



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2025 TMOB 115

**Date of Decision:** 2025-05-27

## **IN THE MATTER OF OPPOSITIONS**

**Opponents:** Weed Pool Cannabis Co-operative Limited  
Weed Pool Processing Co-operative

**Applicant:** Nexus Cannabis Solutions Inc.

**Applications:** 1,932,160 for CONTINENTAL WEED POOL & Design  
1,932,159 for B.C. WEED POOL & Design  
1,932,097 for ALBERTA WEED POOL & Design  
1,932,084 for CANADIAN WEED POOL & Design

## **OVERVIEW**

[1] This decision addresses oppositions by Weed Pool Cannabis Co-operative Limited and Weed Pool Processing Co-operative (collectively, the Opponent) to a set of four applications filed by Nexus Cannabis Solutions Inc. (the Applicant) for the trademarks CONTINENTAL WEED POOL & Design, B.C. WEED POOL & Design, ALBERTA WEED POOL & Design, and CANADIAN WEED POOL & Design (collectively, the Marks), shown below:



[2] The Opponent has raised several grounds of opposition, including objections based on non-registrability, non-entitlement to use, non-distinctiveness, and bad faith.

[3] For the reasons that follow, all of the oppositions are rejected.

### **THE RECORD**

[4] The applications for the trademarks ALBERTA WEED POOL & Design and CANADIAN WEED POOL & Design were filed on November 22, 2018, and the applications for the trademarks B.C. WEED POOL & Design and CONTINENTAL WEED POOL & Design were filed on November 23, 2018. Colour is claimed as a feature of the Marks. The applications for the Marks are based on proposed use in Canada in association with the following goods (collectively the Goods):

- (1) Cordage made of hemp; hemp; hemp bands; hemp fibers; hemp fibres; hemp netting; hemp nettings; raw true hemp fiber; raw true hemp fibre; rope.
- (2) Hemp base mixed thread and yarn; hemp based mixed thread and yarn; hemp thread; hemp thread and yarn; hemp thread and yarns; hemp yarn; true hemp thread and yarn; twisted hemp thread; twisted hemp thread and yarn; twisted hemp yarn
- (3) Hemp base mixed fabrics; hemp based mixed fabrics; hemp cloth; hemp fabric; hemp yarn fabrics; hemp-cotton mixed fabrics; hemp-silk mixed fabrics; hemp-wool mixed fabrics; true hemp fabrics
- (4) Live cannabis plants; live hemp plants; loose hemp for use as animal bedding
- (5) Dried cannabis

[5] The applications were subsequently advertised in the *Trademarks Journal* following which the Opponent filed statements of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The dates of

advertisement and filing of a statement of opposition for each application are set out below:

Trademark	App. No.	Date of advertisement	Date of filing of statement of opposition
CONTINENTAL WEED POOL & Design	1,932,160	June 30, 2021	August 27, 2021
B.C. WEED POOL & Design	1,932,159	July 21, 2021	September 17, 2021
ALBERTA WEED POOL & Design	1,932,097	April 20, 2022	May 30, 2022
CANADIAN WEED POOL & Design	1,932,084	March 30, 2022	May 30, 2022

[6] The grounds of opposition are the same across the applications. As last amended (on June 7, 2024), they relate to bad faith under section 38(2)(a.1), registrability under section 12(1)(b), distinctiveness under section 2, and non-entitlement to use under section 38(2)(f) of the Act.

[7] Both parties filed evidence and written representations, and were represented at a hearing.

[8] As the issues and evidential record are nearly identical for all the cases, all four oppositions are discussed in this decision.

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

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the applications comply 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 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), 1990 CanLII 11059 (FC), 30 CPR (3d) 293 (FCTD) at 298].

## **EVIDENCE**

[10] A brief overview of the evidence is set out below. Pertinent portions of the evidence are discussed further in the analysis of the grounds of opposition.

### ***The Opponent's evidence***

[11] The Opponent's evidence consists of the affidavit of Brigitte Yim (sworn May 31, 2022); the affidavit of James Erwin Southam (sworn July 7, 2022); the affidavit of Clayton Curtis Sparks (sworn July 8, 2022); and the affidavits of Kristen Jean Merke (sworn May 30, 2022, and July 7, 2022). No cross-examinations were conducted on these affidavits.

#### **The Yim affidavit**

[12] Ms. Yim is a legal assistant employed by the agent for the Opponent. Ms. Yim obtained copies of various online materials including: dictionary definitions for several words including 'weed' and 'pool'; an 'Information Guide on Co-operatives' from a Government of Canada website, articles on the 'Co-operative Movement', 'Alberta Wheat Pool', and 'Saskatchewan Wheat Pool' from *thecanadianencyclopedia.ca* website, articles from various provincial government websites referencing the Alberta Wheat Pool grain elevators; and printouts of current and archived pages from the applicant's website *weedpool.ca*.

#### **The Southam affidavit**

[13] Mr. Southam is the president and a director and co-founder of the Weed Pool Cannabis Co-operative Limited (WPCC), and a director and co-founder of the Weed Pool Processing Co-operative. Mr. Southam is also the

president and a director and co-founder of Prairie Cannabis Ltd., which operates retail cannabis stores in Saskatchewan.

[14] Mr. Southam provides background information on the Opponent, and explains that the Opponent's name 'Weed Pool Cannabis Co-operative Limited' was chosen as a reference to the "former well-known Saskatchewan Wheat Pool, also a cooperative, which was formed by the small farmers also to compete against the corporate giants of their day." Information on the Opponent's business as a cooperative and activities, sales, and advertising in association with its trade name and trademark WEED POOL, as well as third-party publicity, is also provided.

#### The Sparks affidavit

[15] Mr. Sparks is a co-founder and former Director and Officer of the WPCC, and was Director and Officer from the time of WPCC's incorporation date of July 31, 2019, until October 2, 2019. Mr. Sparks is also president and founder of Flower Power Cannabis Pharms Inc. (Flower Power), which operates a retail cannabis store in La Loche, Saskatchewan. Flower Power is an original member of WPCC, and has continuously been a member since July 31, 2019.

[16] Mr. Sparks recounts a meeting that he had with Jim Southam (the president of WPCC), Jason O'Connor, and his father, Terry O'Connor, on January 23, 2022. Mr. Sparks states that, during the meeting, Messrs. O'Connor advised that they were not interested in setting up a cooperative.

#### The Merke affidavits

[17] Ms. Merke is law clerk employed by the agent for the Opponent. In her first affidavit, Ms. Merke conducted corporate searches for the Applicant and the Opponent. She also provided the particulars of the applications for the Marks.

[18] In her second affidavit, Ms. Merke was asked to contact the *Prince Albert Daily Herald* newspaper in Saskatchewan and *CTV News Saskatoon* in Saskatoon, Saskatchewan, to obtain their respective audience reach. The responses she received are attached as exhibits.

### ***The Applicant's evidence***

[19] As its evidence, the Applicant filed the affidavit of Jason O'Connor (sworn March 13, 2023) and the affidavit of Aidan McDermott (sworn March 10, 2023). The Applicant subsequently sought and was granted leave to file a further affidavit of Aidan McDermott (sworn October 17, 2023) (the second McDermott affidavit).

[20] Cross-examinations were conducted on all of these affidavits and the transcripts form part of the record. The undertakings from the cross-examination of Mr. O'Connor were subsequently filed and also form part of the record. With respect to the first McDermott affidavit, the Applicant took under advisement two requests which were not provided.

