



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2025 TMOB 176

Date of Decision: 2025-09-03

IN THE MATTER OF AN OPPOSITION

Opponent: BlendTec Inc. (formerly K-Tec, Inc)

Applicant: BlendJet Inc.

Application: 2002139 for SPIRAL Design

INTRODUCTION

[1] BlendJet Inc. (the Applicant) has applied to register the trademark SPIRAL Design shown below (the Mark):



[2] The Mark has been applied for in association with the following goods:

- (1) Electric food processors; electric food mixers; electric mixers for household purposes; electric hand-held mixers for household purposes; food processors, electric; hand-held electric-powered food processors.

[3] BlendTec Inc. (the Opponent) is in the business of designing and making electric food and drink blenders for sale internationally, including in Canada. It opposes the application primarily on the basis that the Mark is confusing with its use and registration of its SWIRL Design trademark, registration No. TMA981,053 shown below, registered in association with electric food processors used for making frozen desserts.



[4] For the reasons that follow, I refuse the application.

BACKGROUND

[5] The application was filed October 18, 2019, and has a priority filing date of June 19, 2019, based on the Applicant's application for the Mark filed in the United States. It was advertised in the *Trademarks Journal* on July 28, 2021. The Opponent opposed the application pursuant to section 38 of the *Trademarks Act*, RSC 1985, C T-13 (the Act) on September 21, 2021. The grounds of opposition are based on sections 38(2)(a.1), 12(1)(d), 16(1)(a), 38(2)(d)/2 and 38(2)(f) of the Act.

[6] The Applicant filed and served its counter statement on November 17, 2021, comprising a statement that it intended to respond to the opposition.

[7] The Opponent filed as its evidence the affidavit of Chris Georgeson, Senior Vice President of the Opponent. Mr. Georgeson was cross-examined and the transcript and answers to undertakings form part of the record. The Applicant filed as its evidence certified copies of registration certificates for nine registered trademarks and certified copies of file histories for two pending trademark applications. Both parties filed written representations and attended a hearing.

EVIDENTIAL BURDEN AND LEGAL ONUS

[8] Before considering the grounds of opposition, it is necessary to review some of the requirements with regard to (i) the evidential burden on an opponent to support the allegations in the statement of opposition and (ii) the legal onus on an applicant to prove its case.

[9] With respect to (i) above, there is an evidential burden on an opponent to support the facts in its allegations pleaded in the statement of opposition: *John Labatt Limited v The Molson Companies Limited*, 30 CPR (3d) 293 (FCTD) at 298. An evidential burden on an opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. With respect to (ii) above, the legal onus is on an applicant to show that the application does not contravene the provisions of the Act as alleged by an opponent (for those allegations for which the opponent has met its evidential burden). A legal onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is considered, then the issue must be decided against an applicant.

AFFIDAVIT OF MR. GEORGESON

[10] Chris Georgeson is the Senior Vice-President of Sales of the Opponent, BlendTec, Inc., a company in the business of designing and making electric food and drink blenders for sale internationally, including in Canada. The Opponent changed its name from K-Tec, Inc. to BlendTec, Inc. on December 30, 2014. Prior to this name change, the Opponent operated its business under both its corporate name, K-Tec, Inc. and the trade name and trademark BlendTec.

[11] The Opponent has used a swirl design trademark in association with its blender sales and promotions in Canada, the United States, and internationally for many years starting about the year 2000. Below are the variants of the Opponent's swirl design trademark.



[12] A first version of the Opponent's swirl design trademark had two colours in what he described as a "mating swirl pattern". Variants of that first version, when printed, included the one at the far left shown above, in grey scale and the middle one shown above, in monochrome black and white with a border or box outlining the missing colour. A further variant included such first version with a roof-like top. A second version of his company's swirl design trademark, *i.e.*, the one at the far right shown above, which replaced the first version, was developed in 2010 and was made the subject of a trademark application in the United States (now U.S. Registration No. 4,0505,765), Canada (now Registration Number TMA981,053), and many other countries. He notes that reference to the Opponent's Swirl Design

means either or both of the first and second versions of the Opponent's swirl design trademark and any variants thereof (the Opponent's SWIRL Design).

