whole, the NUTRIEN AG SOLUTIONS Marks are also inherently weak. In this regard, I have already found the component NUTRIEN to be suggestive of the word "nutrients". In these cases, the components AG and SOLUTIONS do not add any distinctiveness to the component NUTRIEN. The NUTRIEN AG SOLUTIONS Marks as a whole are therefore suggestive that the applied for goods and related services comprise nutrient solutions for agriculture. I will also add that I do not find that the fact that the component NUTRIEN appears in a larger font and above the component AG and the word SOLUTIONS to add much distinctiveness to the Applicant's NUTRIEN AG SOLUTIONS Design mark.

[98] With respect to the extent known of the Applicant's NUTRIEN AG SOLUTIONS Marks, there is no admissible evidence of record.

[99] Therefore, overall, I find that this factor favours the Opponent.

Length of time the trademarks have been in use

[100] The Opponent has shown use of its trademark in association with some of its goods since at least as early as 2000 while the Applicant has not provided any reliable evidence of use of either of its NUTRIEN AG SOLUTIONS Marks. This factor therefore also favours the Opponent.

Nature of the goods and channels of trade

[101] The goods and services for each of the NUTRIEN AG SOLUTIONS Marks, read as follows:

Goods

- (1) Fertilizers and plant nutrients for agricultural use

Services

- (1) Retail stores and on-line retail stores in the field of agricultural chemicals, seeds, and fertilizers; distributorship services in the field of agricultural chemicals, seeds, and fertilizers

[102] The Opponent's submissions with respect to these factors are the same as they were with respect to the Applicant's overlapping goods under the NUTRIEN Mark. In this regard, the Opponent submits that the products and related services covered by the NUTRIEN AG SOLUTIONS Marks, namely crop protection products including fertilizers and plant nutrients for agriculture and related retail services, overlap substantially with the Opponent's registered goods in terms of their nature and the places where they are sold and to whom.

[103] The Applicant also makes many of the same submissions with respect to these factors as it did with respect to the NUTRIEN Mark. In this regard, the Applicant submits that the Opponent has testified that it has always marketed, distributed, and sold its registered micronutrient and supplements different from the way in which exempt fertilizers for basic nutrition are marketed and sold. Further, the Applicant does not currently make or sell registered fertilizers in Canada. As Mr. Bloomberg explains, registered fertilizers are specialized products that incorporate proprietary technologies. This is what makes them different from fertilizer products which do not need to be registered under the Fertilizer Act (Bloomberg Reply, paras. 9 and 11).

[104] What is different about the facts with respect to the NUTRIEN AG SOLUTIONS Marks is that the evidence shows that Nutrien Ag Solutions has been the name of the Applicant's newly branded retail business since April 5, 2018. The evidence also shows that Nutrien Ag Solutions is a dealer which offers the Opponent's products for sale in Canada.

[105] I agree with the Applicant that it is indeed odd that the Opponent is arguing that there is a risk of confusion when it is entrusting a company related to the Applicant to sell its product. By doing so, the Applicant also submits that there does not appear to be any legitimate concern that anyone would be confused between the respective parties' trademarks or between the Opponent and the Applicant.

[106] Whether or not that is the case, in the absence of restrictions in the Applicant's statement of goods, or evidence from the Applicant that its fertilizers and plant nutrients only refer to those types of primary fertilizer materials that cannot be registered under the *Fertilizers Act*, I do not find the Applicant's submissions sufficient to infer that the Applicant's NUTRIEN AG SOLUTIONS Goods and Services refer to exempt fertilizer materials and their related services only. In other words, the Applicant could use its trademarks on these types of specialized registered fertilizers and related services in the future. I therefore find that there is a potential for overlap between the parties' goods and related services.

[107] With respect to the parties' channels of trade, as noted above, the evidence shows that the Opponent's goods are sold to end consumers through local and multinational dealers, dealer groups, co-ops, agricultural coops, and distributors of agricultural and horticultural products (Bloomberg, para 28), including the Applicant's retail division Nutrien Ag Solutions. It therefore appears that the parties' channels of trade already overlap to some extent. In the absence of evidence to the contrary from the Applicant, I find that the parties' channels of trade could also overlap for all of the NUTRIEN AG SOLUTIONS Goods and Services.