#### The O'Connor affidavit

[21] Mr. O'Connor is the co-founder and marketing director of the Applicant. Mr. O'Connor provides the particulars of an Industrial hemp license granted to the Applicant in 2017, and information on the Applicant's promotional efforts in association with its 'Weed Pool Logo'. This consists primarily of printouts of a Facebook social media account displaying the ALBERTA WEED POOL Design mark.

[22] Mr. O'Connor also provides information on three orders of industrial hemp seeds (which are not among the listed goods in the applications) sold to two retailers in Alberta between 2019 and 2023. Exhibit E to his affidavit shows the ALBERTA WEED POOL & Design mark on sell sheets for the hemp seeds, and on seed packets depicted on the sell sheets.

#### The McDermott affidavit

[23] Mr. McDermott identifies himself as a technical assistant employed by the agent for the Applicant. Mr. McDermott provides the results of searches he conducted for information regarding cooperatives with the word 'pool' in their name, and for trademark registrations with the word POOL in association with goods and services including the terms CO-OP\*, COOP\* or COLLECTIVE\*.

#### The second McDermott affidavit

[24] Mr. McDermott was asked by the agent for the Applicant to search for information on the history of the 'Alberta Wheat Pool' and the 'Saskatchewan Wheat Pool' and, in particular, the dates and circumstances under which these entities ceased to exist. He was provided with a copy of a book entitled "the Rise and Fall of United Grain Growers" and was instructed to conduct an internet search for further information.

#### **PRELIMINARY REMARKS**

[25] The Opponent, citing the decision in *Cross-Canada Auto Body Supply (Windsor) Ltd v Hyundai Auto Canada*, 2005 FC 1254, 43 CPR 4th 21, takes the position that the McDermott affidavits are inadmissible in their entirety because they are in the name of a trademark agent employed by the Applicant's agent of record, they contain evidence curated under the direct guidance of the Applicant's agent of record, and evidence goes to material issues in these proceedings including the bad faith grounds and the issue of distinctiveness. The Opponent submits that Mr. McDermott's evidence does not provide a complete view of all available evidence, but rather was compiled in such a way as to appear deliberately favourable to the Applicant. The Opponent's written representations [at paras 30-37] include a detailed list of admissions from Mr. McDermott's cross-examination testimony which it considers to support its position.

[26] The Applicant takes the position that the Opponent has not addressed any of the factors (cited in paragraph 5 of *Cross-Canada*) that are relevant to assessing whether to accept evidence from employees of the law firm conducting the litigation, but rather has suggested that the standard for exclusion is whether the affidavits “are in the name of a trademark agent, employed by the Applicant’s agent of record.” The Applicant submits that the Opponent has incorrectly suggested that the evidence may be excluded if the evidence “goes to material issues” and that *Cross-Canada* is instead concerned with “opinion evidence on the most crucial issues in the case”. The Applicant adds that the Opponent has failed to distinguish between an opposition, which is an inherently contentious proceeding, and a contentious issue for which opinion evidence is provided [Applicant’s written representations, paras 11-15].

[27] The Applicant in its written representations [at paras 16-25] responds to some of the arguments raised by the Opponent. In particular, the Applicant submits that at the time of swearing his affidavits (in March and October 2023), Mr. McDermott was not a trademark agent, though he did become one in December 2023, and that the McDermott affidavits provided a clear indication of the scope of the searches conducted. The Applicant notes that while the Opponent has alleged that the evidence of Mr. McDermott is ‘partial’, that the Opponent has not presented any evidence that would contradict Mr. McDermott’s evidence, despite the fact that the searched corporate and trademark registers are readily publicly available.

[28] At the outset, and leaving these issues aside, I find the state of the register evidence provided in the first McDermott affidavit holds little value given the search parameters that were applied. Mr. McDermott has sought to establish the commonality of trademarks with the word POOL in connection with cooperatives by conducting searches for 1) POOL in



Trademark and CO-OP\* in the Goods and Services; 2) POOL in Trademark and COOP\* in the Goods and Services, and 3) POOL in Trademark and COLLECTIVE in the Goods and Services [First McDermott affidavit, paras 16-19, Exhibits K-M]. However, this presupposes that the specification of goods and services for trademarks containing the word POOL owned or connected with cooperatives would necessarily contain any of these words. I do not consider this to be the case.

[29] Turning to the corporate searches in the first McDermott affidavit [paras 1-15; Exhibits A-H], I agree that these are problematic, though not necessarily because Mr. McDermott is an employee of the agent for the Applicant (and likely a trademark agent in training at the time). Rather, there appears to be a subjective element to how they were compiled that is not fully reflected in the stated search parameters, or in the exhibits to his affidavit. For instance, Mr. McDermott simply states that he was asked to “conduct an internet search for information regarding co-operatives with the word “pool” in their name” [para 2]. His affidavit includes the results of searches of the federal corporate registry and the corporate registries of British Columbia, Saskatchewan, Manitoba, and Ontario for cooperatives, but there is no reference to any other provincial corporate registries. On cross-examination, Mr. McDermott admitted that his instructions in paragraph 2 were not to cover the province of Alberta; he then admitted that his instructions did not explicitly say to exclude Alberta but, rather, that he chose not to [Q160-163]. Similar admissions were made with respect to the exclusion of Quebec and Newfoundland and Labrador [Q164-167]. I therefore attach little weight to Mr. McDermott’s corporate search results.

[30] In the second McDermott affidavit, Mr. McDermott was provided with a copy of the book “The Rise and Fall of United Grain Growers” by Paul D. Earl (University of Manitoba Press, 2019) by the agent for the Applicant, and was

instructed to conduct an internet search for further information. His attached search results consist of three academic articles. In my view, regardless of whether or how heavily his search was influenced by the Applicant's agent of record, the results are of little assistance in that these articles may not be considered as evidence of the truth of their contents, but rather simply establish that they exist.

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

#### ***Bad faith - Section 38(2)(a.1)***

[31] The Opponent has raised three arguments under the bad faith ground of opposition, which are reproduced below:

- a) Pursuant to subsection 38(2)(a.1), the Application was filed in bad faith and, as such, the Applicant could not have been satisfied, at the date of filing of the Application, or at any other time, that it was entitled to use the Opposed Mark in Canada in association with the Opposed Goods. At the time of filing the Application, the Applicant intended to use the Opposed Mark to trade off the reputation of the original Alberta Wheat Pool as a cooperative, knowing the Applicant was not itself a cooperative and would not be operating as a cooperative.
- b) Pursuant to subsection 38(2)(a.1), the Application was filed in bad faith and, as such, the Applicant could not have been satisfied, at the date of filing of the Application, or at any other time, that it was entitled to use the Opposed Mark in Canada in association with the Opposed Goods. The Applicant, without authorization from the owner of the Alberta Wheat Pool trademark and logo, intentionally misappropriated the copyright, logo and substantially copied the Alberta Wheat Pool trademark and logo or elements thereof.
- c) Pursuant to subsection 38(2)(a.1), the Application was filed in bad faith. As such, the Applicant could not have been satisfied, at the date of filing of the Application, or at any other time, that it was entitled to use the Opposed Mark in association the Opposed Goods. The Applicant has substantially misappropriated the Alberta Wheat Pool trademark and logo or elements thereof and sought to assert ownership and exclusive rights over portions of a trademark and logo or elements thereof to which it knew or ought to have known belonged

to a third party, namely the owner of the Alberta Wheat Pool trademark and logo.