[13] Other pertinent parts of Mr. Georgeson's evidence include the following:

- the Opponent's SWIRL Design trademark appears on the blender product, including on the electrically powered blender base, on the side and lid of the blending container, and on user manuals, instruction manuals, recipe books, and selected invoices (after 2010);
- the Opponent's total sales (in US dollars) of blender products in association with the Opponent's SWIRL Design trademark in Canada since 2009 are in excess of \$58,000,000 and have never been less than \$1.1 million per year; and
- the Opponent's blender products and the products of the Applicant compete in the same market and there is evidence that the Applicant's blender is mistakenly identified on third party websites as a "BlendTec" blender.

CROSS-EXAMINATION OF MR. GEORGESON

[14] The Applicant submits that on cross-examination a number of the exhibits attached to Mr. Georgeson's affidavit were found to be either irrelevant or unreliable for the following reasons:

- Mr. Georgeson was unable to authenticate any of the photographs of the alleged packaging on which the Opponent's SWIRL Design is displayed or provide dates for the photographs [Georgeson cross examination, Qs. 128-130, 160-162 and 176-178].

- Mr. Georgeson was unable to explain the discrepancies between alleged photographs of the Opponent's products on which the Opponent's SWIRL Design appears and internal drawings of those same products on which the Opponent's SWIRL Design does not appear, both of which he has identified in his affidavit as related to the same alleged sale in 2013 [Georgeson cross examination, Qs. 132-157 and Exhibit I];
- Mr. Georgeson admitted that the manuals and recipe books on which the Opponent's SWIRL Design was displayed were "typically ...provided inside the packaging" and therefore not visible to consumers at the point of sale [Georgeson Affidavit, para 4 and 6, and Exhibits C, D, F and G; Georgeson cross-examination, Qs. 97-103, 113-115, 179];
- Mr. Georgeson admitted that the Opponent's SWIRL Design did not appear on the Opponent's invoices before 2012 [Georgeson Affidavit para 5 and Exhibit E; Georgeson cross examination, Qs. 107-112]; and
- Mr. Georgeson was unable to demonstrate that any of the alleged instances of confusion identified in his affidavit arose from use of the Mark rather than the sale of counterfeit goods or clerical errors arising from the similar names of the Applicant and the Opponent, namely BLENDJET and BLENDTEC [Georgeson cross-examination, Qs. 189-219].

[15] I will address those deficiencies I consider to be the most relevant in the body of my decision.

PRELIMINARY ISSUE –DATE OF FIRST USE OF THE OPPONENT'S SWIRL DESIGN

[16] At the cross-examination of Mr. Georgeson, the Applicant introduced (as an exhibit to his cross-examination for identification purposes) an

application and supporting affidavit filed by the Opponent with the USPTO in 2014 respecting a trademark of the Opponent (which the Applicant submits corresponds to the Canadian registered mark). The documents showed that in the U.S. the date of first use of the Opponent's SWIRL Design was amended from 2010 to 2000.

[17] The Applicant submits that these documents contradict the following statement made by Mr. Georgeson at para. 3 of his affidavit:

...A second version of my company's swirl design trademark, i.e., the one at the far right shown above, which replaced the first version, was developed in 2010 and was made the subject of trademark applications in the United States (now U.S. Registration No. 4,0505,765), Canada (now Registration Number TMA981053) and many other countries...

[18] Even if these documents had been properly introduced as part of the Applicant's evidence, and even if I could conclude that these documents are reliable, I agree with the Opponent that the questions regarding these documents were inappropriate. For one, Mr. Georgeson states on cross-examination that he does not recall that he was ever aware of these documents. Further, while he noted that the Opponent had registrations in Canada and the U.S. for the same trademark, there are key differences between the two countries in process, requirements and legal implications when filing a trademark application. Finally, the application filed in the U.S. did not claim colour as part of the registration, and Mr. Georgeson admitted to there being different variations of its trademark over the years. I therefore do not find that these documents on their own establish any inconsistencies with either Mr. Georgeson's evidence, or the validity of the Opponent's Canadian registration which is not in issue in this opposition proceeding [see *Molson Canada 2005 v Anheuser-Busch, Incorporated*, 2010 FC 283 and *Sunshine Biscuits, Inc. v Corporate Foods Ltd.* (1982), 1982 CanLII 5596 (FC) , 61 CPR (2d) 53 at 62 (FCTD)].