Degree of resemblance

[108] In this case, the marks do resemble each other in appearance and sound to the extent that they both begin with the component NUTRI and also include the component AG. The ideas suggested by the parties' marks are also similar as both suggest nutrients for agriculture.

[109] I therefore find that this factor favours the Opponent.

Surrounding circumstances - State of the register evidence

[110] As previously discussed, the Applicant's evidence does show a number of active NUTRI registrations on the Register. However, none of these active NUTRI registrations also contain the component AG, which is an additional component shared by the parties' marks. Further, there is no evidence of any use in the marketplace of these marks for similar goods or services.

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

Surrounding circumstances - Incident of confusion

[112] As noted above, on March 9, 2018, the Opponent received an electronic funds transfer for over U.S. \$1.13 million from Edberg Crop Management Inc. that was intended for Nutrien Ag Solutions. As this incident of confusion involves the Applicant's NUTRIEN AG SOLUTIONS trademark as opposed to its NUTRIEN trademark, I do consider that it assists the Opponent as a surrounding circumstance with respect to its opposition to the NUTRIEN AG SOLUTIONS Marks.

Remaining surrounding circumstances

[113] The analysis of the remaining surrounding circumstances set out above with respect to the NUTRIEN trademark, including the sophisticated consumers, the Opponent's alleged family of marks, the co-existing registrations owned by the Applicant and the use of products more similar to those of the Opponent by companies related to the Applicant, are more or less the same with respect to the Applicant's NUTRIEN AG SOLUTIONS Marks. I do not find that any of these further surrounding circumstances favour either party.

Conclusion

[114] Considering the above, and keeping in mind that the Opponent's trademark has become known to a considerable extent in Canada, the Applicant has not established any use or reputation of either of its NUTRIEN AG SOLUTIONS Marks, the potential for overlap between the parties' goods and related services, and the fact that there is some

degree of resemblance between the marks, I find that at best for the Applicant the probability of confusion between the NUTRIEN AG SOLUTIONS Marks and the Opponent's trademark is evenly balanced between a finding of confusion and no confusion. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the trademarks, I must therefore find against the Applicant.

[115] The section 12(1)(d) ground is therefore successful with respect to the NUTRIEN AG SOLUTIONS Marks.

SECTION 16(1)(A) GROUND OF OPPOSITION – NON ENTITLEMENT

[116] The section 16(1)(a) ground of opposition also turns on the issue of confusion between the NUTRIEN AG SOLUTIONS Marks and the Opponent's previously used and made known NUTRIAG trademark and trade name as of the filing date of these applications (*i.e.*, March 8, 2018). I am satisfied from the Opponent's evidence set out above that it has met its initial evidential burden under this ground.

[117] For the most part, my conclusions respecting the section 12(1)(d) ground of opposition also apply to this ground of opposition. The notable exception would be the fact that the incident of confusion evidenced by the Opponent occurred after the material date for this ground. However, I do not consider the fact that this one surrounding circumstance is no longer relevant to the issue of confusion at the earlier material date to be sufficient to tip the balance of probabilities in the Applicant's favour. Accordingly, I am satisfied that the section 16(1)(a) ground of opposition also succeeds with respect to both NUTRIEN AG SOLUTIONS Marks.

REMAINING GROUNDS OF OPPOSITION

[118] Since the Opponent has already succeeded under two grounds of opposition in respect of the NUTRIEN AG SOLUTIONS Marks, I do not consider it necessary to review any of the other grounds of opposition in respect of these marks.