Jurisprudence on bad faith

[32] The Opponent in its written representations refers to two bad faith decisions of the Federal Court, *Blossman Gas Inc v Alliance Autopropane Inc.* 2022 FC 1794 (*Blossman*), and *Beijing Judian Restaurant Co Ltd v Meng*, 2022 FC 743 (*Beijing*). *Blossman* is cited for the proposition that bad faith must be interpreted in context, and that bad faith has been found where an applicant applied to register well-known marks to coattail on their reputation. *Beijing* is cited for the proposition that bad faith is not limited to dishonest conduct but may include dealings that fall short of what is considered by reasonable people as acceptable commercial behavior, and that the subjective intention of the applicant at the time of filing was a relevant consideration [Opponent's written representations, paras 40, 41]. Though they consider bad faith in the context of invalidating a trademark registration under section 18(1)(e) of the Act, these cases are nonetheless relevant in clarifying the scope of bad faith.

[33] In *Blossman*, a licensee (AAP) improperly registered trademarks belonging to the licensor (Blossman). At the time of filing its application for the trademark, AAP knew that it was only a sublicensee of the trademark and not its owner; that it had not yet used that trademark under license; and that it had agreed that its rights to use the trademark were dependent on the continuation of agreements with Blossman. AAP nonetheless applied to register the trademark in its own name, without advising Blossman it was doing so. The Court found that in such circumstances, AAP "cannot reasonably or in good faith have applied to obtain itself the exclusive right to use the trademark in Canada" [*Blossman*, para 124]. It further noted that "[t]o the extent that bad faith may include "conduct that falls short of the standards of acceptable commercial behaviour," this would, in my view,

cover attempts by a licensee to register the licensor's trademark, particularly given the Canadian law on this issue." [para 129].

[34] In canvassing the earlier jurisprudence on bad faith, the Court in *Blossman* noted that bad faith has been found where an applicant applied to register well-known marks to coattail on their reputation, citing *Cerveceria Modelo, SA de CV v Marcon*, TMOB No 131 at paras 31-38. In *Cerveceria Modelo*, the evidence showed that the applicant had applied to register over 18 arguably well-known marks for arguably related goods/services, for which the applicant was aware of the established reputation of nearly all of the marks it applied for in association with particular goods, and that it had not taken steps to use them for fear that they might be opposed.

[35] In *Beijing*, the evidence showed that the respondent registered the trademark at issue without a legitimate commercial purpose, and in the circumstances that this constituted bad faith. Factors informing the Court's decision included that the respondent: used a direct reproduction of the applicant's trademark; knew of the applicant's restaurants, and had a pattern of filing trademarks for well-known restaurants, and; did not demonstrate a legitimate commercial intention to use the trademark but rather sought to benefit from the registration of the trademark through extorting money from the applicant (approaching the applicant to buy the mark for a cost well above any cost associated with obtaining the mark) or license (offering a would-be purchaser franchise rights, and relying on the reputation in the applicant's restaurants as a means to justify the significant cost requested to license the mark).

[36] While the boundaries of what constitutes bad faith are still developing, the above cases provide some insight as to the behaviour and context against which a finding of bad faith may be made. With this in mind, I will now turn to my analysis of the bad faith grounds raised by the Opponent.

[37] The material date for this ground of opposition is the filing date of the applications.

Analysis – bad faith grounds

*The Applicant intended to use the Marks to trade off the reputation of the original Alberta Wheat Pool as a co-op while knowing the Applicant was not a co-op*

[38] The thrust of the Opponent's first bad faith allegation is that, at the date of filing of the applications, the Applicant was familiar with and intended to use each of the Marks to trade off the reputation of the Alberta Wheat Pool as a co-operative, knowing that the Applicant was not itself a co-operative and would not be operating as a co-operative [Opponent's written representations, para 39].

[39] In support, the Opponent refers to:

- Mr. Southam's stated belief, based on his experience living and working in Saskatchewan, that "any person using the word(s) POOL or WEED POOL in connection with a business in Canada would be thought by persons in Saskatchewan, and indeed in any of the Prairie provinces, to be carrying on business as a co-operative or people grouping resources as a collective to leverage their assets under one banner distinct from a traditional for profit company" [Southam affidavit, para 65].
- An entry from the *Merriam Webster* online dictionary defining POOL as "an aggregation of the interests or property of different persons made to further a joint undertaking by subjecting them to the same control and a common liability" [Yim affidavit, Exhibit BY-1].
- An entry in the *Canadian Encyclopedia* confirming the Alberta Wheat Pool is an "agricultural co-operative commonly known as "The Pool"

and “part of the province’s cultural landscape” [Opponent’s written representations at para 43, citing Exhibit BY-6 of the Yim affidavit].

- Mr. Southam’s understanding of co-operatives is also confirmed by the Government of Canada’s Information Guide on Co-operatives [Yim affidavit, Exhibit BY-2], which clearly distinguishes between “share capital corporations and co-operative corporations including the difference between members and shareholders” [Opponent’s written representations, para 44].
- A printout of the “About” section of the Applicant’s website *weedpool.ca* stating that “...Jason O’Connor conceived this name (Weed Pool) after working his way up in the original Alberta Wheat Pool...” [Yim affidavit, Exhibit BY-16].
- Mr. O’Connor’s admission that he chose the name Weed Pool because of its resemblance to Alberta Wheat Pool [O’Connor cross-examination; Q226].
- Mr. O’Connor’s admission that the Applicant is not a cooperative, but rather a family-owned, for-profit company [O’Connor cross-examination; Q85-87].

[40] For its part, the Applicant’s position is that the Opponent has failed to meet its evidentiary burden, in particular, by failing to show that, as of the filing date of the applications, the Alberta Wheat Pool had a reputation as a co-operative entity among ordinary consumers. It emphasizes that the Alberta Wheat Pool’s existence ceased in 1998 [citing the encyclopedic article provided at Exhibit BY-6 to the Yim affidavit], and that while it may be that its historical grain elevators are ‘iconic’ and form part of the province’s cultural landscape, this is not evidence that a consumer would

recognize that the word 'pool' in 'Alberta Wheat Pool' designated its historical legal status as a cooperative entity.

[41] While the evidence is clear that the Applicant is not, nor has it at any time been a cooperative, and that it was familiar with the Alberta Wheat Pool, I find that the evidence is not sufficient to establish that the average consumer would be aware of the "reputation of the original Alberta Wheat Pool as a co-operative". The statement of Mr. Southam is problematic at least on the basis that he is not independent of the parties, nor is he qualified as an expert in consumer perception. The inclusion of a *Canadian Encyclopedia* entry (or the other historical references included in the Yim affidavit) on the Alberta Wheat Pool does not necessarily mean that the average consumer would be aware of its historical reputation or even its existence. Indeed, as noted in the *Canadian Encyclopedia*, the Alberta Wheat Pool was an agricultural cooperative created in 1923. By 1998, the Alberta Wheat Pool and the Manitoba Wheat Pool merged to form Agricore Co-operative Limited. The entry does state that "[f]or nearly a century, the Alberta Wheat Pool elevators have been part of the province's cultural landscape...", however I agree with the Applicant that it cannot be inferred from this that the average consumer would recognize that the word 'pool' in 'Alberta Wheat Pool' designated its historical legal status as a cooperative entity. Similarly, the fact that that one of the meanings attributable to 'pool' is that of a cooperative corporate structure is insufficient to establish that the average consumer encountering any of the Marks, would be aware that 'pool' in this context denotes a particular corporate structure. Further, even if the evidence demonstrated that the average consumer would recognize the word 'pool' in 'Alberta Wheat Pool' as designating a particular cooperative entity or legal status, that is not necessarily true of any of the Marks – that average consumer might simply recognize the Marks as being a clever play on words, inspired by a now-defunct cooperative.