**PRELIMINARY ISSUE - MATERIAL DATE OF SECTION 38(2)(D) GROUND OF
OPPOSITION**

[19] In both its written and oral representations, the Applicant submitted that the material date for assessing the issue of distinctiveness should now be the application filing date or the priority date. Its written submissions with respect to this issue are as follows:

With respect to section 38(2)(f) and section 2, we acknowledge that the material date for determining whether an applied-for-mark is distinctive was generally considered to be the opposition filing date prior to amendments to the Act which came into force June 17, 2019. However, the selection of this date was premised on the fact that prior to the 2019 amendments, trademark applications could only be refused as not distinctive if opposed. As a consequence, the material date for determining whether an applied-for-mark is distinctive was the opposition filing date. Under the current Act, this is no longer true. Trademark applications can now be refused as not distinctive in examination. As a consequence, we submit that the material date for determining whether an applied-for-mark is distinctive pursuant to section 2 is now the application filing date or priority date as applicable [see Trademarks Act, RSC 1985, c. T-13 as amended, section 37(1)(d); and *George Weston Ltd. v. Humpty Dumpty Foods Ltd./Aliments Humpty Dumpty Ltée*, 1989 24 C.P.R. (3d) 454 at para 13].

[20] Section 37(1)(d) reads as follows:

37 (1) The Registrar shall refuse an application for the registration of a trademark if he is satisfied that

(d) the trademark is not distinctive.

If the Registrar is not so satisfied, the Registrar shall cause the application to be advertised in the prescribed manner.

[21] The above provision regards when an application can be refused at examination.

[22] Section 38(2)(d), which refers to the grounds of opposition, states as follows:

Grounds

A statement of opposition may be based on any of the following grounds:

(d) that the trademark is not distinctive;

[23] I will begin by noting that the onus and evidence before an examiner differs from that in an opposition proceeding [*Cortefiel, SA v Doris Inc*, 2013 FC 1107 at paras 37-38]. Further, in my view, there is nothing about section 37(1)(d) that changes the earlier case law on point.

[24] In *Molson Breweries, a Partnership v John Labatt Ltd*, 1998 CanLII 31504, at issue was a section 12(1)(b)/12(2) ground of opposition as well as a distinctiveness ground. Notwithstanding that section 12(2) is assessed as of the date of filing as indicated in the *Act* (at the time and still), the Court nevertheless found that the material date for section 38(2)(d) was the filing of the opposition. This case was then cited by the FC in the *American Assn. of Retired Persons v Canadian Assn. of Retired Persons*, 1998 CanLII 8908 (FC) and *Metro Goldwyn Mayer Inc v Stargate Connections Inc*, 2004 FC 1185. Since 2004, the material date as of which the ground of distinctiveness has been decided has consistently been the date of the filing of the statement of opposition.

[25] In view of the above, I find no reason in this case to apply a different date to the section 38(2)(d) ground of opposition. I will also note that even if I did, it would not have led to a different result in this case.

ANALYSIS OF THE GROUNDS OF OPPOSITION

Registrability ground – Section 12(1)(d)

[26] The Opponent pleads that the Mark is not registrable in that, pursuant to section 12(1)(d) of the *Act*, it is confusing with the Opponent's registered SWIRL Design trademark. 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), 37 CPR (3d) 413 (FCA)].

[27] I have exercised my discretion to check the register and confirm this registration remains extant [*Quaker Oats Co of Canada Ltd v Menu Foods Ltd* (1986), 1986 CanLII 7700 (CA TMOB), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden. The Applicant must therefore prove on a balance of probabilities that there is no reasonable likelihood of confusion between the Mark and the Opponent's trademark.