DISPOSITION

[119] In view of the above, and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse application No. 1,841,262, for the trademark NUTRIEN with respect to the overlapping goods set out in strike out below, and reject the opposition with respect to the remainder of the goods and services (as set out in the attached Schedule A), pursuant to section 38(12) of the Act:

Class 1: Potash; ~~fertilizers~~; chemicals for use in the manufacture of fertilizers including, nitrogen, ammonia, ammonium, potassium, potash, phosphate, sulphur, potassium nitrate, ammonium nitrate, ammonium phosphate, urea, sulphuric acid and phosphoric acid; chemicals for use in the manufacture of pesticides; agricultural chemicals, namely surfactants, adjuvants, and wetting agents for use in the application of herbicides, insecticides, pesticides, and soil nutrients; adjuvants for use with agricultural chemicals; oil spray adjuvant for use with agricultural insecticides and fungicides; active chemical ingredients for use in the manufacture of fertilizer, pesticides, herbicides, fungicides, insecticides and rodenticides; soil conditioners for agricultural use; ~~nutritive additive chemicals to enhance the biological activity of water and soil for purposes of fertilization~~, improvement of soil pH and irrigation water pH, improvement of soil penetrability, and enhancement of pesticide and fertilizer performance; chemical preparations for use in agriculture, namely, chemical preparations for seed treatment; soil surfactant used to promote uniform movement of water in soil; soil inoculants for application to seeds used in agriculture; ~~chemical additives for fertilizers~~; wetting agent, spreading agent, penetrant and surfactant for use in connection with pesticides, herbicides, desiccants, defoliants, insecticides, fungicides, acaricides, ~~plant growth regulators and foliar nutrients~~; water conditioners, namely, phosphates for potable water treatment; agricultural anti foamer and defoamer; amino acids for use with water soluble plant nutritional products; amino acids as a nitrogen source for use with water soluble plant nutritional products and amino acids as a nitrogen sources for use in combination with water soluble plant nutritional products formulated for foliar or drip irrigation

application; ~~plant growth nutrients; plant feed~~; water treatment chemicals for use in golf course turf management; high purity urea solution for the treatment and control of diesel exhaust, nitric oxide and nitrogen dioxide emissions, namely, chemical additives for fuel exhaust (the Applicant's overlapping goods).

[120] I also refuse application No. 1,886,896 for NUTRIEN AG SOLUTIONS and application No. 1,886,897 for NUTRIEN AG SOLUTIONS & Design, pursuant to section 38(12) of the Act:

Cindy R. Folz
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A

Application No. 1841262 - NUTRIEN

Goods:

(1) Potash; fertilizers; chemicals for use in the manufacture of fertilizers including, nitrogen, ammonia, ammonium, potassium, potash, phosphate, sulphur, potassium nitrate, ammonium nitrate, ammonium phosphate, urea, sulphuric acid and phosphoric acid; chemicals for use in the manufacture of pesticides; agricultural chemicals, namely surfactants, adjuvants, and wetting agents for use in the application of herbicides, insecticides, pesticides, and soil nutrients; adjuvants for use with agricultural chemicals; oil spray adjuvant for use with agricultural insecticides and fungicides; active chemical ingredients for use in the manufacture of fertilizer, pesticides, herbicides, fungicides, insecticides and rodenticides; soil conditioners for agricultural use; nutritive additive chemicals to enhance the biological activity of water and soil for purposes of fertilization, improvement of soil pH and irrigation water pH, improvement of soil penetrability, and enhancement of pesticide and fertilizer performance; chemical preparations for use in agriculture, namely, chemical preparations for seed treatment; soil surfactant used to promote uniform movement of water in soil; soil inoculants for application to seeds used in agriculture; chemical additives for fertilizers; wetting agent, spreading agent, penetrant and surfactant for use in connection with pesticides, herbicides, desiccants, defoliant, insecticides, fungicides, acaricides, plant growth regulators and foliar nutrients; water conditioners, namely, phosphates for potable water treatment; agricultural anti foamer and defoamer; amino acids for use with water soluble plant nutritional products; amino acids as a nitrogen source for use with water soluble plant nutritional products and amino acids as a nitrogen sources for use in combination with water soluble plant nutritional products formulated for foliar or drip irrigation application; plant growth nutrients; plant food; water treatment chemicals for use in golf course turf management; high purity urea solution for the treatment and control of diesel exhaust, nitric oxide and nitrogen dioxide emissions, namely, chemical additives for fuel exhaust