[42] In its written representations and at the hearing, the Opponent further alleges that the Applicant acted in bad faith in that its use of the word POOL with the conduct of its business contravenes section 25 of the *Canada Cooperatives Act*. This section is not pleaded under the Opponent's 38(2)(a.1) ground of opposition, though it is pleaded in respect of the section 38(2)(f) ground of opposition, and is discussed in more detail in my analysis of that ground of opposition.

[43] Notwithstanding that the Opponent has not pleaded a ground of bad faith based on non-compliance with section 25 of the *Canada Cooperatives Act*, I note that even if raised, the Opponent would fail to meet its initial evidential burden. There is no evidence that the Applicant knew or believed that the adoption of POOL in its Marks was prohibited in Canada, nor is there evidence that it would be an expected or normal commercial behaviour for the Applicant to check its compliance with the section 'Prohibition of names' in the *Canada Cooperatives Act* before the filing of its trademark applications pursuant to the *Trademarks Act*. Finally, mere willful blindness (at least in the context of competitor's rights) is insufficient to constitute bad faith [*Blossman*, para 121].

[44] Accordingly, this ground of opposition is rejected.

*The Applicant, without authorization from the owner of the Alberta Wheat Pool trademark and logo, intentionally misappropriated the copyright and trademark of the Alberta Wheat Pool design/logo*

[45] Turning to the second bad faith ground of opposition, the thrust of this allegation is that the Applicant misappropriated the copyright and trademark of the Alberta Wheat Pool design/logo.

[46] The Opponent submits that to meet its initial evidential burden of demonstrating a *prima facie* case of copyright infringement, it must establish (i) copyright in the work, being the Alberta Wheat Pool design and (ii) that



the trademark applied for is a substantial copying of the Alberta Wheat Pool design [Opponent's written representations at para 60, citing *Jones v Dragon Tales Production Inc*, 2002 CanLII 79654 (TMOB), 27 CPR (4th) 369].

[47] At a minimum, I am not satisfied that the Opponent has established copyright in the Alberta Wheat Pool design. The Opponent does not identify the author of the design, or the date of its creation, but rather appears to rely on an acknowledgement by Mr. O'Connor of the existence of and his familiarity with the Alberta Wheat Pool design and its appearance on grain elevators in Alberta, which are 'iconic' [O'Connor cross-examination, Q315-319]. The Opponent takes the position that the copyright is owned by Viterra, but there is no evidence, such as a certificate of copyright registration or an affidavit from a representative of Viterra, confirming that this is in fact the case. The encyclopaedia entry for the Alberta Wheat Pool entered by the Opponent [Yim affidavit; Exhibit BY-6] states that in 1998, the Alberta Wheat Pool was involved in a merger forming Agricore Cooperative Limited, which subsequently became a publicly traded company. In 2007, this entity was taken over by the Saskatchewan Wheat Pool (another former farmer cooperative which became a publicly traded company in 1996) to form Viterra. However, I do not consider this to be sufficient information from which to make conclusions on the existence and ownership of copyright in the Alberta Wheat Pool design.

[48] The Opponent also points to a photograph of a grain elevator displaying the Alberta Wheat Pool design, which was digitally manipulated by the Applicant so as to superimpose its ALBERTA WEED POOL & Design trademark over the image of the Alberta Wheat Pool design, and placed for at least some period of time on the Applicant's website [Yim affidavit, Exhibit BY-19]. On cross-examination, counsel for the Opponent asked Mr. O'Connor if he was aware that this image was owned by Viterra, and if he had

obtained permission from Viterra to use the image; Mr. O'Connor answered that he was not aware the image (that he superimposed) is owned by Viterra and that he did not get permission [Exhibit 5, Q321-325]. In my view, the issue of a potential breach of copyright in this photograph is not the same as the issue of breach of copyright in the Alberta Wheat Pool Design itself, and in any event, it is not determinative of ownership of the Alberta Wheat Pool design by Viterra.

[49] Similarly, as for the allegation of violation of trademark rights in the Alberta Wheat Pool design, the Opponent has not provided evidence establishing that as of the material dates, such rights existed. On the contrary, the evidence suggests that the entity 'Alberta Wheat Pool' ceased to exist in 1998, which, as noted by the Applicant, is nearly 20 years before the present applications were filed. The Opponent has also not provided any evidence regarding the status of any trademark registrations covering the Alberta Wheat Pool design.

[50] Accordingly, this ground of opposition is rejected.

*The Applicant sought to assert ownership over rights belonging to a third party*

[51] The third bad faith ground raised by the Opponent is based on an allegation that the Applicant "...sought to assert ownership and exclusive rights over portions of a trademark and logo or elements thereof to which it knew or ought to have known belonged to a third party, namely the owner of the Alberta Wheat Pool trademark and logo."

[52] As I have previously found that the Opponent has not established copyright and trademark ownership to the Alberta Wheat Pool trademark and logo, this ground of opposition is rejected at least on the basis that the Opponent has failed to meet its initial evidential burden to establish the existence of these claimed third party rights.

[53] In its written representations, the Opponent further alleges that “the Applicant cannot claim ownership of each of the Opposed Marks, contrary to section 13 of the *Copyright Act*, because the infringing designs belong to a third party, Terroco Industries Limited – which has no relationship to the Applicant” [para 82]. The Opponent points to Mr. O’Connor’s admission that he was employed at Terroco Industries Limited at the time he created the designs of the Marks [O’Connor cross-examination, Q63-67] to support the allegation that the Marks presumptively belong, and still belong, to Terroco Industries Limited.

[54] The Applicant submits that this ground was not pleaded in the statement of opposition, and that it is improper for it to be raised at the written representations stage. I am inclined to agree that this objection, which does not specifically relate to the ownership of the Alberta Wheat Pool trademark and logo, does not fit within the scope of the ground of opposition as pleaded by the Opponent. Nonetheless, even if I were to consider it, I do not consider that the mere fact that Mr. O’Connor was employed by Terroco Industries at the time he designed the applied for Marks to mean that the Marks were created in the course of his employment at Terroco Industries.

#### Conclusion – bad faith grounds

[55] As I have found that the Opponent has failed to meet its initial evidential burden in respect of all three of the bad faith grounds alleged, they are all rejected.

[56] I would add that while issues such as an intention to harm or disrupt the business of another might, depending on the facts, be relevant to an assessment of bad faith, that such an intention is particularly difficult to discern when the ‘other’ at issue has not itself raised any objection but rather is a third party which appears to have ceased to exist decades ago, and for which no *prima facie* copyright or trademark rights are of record.

Moreover, the Applicant does not owe a duty to the Opponent in respect of the alleged third party rights.