Test for confusion

[28] The test to determine the issue of confusion is set out in section 6(2) of the Act which stipulates that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely 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 appear in the same class of the Nice Classification.

[29] Therefore, section 6(2) of the Act does not concern confusion of the trademarks themselves, but of the goods or services from one source as being from another. Essentially, the question is whether a consumer, with an imperfect recollection of the Opponent's SWIRL Design trademark would think that the Applicant's goods emanate from, are sponsored by, or approved by the Opponent.

[30] In applying the test for confusion, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act, namely: (a) the inherent distinctiveness of the trademarks and the extent to which they have become known; (b) the length of time they have been in use; (c) the nature of the goods, services or business; (d) the

nature of the trade; and (e) the degree of resemblance between the trademarks including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context-specific assessment [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée, supra*]. 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

[31] The overall consideration of the section 6(5)(a) factor involves a combination of inherent and acquired distinctiveness of the trademarks. A trademark is inherently distinctive if it is not suggestive of a characteristic of the associated goods and services. The Applicant submits that the Opponent's SWIRL Design could suggest the blending action of the associated goods. In my view, the same could be said about the Mark. I therefore find that, being relatively simple designs, neither is an inherently strong mark [see *Levi Strauss & Co v Vivant Holdings Ltd* (2003), 2003 CanLII 71216 (CA TMOB), 34 CPR (4th) 53 (TMOB)].

[32] The acquired distinctiveness of a mark refers to the extent to which it has become known. Mr. Georgeson pointed to sales in Canada of over \$58 million for blender products sold in association with the Opponent's SWIRL Design since 2009. On cross-examination, however, Mr. Georgeson admitted that the manuals and recipe books on which the Opponent's SWIRL Design was displayed were "typically... provided inside the packaging" and therefore not visible to the consumers at the point of sale. Mr. Georgeson also admitted that the Opponent's SWIRL Design did not appear on the Opponent's invoices before 2012.

[33] While I agree that these deficiencies may affect the extent to which the Opponent's SWIRL Design has become known, I am satisfied from Mr. Georgeson's evidence as a whole that the Opponent's SWIRL Design has still become known to at least some extent in Canada.

[34] As the Applicant has not provided any evidence of use or making known of its Mark, this factor favours the Opponent.

Length of time they have been in use

[35] While the Opponent has claimed use of variants of its mark dating back to at least 2000, I agree with the Applicant that at best, the Opponent's evidence demonstrates use of its mark as of 2012. As the Applicant has not provided any evidence of use of its Mark, this factor also favours the Opponent.

Nature of the goods, services and trade

[36] The Applicant submits that while there are some practical differences in the nature of the parties' goods, it concedes that both parties' goods would be sold in the same channels of trade. This factor therefore also favours the Opponent.

Degree of resemblance

[37] The degree of resemblance between the trademarks will often have the greatest effect on the confusion analysis. When considering the degree of resemblance, the law is clear that the trademarks must be considered in their totality. The appropriate test is not a side by side comparison but an imperfect recollection in the mind of a consumer of an opponent's trademark [*Veuve Clicquot, supra* at para 20]. The preferable approach when comparing trademarks is to begin by determining whether there is an aspect of a trademark that is particularly striking or unique [see *Masterpiece* at para 64].

[38] In this case, both parties' marks comprise a spiral or swirl pattern. There is a strong degree of visual resemblance between the marks as both include the combination of white and black lines of equal width arranged in a swirling pattern, with the white line forming the inside of the design and the black line forming the outside of the design and concluding with a sharp point. The ideas suggested by the marks area are also similar, *i.e.*, the blending action of a blender or food processor. I therefore find that overall this factor favours the Opponent.

Surrounding circumstance - State of the register and state of the marketplace evidence

[39] The state of the register and marketplace evidence does not favour the Applicant to any significant extent.