SERVICES

35(1) Providing business information services relating to the distribution of seed, fertilizer, chemical and biological ingredients for use in the manufacture of fertilizer, pesticides, herbicides, fungicides, insecticides and rodenticides; providing business information services relating to distribution of nitrogen, phosphate and potash; administration of employee service award programs; personnel placement and recruitment; internal and external employee recruitment programs and campaigns; arranging and conducting incentive reward programs to promote the sale

of agricultural chemicals; farm business planning services; providing financial record-keeping services for farms; business risk management and cost analysis services for farms; farm management services for others; providing information in the field of maintaining farm business records; business consulting services that provides transformational strategies to companies wishing to move towards sustainability and socially responsible business practices in the field of agriculture; charitable services, namely, organizing and conducting volunteer programs and community services projects in the nature of assisting farmers and agricultural-based businesses in global and local communities in areas of crop diversification, seed conservation, effective fertilizer use and environmental protection; promoting public awareness of environmental matters; promoting public awareness of environmental issues and initiatives; organizing and conducting business and social engagement opportunities for participation in youth, culture, health and environmental community service projects, namely developing and coordinating volunteer projects for charitable organizations; providing global and local support to communities through charitable services, namely, organizing and conducting volunteer programs and community service programs; direct marketing consulting for fertilizer, seeds, chemicals, landscape supplies, namely, compost, manure, potting soil, peat, humus and soil conditioner, cedar chips, cedar mulch, tinted mulch, pine bark mulch, pine bark nuggets, cypress mulch, black hardwood mulch and topsoil for use in agriculture, horticulture and turf; business management services in the areas of manufacturing process safety, namely, safe plant operations, equipment reliability, equipment procurement, operational cost improvement to prevent catastrophic losses related to environmental damage, loss of containment, worker injuries, energy and chemical releases, knowledge networks, namely, internal cross functional and cross facility technical, and business teams, councils and working groups, project management, equipment reliability, cost improvement and employee engagement and collaboration and environment health, safety and security performance; providing business management and business management services relating to information and data compiling and analyzing for the agriculture and turf industries; retail stores in the field of agricultural chemicals, seeds, and fertilizers; distributorship services in the field of agricultural chemicals, seeds, and fertilizers; retail services by direct solicitation by sales agents in the field of agricultural inputs, namely, fertilizers, pesticides, herbicides, fungicides, insecticides, seeds; administration of employee reward systems, namely conducting employee incentive award programs to promote on the job safety, to promote productivity and quality; distributorship of commodity fertilizers; business management services relating to information and data compiling and analyzing; administration of employee remuneration programs, namely, pension plans, benefit plans, profitsharing plans, stock bonus plans

39(2) Transportation of commodity fertilizers by truck and rail; distribution services, namely, delivery of agricultural chemicals, seeds, and fertilizers; tracking services for the retrieval of encoded products in transit, namely

the tracking and tracing of encoded retrievable reusable containers for pesticides, herbicides and fertilizers used in the agricultural industry; tracking inventory in transit, namely the tracking and tracing of pesticides, herbicides and fertilizers stored in retrievable reusable containers for use in the agricultural industry

40(3) Processing of phosphate ore, namely custom fertilizer manufacturing; Processing of potash, namely custom fertilizer manufacturing; custom production of chemicals, by means of blending component liquids in certain proportions and filling in refillable and reusable containers

44(4) Custom application, namely application of fertilizer and other agricultural chemicals; agronomy services, namely, consulting services in the nature of providing crop and yield production management information in the nature of agricultural advice and crop recommendations, pest management recommendations and seed recommendations; pest control services for agriculture; agricultural advice and information in the fields of crop production, crop planning, crop feasibility, crop seeding rates, crop cultivation, crop monitoring, crop fertility, seed selection and improving crop production; consulting services in the fields of agriculture and agronomy, namely, providing crop and yield production management information in the nature of agricultural advice and crop recommendations; agriculture crop management, namely, crop planning and crop scouting

Appearances and Agents of Record

HEARING DATE: 2023-12-04

APPEARANCES

For the Opponent: Adam Bobker

For the Applicant: Antonio Turco

AGENTS OF RECORD

For the Opponent: Bereskin & Parr

For the Applicant: CPST IP