***Registrability under section 12(1)(b)***

[57] The Opponent has pleaded that, contrary to sections 38(2)(b) and 12(1)(b) of the Act, the Marks are clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the such goods or of the place or origin of such goods. The 12(1)(b) grounds of opposition are summarized below, and reproduced in full in Schedule A to this decision.

[58] For goods (1) through (4) (with the exception of 'live cannabis plants') in the applied for specification of goods, all of which are hemp based, the Opponent has pleaded that:

- "to the extent that these goods are made of hemp that does not contain the same high levels of psychoactive substance associated with marijuana, the Marks are deceptively misdescriptive of the character or quality of such goods, in that the use of the Marks in association with such goods is likely to mislead consumers into believing such goods are made from marijuana and are placed on the market by a trademark owner which is a cooperative entity, when neither is the case", and;
- "to the extent that these goods do relate to hemp that contains the same high levels of psychoactive substance associated with marijuana, the Marks are deceptively misdescriptive of the conditions of the persons employed in their production or of the place of origin of such goods, in that the use of the Marks in association with such goods is likely to mislead consumers into believing such goods are placed on the market by a trademark owner which is a cooperative entity when that is not the case".

[59] For goods (4) specifically 'live cannabis plants' and (5) 'dried cannabis' in the applied for specification of goods, the Opponent has pleaded that:

- The Marks are deceptively misdescriptive of the conditions of the persons employed in the production of the goods or of the place of

origin of such goods, in that the use of the Marks in association with such goods is likely to mislead consumers into believing such goods are placed on the market by a trademark owner which is a cooperative entity when that is not the case.

[60] The material date for a ground of opposition under section 12(1)(b) is the filing date of the application.

Jurisprudence on section 12(1)(b)

[61] The issue as to whether a trademark is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of the associated goods or services. "Character" means a feature, trait or characteristic of the goods and services and "clearly" means "easy to understand, self-evident or plain" [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 1968 CanLII 1288 (CA EXC), 55 CPR 29 (Ex Ct) at 34]. The applied-for trademark must not be carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 1978 CanLII 4115 (FC), 40 CPR (2d) 25 (FCTD); *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 1984 CanLII 5944 (FC), 2 CPR (3d) 183 (FCTD)]. In other words, the trademark must not be considered in isolation, but rather in its full context in conjunction with the applied-for goods [*Ontario Teachers' Pension Plan Board v Canada*, 2012 FCA 60]. Finally, one must apply common sense in making the determination about descriptiveness [*Neptune SA v Canada (Attorney General)* 2003 FCT 715].

[62] For a trademark to be considered deceptively misdescriptive, the trademark must mislead the public as to the character or quality of the goods or services. The trademark must be found to be descriptive so as to suggest the goods or services are or contain something that is not the case. The purpose of the prohibition with respect to deceptively misdescriptive

trademarks is to prevent the public from being misled [*Atlantic Promotions Inc v Canada (Registrar of Trade Marks)*, 1984 CanLII 5944 (FC), 1984 CarswellNat 831 (FCTD); and *Provenzano v Canada (Registrar of Trademarks)*, 1977 CanLII 3506 (FC), 1977 CarswellNat 676 (FCTD)].

[63] An opponent's initial burden may be met by reference to dictionary definitions [*Maple Ridge Florist Ltd v Flowers Canada/Fleurs Canada Inc*, 1998 CarswellNat 3004 at para 17]. In the present case, at least on the basis that the Opponent has included dictionary definitions for all of the words in the Marks [Yim affidavit, Exhibits BY-1, BY-2], I find the Opponent has submitted sufficient evidence to meet its initial evidential burden.

#### The Opponent's position

[64] At the hearing, the Opponent did not make submissions on this ground of opposition but indicated that it was relying on its written representations. With this in mind, I will turn to the arguments set out in the Opponent's written representations.

[65] The Opponent submits that each of the Marks has: a recognizable geographical designation as defined in the *Merriam Webster* dictionary (ALBERTA, B.C., CONTINENTAL and CANADIAN), followed by; an easy-to-understand product designation WEED (also known as marijuana), and then; a corporate designation POOL. The design elements in each of the Marks cannot be spoken or verbalized. When sounded, each of the Marks would be understood by the average purchaser of the associated goods to be: ALBERTA WEED POOL; B.C. WEED POOL; CONTINENTAL WEED POOL; and CANADIAN WEED POOL [Opponent's written representations, paras 97 and 98].

[66] The Opponent submits the following:

102. The Opponent's unchallenged and uncontradicted dictionary evidence is that cannabis, or hemp, is the name of the plant. Weed, marijuana and hash (hashish) refer to various products that are made from the plant.

103. Furthermore, the Opponent's unchallenged and uncontradicted dictionary evidence, and according to several dictionaries, is that the terms weed, marijuana, hemp and cannabis are often used interchangeable [interchangeably]. Cannabis and hemp are also known as marijuana or weed. In essence, weed is an ordinary dictionary word for cannabis or hemp.

104. Under cross-examination, Mr. O'Connor agreed that "hemp and cannabis"... for the purposes of a consumer, they're the same product". He further agreed that "weed"... refers to the cannabis sativa plant, the species, which is both what you may know as cannabis and what people commonly call hemp. As such, weed is a trade terminology.

105. Moreover, in *Weeds Glass & Gifts Ltd. v Kenneth Kinnear*, the Trademarks Opposition Board held that the words "WEEDS"... [is] descriptive, of the character of ... dried marijuana.

106. Considering each of the Opposed Marks in the context of the Opposed Goods and the admissible evidence on record, each of the Opposed Marks clearly describes characteristics of the Applicant's Opposed Goods namely weed from a specific geographical location (Alberta, BC, Continental or Canada, as applicable) by a collective or a co-operative. Applying common sense, each of the Opposed Marks equally, clearly descriptively conveys the idea likely to be understood by the average consumer that the weed originates from a local (geographical location) farming collective or co-operative. Both the dictionary and statutory definitions, support this conclusion.

107. Weed is an intrinsic or self-evident characteristic of the Opposed Goods. Here, the present case and in the context of the Opposed Goods, the meaning of the term "WEED POOL", as a matter of first impression, clearly describes or deceptively misdescribe the Applicant's Opposed Goods. The Applicant is not a collective nor a farming collective nor a co-operative. A normal or reasonable person would not require effort or imagination to reach this conclusion.

#### The Applicant's position

[67] The Applicant challenges the Opponent's submission that the word POOL would be understood by an ordinary consumer to be a corporate designation. It notes that while the Opponent has cited the *Canada*

*Cooperatives Act* as providing a “statutory definition”, the Opponent has not said what that definition is, nor cited a particular statutory provision or section where such definition may be found. The Applicant notes that the *Canada Cooperatives Act* permits “pool” to be used as a corporate identifier, but does not provide a “statutory definition” of the word [Applicant’s written representations, para 66]. In other words, as discussed further below, while the word “pool” *may* be a corporate identifier, it is obviously not necessarily so.