[40] Evidence concerning the state of the register is relevant only to the extent that inferences may be drawn concerning the state of the marketplace [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); *Del Monte Corporation v Welch Foods Inc* (1992), 44 CPR (3d) 205 (FC)]. Furthermore, inferences concerning the state of the market may be drawn from this evidence only if a large number of relevant registrations are located [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd*, 1992 CanLII 14792 (FCA)]. Relevant trademarks include those that (i) are registered or are allowed and based on use; (ii) are for similar goods and services as the marks at issue; and (iii) are those that include the component at issue in a material way [*Sobeys West Inc v Schwan's IP, LLC*, 2015 TMOB 197].

[41] The evidence of the Applicant in this case includes spiral or swirl patterns being a common element of at least nine other registered trademarks and two pending trademark applications in Canada for similar products and services. In the absence of the evidence of use of any of these trademarks in the marketplace, I am unable to conclude that there is

common use of the swirl or spiral design component such that I can infer that consumers are accustomed to distinguishing between trademarks including this component by paying more attention to the differences between them [*Advance Magazine Publishers Inc v Farleyco Marketing Inc. Eyeglasses* 2009 FC 153 at para 78].

Surrounding Circumstance – Evidence of actual confusion

[42] At paragraph 12 of his affidavit, Mr. Georgeson attached printouts from various websites and advertisements showing that the Opponent, BlendTec, and the Applicant's company compete for the same market and that consumers confuse the two companies. At cross examination, however, Mr. Georgeson was unable to demonstrate that any of the alleged instances of confusion identified in his affidavit arose from use of the Mark rather than the sale of counterfeit goods or clerical errors arising from the similar names of the Applicant and the Opponent at the date of his affidavit, namely Blendjet and BlendTec. I therefore do not find this to be a relevant surrounding circumstance.

Conclusion

[43] The question posed by section 6(2) of the Act is whether customers purchasing electric food processors and related goods in association with the Mark would believe that these goods are provided, authorized or licensed by the Opponent owing to its SWIRL Design trademark. I have assessed this as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the Mark, at a time when they have no more than an imperfect recollection of the Opponent's SWIRL Design trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks.

[44] Having considered all of the surrounding circumstances, I find that the Applicant has failed to meet the legal onus on it to show, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's SWIRL Design registration covering electric food processors used for making frozen desserts. I reach this conclusion based on the degree of resemblance between these trademarks for similar goods and the fact that only the Opponent's SWIRL Design has become known to some extent in Canada.

[45] I acknowledge that suggestive trademarks are more likely to be able to co-exist; with a party adopting a weak trademark being held to accept some risk of confusion [*General Motors Corp v Bellows* (1949), 10 CPR 101 (SCC) at 115-116; *Mövenpick Holding AG v Exxon Mobil Corp*, 2010 TMOB 126, 2011 FC 1397, aff'd 2013 FCA 6; *Culinar Inc v National Importers* (2004), 2004 CanLII 71834 (TMOB)]. While the Opponent's SWIRL Design is not the sort of mark that is typically afforded a broad scope of protection, a narrow scope of protection is not the same as having no protection at all. Accordingly, the section 12(1)(d) ground of opposition succeeds.

Non-entitlement ground of opposition – Section 16(1)(a)

[46] The material date for a ground of opposition under section 16(1)(a) is the date of filing of the application. The Opponent's evidence described at paragraphs 11-13 of this decision is sufficient to meet its evidential burden under this ground.

[47] While I acknowledge that the acquired distinctiveness and length of use of the Opponent's SWIRL Design is slightly less as of the material date for the non-entitlement ground, I nonetheless find for the reasons set out in respect of the section 12(1)(d) ground above that there is a reasonable likelihood of confusion between the parties' marks. The non-entitlement ground is therefore also successful.

Remaining grounds of opposition

[48] Having refused the application on the basis of sections 12(1)(d) and 16(1)(a), it is unnecessary for me to consider the remaining grounds of opposition.

DISPOSITION

[49] In view of the above, and pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application pursuant to section 38(12) of the Act.

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

Appearances and Agents of Record

HEARING DATE: 2025-07-17

APPEARANCES

For the Opponent: Christopher Dejardin

For the Applicant: Michele Balagh

AGENTS OF RECORD

For the Opponent: Cassan Maclean IP Agency Inc.

For the Applicant: Brunet & Co.