[68] The Applicant further submits that whether the individual words that make up a trademark are registrable on their own is immaterial as a trademark must be considered as a matter of first impression in its entirety, and where a trademark has different meanings, the meaning in the context of the trademark is the one given by an immediate impression in the mind of a normal or reasonable person. The Applicant contends that, for each of the Marks, the order of the words is not a grammatical structure that would be used to clearly describe a good or service, primarily because of the vagueness of the word POOL. In particular:

...While the Opponents have identified only a single definition of the word “pool”, the dictionary definition of the word “pool” includes dozens of definitions, some of which relate to an accumulation, aggregation, supply, group, or combination of something (e.g. water, blood, property, people), and others relate to other common uses, such as “swimming pool”. Given the number of definitions, the word POOL would be considered vague when combined with other words, or at most, merely suggestive of an accumulation, aggregation, supply, group or combination. There has been no evidence or argument to suggest that an ordinary consumer would prefer the definition of a cooperative corporate entity over any of the other definitions of the word POOL. [Applicant’s written representations, para 68]

#### Analysis - 12(1)(b)(ground)

[69] It is noteworthy that the Opponent in its representations focuses little on the meaning attributable to ‘weed’ (it is simply recognized as a word for cannabis or hemp without regard to ‘levels of psychoactive substance



associated with marijuana') but rather on the meaning of the word 'pool' in the context of the Marks as a whole and the applied for goods. I have focused my analysis similarly.

[70] On balance, I favour the Applicant's position with respect to section 12(1)(b) of the Act. Each of the words in the Marks, in particular 'pool', are words with dictionary meanings, and 'pool' does hold many meanings [Yim affidavit, Exhibit BY-2]. Some of these meanings, such as a 'swimming pool' or a 'game played on an English billiard table...' are unlikely to be the first meanings to come to mind in this context. In my view, it is also unlikely that consumers would readily interpret 'pool' to mean a corporate designation identifying a cooperative entity when considering the Marks in the context of the applied for goods. In contrast, other meanings of 'pool', particularly those relating to a 'readily available supply', more readily lend themselves to other interpretations of the Marks that could occur on first impression by the average consumers.

[71] Based on the foregoing, I consider that at best, the Mark is suggestive of the character or quality of the Goods - perhaps suggesting a readily available supply or abundance of hemp or cannabis related goods. Thus, the Mark is not clearly descriptive or deceptively misdescriptive of the character or quality of the goods or that they are coming from a cooperative.

[72] Accordingly, the section 12(1)(b) ground of opposition is rejected.

***Entitlement to use under section 38(2)(f)***

Failure to comply with section 25 of the *Canada Cooperatives Act*

[73] The Opponent has pleaded that, contrary to section 38(2)(f) of the Act, the Applicant was not entitled to use the Marks in Canada in association with the Goods. In view of the presence of the word POOL in the Marks, the Applicant's use of the Marks in association with the Goods would cause the

Applicant reasonably to be considered to be holding itself out as carrying on business as a cooperative entity, when it is not such an entity, contrary to section 25 of the *Canada Cooperatives Act*.

*Opponent's submissions*

[74] In its written representations, the Opponent provides the text of section 25 of the *Canada Cooperatives Act*, which I reproduce below:

Prohibition on use of name

**25** Every entity, other than a cooperative incorporated under this Act or a body corporate incorporated by or under the authority of another Act of Parliament or an Act of the legislature of a province, is guilty of an offence if the entity uses or authorizes the use of the word "cooperative", "co-operative", "co-op", "coop", "coopérative" or "pool", or another grammatical form of any of those words, as part of its name or in any manner in connection with the conduct of its business so that the entity could reasonably be considered to be holding itself out as carrying on business as a cooperative entity.

[75] The Opponent submits that this is not the first time the Opposition Board has addressed compliance with the *Canada Cooperatives Act*, and cites the Registrar's decision in *Co-operative Union of Canada v Tele-Direct (Publications) Inc.* 1991 CanLII 6775 (CA TMOB). In that case, the Board considered a section 30(i) ground of opposition (under the previous Act) alleging that the adoption of the word "co-op" as a trademark or otherwise by a non co-operative was prohibited by Sections 33(2) and 33(3) of the (then) *Canada Co-operatives Associations Act*. Board Member Martin stated:

...As for the second aspect of the ground, Section 33(2) of the Canada Cooperative Associations Act reads as follows:

No person, other than an association, may use the words "cooperative", "co-op" and "pool" or any of them or any abbreviation or derivation of any of them as part of its name or in any other manner in connection with the conduct of its business so that he could reasonably be considered to be holding himself out as carrying on business on a cooperative basis.  
(emphasis added)

The proposed use by the applicant of a trade-mark which includes the word CO-OP and two hands joined in a handshake in association with "classified advertising services" does raise the suggestion that the applicant may be holding itself out as carrying on business on a cooperative basis. Exhibits G and H to the Seguin affidavit are copies of portions of handbooks which evidence the manner in which the applicant has commenced to use its mark. Although the inside pages of these handbooks indicate that they are essentially directories of information relating to cooperative advertising plans of various companies, the cover pages only show the applicant's mark and its name. Someone viewing the cover page of one of these handbooks might reasonably assume that the applicant was holding itself out as carrying on business as a co-op. It is clear from the Seguin affidavit, however, that the applicant is not a co-op. Thus, I consider that the opponent has met its evidential burden respecting the ground of opposition based on Section 30(i) of the Trade-marks Act. Furthermore, I consider that the applicant has failed to satisfy the onus on it to show the truthfulness of the statement in its application that it was satisfied that it was entitled to use the trade-mark CO-OP & Design in association with the applied for services. Thus, the first ground is successful.

[76] The Opponent submits that the facts in the instant oppositions are identical to those in *Co-operative Union of Canada*, and that:

...Here, the Applicant by its own admission is not a co-operative. It is a fact beyond dispute that the word "Pool", a trade terminology, falls within a federal statutory prohibition. The Applicant is incorporated under the *Alberta Business Corporations Act* but not authorized to use "Pool". The word "Pool" is not part of the Applicant's statutory corporate name. Nor is there any evidence on record showing how the Applicant is exempt from the application of the *Canada Cooperatives Act*. Therefore, the Applicant in using or authorizing the word "POOL" with the conduct of its business contravenes and is guilty of an offence under the *Canada Cooperatives Act* [Opponent's written representations, para 52].

#### *Applicant's submissions*

[77] The Applicant asserts that the Opponent's argument is based on a misreading of section 25 of the *Canada Cooperatives Act*, which explicitly excludes "a body corporate incorporated by or under the authority of... an Act of the legislature of a province". The Applicant submits that it is incorporated under the *Business Corporations Act* of Alberta [citing the First Merke Affidavit, Exhibit KJM-2], which states that a "body corporate"

includes a company or other body corporate wherever or however incorporated". As such, the Applicant is "a body corporate incorporated by or under the authority of... an Act of the legislature of a province" and therefore section 25 of the *Canada Cooperatives Act* does not apply [Applicant's written representations, paras 75-79].

[78] At the hearing, the parties made further submissions on the correct interpretation of section 25 the *Canada Cooperatives Act*. In doing so, reference was made to various sections of the *Alberta Cooperatives Act*, including those relating to the naming of cooperatives, and prohibited names, though none of these sections appear to be of record.

#### *Analysis*

[79] The jurisprudence pertaining to section 30(i) of the previous Act may inform the interpretation of section 38(2)(f). In determining whether an opponent met its initial evidential burden for a ground of opposition based on section 30(i) of the previous Act in conjunction with non-compliance with a federal statute, this Board in the past has considered whether the opponent has made out a *prima facie* case of contravention of the federal statute, as opposed to determining that there has actually been contravention.

[80] In the present case, I find that the Opponent has not met its initial evidential burden of demonstrating a *prima facie* case that the Applicant was not in compliance with section 25 of the *Canada Cooperatives Act* at the date of filing the applications. No evidence concerning the interpretation of the relevant sections of the Act has been introduced to assist the Registrar, nor is there evidence to show that proceedings have been brought against the Applicant in relation to use of the Marks contravening the *Canada Cooperatives Act*.

[81] As for the *Co-operative Union of Canada* case cited by the Opponent, it can be distinguished from the present case at least on the basis that both the trademarks at issue and the relied upon section and statutes are different. At a minimum, the former cited section of the *Canada Co-operatives Associations Act* does not appear to include any of the exemptions that may be applicable in this case.

[82] Accordingly, this ground of opposition is rejected.

Failure to comply with section 52 of the *Competition Act*

[83] The Opponent has pleaded that, contrary to section 38(2)(f) of the Act, the Applicant was not entitled to use the Marks in Canada in association with the Goods. In view of the presence of the word POOL in the Marks, the Applicant's use of the Marks in association with the Goods would mislead the public into believing the Goods are offered by a trademark owner which is a cooperative entity, when it is not such an entity, thus being a misrepresentation to the public that is false or material in a misleading respect, contrary to section 52 of the *Competition Act*.

[84] In its written representations, the Opponent provides the text of section 52(1) of the *Competition Act*, which I reproduce below:

**52 (1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[85] The Opponent submits that, to satisfy the cause of action criterion under section 52 of the *Competition Act*, a constituent element of the misrepresentation claim is that a person made misrepresentations "knowingly or recklessly". That is, all that is required is that a person knowingly "misrepresent facts". The Opponent submits that the evidence on

record is that Mr. O'Connor knew that the Applicant's business from the outset was not a cooperative and yet still chose to proceed to use the word 'pool' in association with the Applicant's business [Opponent's written representations, para 119]. The Opponent then makes reference to its arguments under the section 12(1)(b) ground of opposition.

[86] My understanding is that the Opponent's argument is based on an assumption that the word 'pool' in the context of the Marks is synonymous with and readily understood by the average consumer as 'trade terminology' signalling a cooperative. However, as discussed in my analysis of the section 12(1)(b) ground, I do not consider this to be the case. Further, as noted by the Applicant, the Opponent has not presented any evidence that would support a finding that the alleged misrepresentation was material, or that it would have an impact on a consumer's buying decision. [Applicant's written representations, para 82].

[87] For at least these reasons, I find that the Opponent has not met its initial evidential burden of demonstrating a *prima facie* case that the Applicant was not in compliance with section 52 of the *Competition Act* at the date of filing the applications. This ground of opposition is therefore rejected.

### ***Distinctiveness under section 2***

[88] The Opponent has pleaded that the Marks are not distinctive within the meaning of sections 2 and 6. In particular, "the Marks do not distinguish, nor are they adapted to distinguish, the Goods from the goods and services of others, including the goods and services in association with which the Opponents have used and continue to use the trademark "Weed Pool" and the trade names featuring the combination "Weed Pool" in Canada in association with the sale of cannabis and cannabis products and the provision of services related to the sale of cannabis".

[89] The material date for this ground is the filing of the statements of opposition which ranges between August 27, 2021 and May 30, 2022.

[90] Section 2 of the Act defines “distinctive” as follows:

“distinctive” in relation to a trademark, describes a trademark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or that is adapted so to distinguish them.

[91] A trademark “actually distinguishes” by acquiring distinctiveness through use, resulting in distinctiveness in fact. On the other hand, a trademark that is “adapted so to distinguish” is one that does not depend upon use for its distinctiveness because it is inherently distinctive [see *Astrazeneca AB v Novopharm Ltd*, 2003 FCA 57 at para 16].

[92] Under this ground, an opponent’s initial burden is not merely to evidence that its trademark had been used, but rather that as of the material date, its trademark: i) had become known to some extent in Canada in association with the relevant goods and services; and ii) had a reputation in Canada that was “substantial, significant or sufficient” so as to negate the distinctiveness of the applied-for trademark [see *Bojangles’ International LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 33 and 34; and *Canadian Dental Association v Ontario Dental Assistants Association*, 2013 FC 266 at para 42, aff’d 2013 FCA 279]. When an opponent’s reputation is restricted to a specific area of Canada, an opponent’s evidential burden may be satisfied if its trademark is well known in a specific area of Canada [*Bojangles, supra*].

[93] The Opponent submits that there is sufficient evidence on record from which it could be concluded that its ‘Weed Pool’ trademark and trade names had become sufficiently known to negate the distinctiveness of the Marks. The Opponent’s submissions are detailed in paragraphs 126-132 of its

written submissions, though I note that, in particular, the Opponent highlights the ‘unchallenged and uncontradicted’ evidence that:

- WEED POOL has been used in Canada as a trade terminology by the Opponent since at least as early as July 2019;
- By July 2020, WPCC “had become, and continues to be, the largest cannabis buying group in Saskatchewan” [Southam affidavit, para 27];
- “in the fiscal year ending December 31, 2020, WPCC’s total revenues were over 7 million dollars. The figure for the fiscal year ending December 31, 2021 is over 15 million dollars [Southam affidavit, para 28];
- The Opponent’s invoices from October 22, 2019, onwards always displayed WEED POOL (initially in an earlier logo and later transitioning to a new logo but with both featuring WEED POOL) [Southam affidavit, para 39];
- WPCC’s WEED POOL branded products are sold through its members’ stores and display the (newer) WEED POOL trademark [Southam affidavit, para 52]; and
- The Opponent provides a chart showing the number of packages [displaying the WEED POOL trademark] delivered by WPCC to its members for the period covering February 7, 2020 to May 18, 2022. The total number of packages of cannabis delivered during this period exceeded 42,000 [Southam affidavit, para 54].

[94] The Opponent also details how the Applicant has no evidence showing use of any of the Marks on the applied for goods [Opponent’s written representations, paras 133-138].



[95] For its part, the Applicant submits that the Opponent has not provided sufficient evidence of the term WEED POOL or the Opponent's WEED POOL logo as of the material date to establish that these *negate* the distinctiveness of the Marks, but rather shows that, at most, the Opponent has established use of the words with a few dozen members for two or three years [Applicant's written representations, paras 85-93]. The Applicant notes that:

- The earliest evidence of use presented by the Opponent is an invoice dated October 22, 2019 [citing Southam affidavit, para 39], which is roughly two to three years before the respective relevant dates for this ground. This is not a substantial period of time.
- The Opponent's sales were primarily to the 29 members of the WPCC [citing Southam affidavit, para 29]. While the Southam affidavit suggests that the WPCC was available to sell product to non-members, there is no indication of how many sales were made to non-members.
- The first retail store of the Opponent to use the term WEED POOL is the WEED POOL store in Rosetown, Saskatchewan, which opened "later in 2021".
- The Southam affidavit states that WPCC has delivered cannabis in packaging displaying the WPCC trademark to its member stores after February 7, 2020. However, the Southam affidavit does not state that all packaging sold bore the WEED POOL trademark, but instead, that many of the products sold "are non-WEED POOL branded, and are supplied by WPCC to its members in the original packaging as received by WPCC" [citing Southam affidavit, para 24]. As such, there is no indication of the number of products that were "WEED POOL branded" relative to those that were "non-WEED POOL branded".

[96] In this case, I accept that the Opponent's evidence establishes that the WEED POOL trademark and trade name was known to some extent in Canada in association with cannabis products and the sale of cannabis products as of the material dates. However, in my view, the Opponent's evidence falls short of establishing that the reputation of the Opponent was substantial, significant or sufficient so as to negate the distinctiveness of the Marks at the material dates. Based on the evidence before me, I am also unable to conclude that the Opponent's trademark or trade name is well known in a specific area of Canada.

[97] First, while there is evidence of use of the Opponent's trademark and trade name, there is no evidence of negation of the distinctiveness of the applied-for Marks. A non-distinctiveness ground is not to be resolved simply as a popularity contest as of the material date [*Standard International Management LLC v Asia Standard Management Services Limited*, 2021 TMOB 100, paras 33-50]. The issue of non-distinctiveness is not a hypothetical one, but rather involves a highly fact and evidence based analysis, requiring evidence of reputation sufficient to negate the distinctiveness of the applied-for trademark. Here, the Marks have at least some inherent distinctiveness, at a minimum due to the design elements in each. There is simply no evidence that such distinctiveness has been negated, by the reputation of the Opponent's trademark or trade name or otherwise.

[98] The evidence before me also falls short of establishing that the Opponent's trademark and trade name are well-known in a specific area of Canada. The evidence of use covers a relatively short period of time leading up to the relevant date (2-3 years), and the sales figures, while significant, appear to have been made primarily within its member group of independent cannabis retailers (arguably 29 members), with its visibility on invoices and packaging likely largely limited to this specific member group as well. As

noted in the Southam affidavit, many of the products sold are non-WEED POOL branded, and supplied by WPCC in the original packaging as provided to them.

[99] The Opponent's evidence does point to the prominent placement of the name WEED POOL ROSETOWN on its "first official Weed Pool" store in Rosetown, Saskatchewan, on its website on July 9, 2021, and on exterior store signs later in 2021 [Southam affidavit, paras 50, 51]. However, there is no indication of how popular or well-publicized the store was, or to the number of visits to the website at the material date. Reference is also made to the appearance of the WEED POOL trademark on member stores' websites to identify WEED POOL branded cannabis and other products sold through those stores, and screenshots of six member websites are provided. However, this is a fairly small sampling and there is no indication of the number of visits to these websites.

[100] The Opponent's evidence also makes reference to third-party publicity of its trademark and trade name, citing 16 articles published between 2019 and 2021. I do not consider this to be of particular significance for a number of reasons: seven of the articles were published in October 2019 and discuss the formation of the WPCC. Some of the articles are from publications for which no readership info is provided (*growtechlabs.com*, *cannabislifenews.ca*).

[101] Ultimately, I do not consider the foregoing to be sufficient to establish that the Opponent's WEED POOL trademark and trade name are sufficiently well-known in a specific area of Canada so as to negate the distinctiveness of the Marks at the material date. Again, an opponent does not meet its initial burden under a ground such as this simply by showing that it has used its trademark more than the applicant has used their trademark, as of the material date.

[102] Accordingly, I find the Opponent has not met its initial evidential burden for this ground. Therefore, this ground of opposition is rejected.

[103] I would add that in its written representations [paras 139, 140], the Opponent further submits that the Marks are not registrable because “each is composed solely of clearly descriptive or deceptively misdescriptive trade terminology, and as such does not distinguish, and is not adapted to distinguish, the Applicant’s Goods...”, and that this “derivative ground” should succeed as well. However, this ground of opposition does not appear to have been pleaded by the Opponent in its statement of opposition and so will not be considered. In any event, had it been pleaded, as I have found that the Opponent has not succeeded under the section 12(1)(b) ground of opposition (and recognizing the difference in the standard for a derivative ground), I would have found this ground of opposition to fail as well.

#### **DISPOSITION**

[104] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the oppositions to the applications pursuant to section 38(12) of the Act.

Jennifer Galeano  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

## **SCHEDULE A**

Pursuant to section 38(2)(b), the Opposed Mark for use in association with the following goods:

(1) Cordage made of hemp; hemp; hemp bands; hemp fibers; hemp fibres; hemp netting; hemp nettings; raw true hemp fiber; raw true hemp fibre; rope

(2) Hemp base mixed thread and yarn; hemp based mixed thread and yarn; hemp thread; hemp thread and yarn; hemp thread and yarns; hemp yarn; true hemp thread and yarn; twisted hemp thread; twisted hemp thread and yarn; twisted hemp yarn

(3) Hemp base mixed fabrics; hemp based mixed fabrics; hemp cloth; hemp fabric; hemp yarn fabrics; hemp-cotton mixed fabrics; hemp-silk mixed fabrics; hemp-wool mixed fabrics; true hemp fabrics

(4) live hemp plants; loose hemp for use as animal bedding

is not registrable in view of section 12(1)(b) because whether depicted, written or sounded, it is either clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the such goods and of the conditions of the persons employed in their production or of the place of origin of such goods.

The word “weed” is a synonym for cannabis, the psychoactive dried flower buds, leaves or preparations – also known as “marijuana” - that are derived from the cannabis plant. The above-listed goods relate to hemp, a fiber obtained from a plant of the same family as cannabis but distinguished from cannabis by the plant’s low levels of psychoactive substance.

The word “pool” has long been used in association with co-operative entities and co-operative principles. The Applicant is not a cooperative, but rather a closely held corporation.

*Deceptively misdescriptive of character or quality of goods and of conditions of persons employed or place of origin of goods*

To the extent that the above-listed goods are made of hemp that does not contain the same high levels of psychoactive substance associated with marijuana, the Opposed Mark is deceptively misdescriptive of the character or quality of such goods and of the conditions of the persons employed in their production or of the place of origin of such goods, in that the use of the Opposed Mark in association with such goods is likely to mislead consumers into believing such goods are made from marijuana and are placed on the market by a trademark owner which is a co-operative entity, when neither is the case.

*Deceptively misdescriptive of conditions of persons employed or place of origin of goods*

To the extent that the above-listed goods do relate to hemp that contains the same high levels of psychoactive substance associated with marijuana, the Opposed Mark is deceptively misdescriptive of the conditions of the persons employed in their production or of the place of origin of such goods, in that the use of the Opposed Mark in association with such goods is likely to mislead consumers into believing such goods are placed on the market by a trademark owner which is a co-operative entity when that is not the case.

f) Pursuant to section 38(2)(b), the Opposed Mark for use in association with the following goods:

(4) Live cannabis plants

(5) Dried cannabis

is not registrable in view of section 12(1)(b) because whether depicted, written or sounded, it is either clearly descriptive or deceptively misdescriptive in the English language of the character or quality of the such goods and of the conditions of the persons employed in their production or of the place of origin of such goods.

The word "weed" is a synonym for cannabis.

The word "pool" has long been used in association with co-operative entities and co-operative principles. The Applicant is not a cooperative, but rather a closely held corporation.

The Opposed Mark is deceptively misdescriptive of the conditions of the persons employed in the production of the above-listed goods or of the place of origin of such goods, in that the use of the Opposed Mark in association with such goods is likely to mislead consumers into believing such goods are placed on the market by a trademark owner which is a co-operative entity when that is not the case.

# Appearances and Agents of Record

**HEARING DATE:** January 27, 2025

## **APPEARANCES**

**For the Opponents:** Bayo Odutola

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