LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2015 TMOB 66
Date of Decision: 2015-04-07

IN THE MATTER OF AN OPPOSITION by Jarrow Formulas, Inc. to application No. 1,305,286 for the trade-mark POM in the name of Canada Bread Company, Limited

[1] Jarrow Formulas, Inc. opposes registration of the trade-mark POM applied for registration under serial No. 1,305,286 in association with, among others, botanical extracts for use in the preparation of cosmetic and skin care products; a variety of cosmetic and skincare preparations; essential oils and nutritional oils; bath oils and bath products; hair and nail care preparations; and pharmaceutical preparations and nutritional supplements for skin care, nail care and hair care.

[2] The determinative issue in this proceeding is whether the trade-mark POM (the Mark) is confusing with the trade-mark POMEGREAT of application No. 1,277,280. At the date of advertisement of the application for the Mark, application No. 1,277,280 was pending for "dietary supplements namely fruit juice concentrates and vitamin and fruit extract supplements in liquid form".

[3] For the reasons that follow, I find that the application ought to be refused in part.

The Record

[4] The application was filed by PomWonderful LLC on June 13, 2006 on the basis of proposed use in Canada and claims the priority of a United States application filed on

December 13, 2005; it currently stands in the name of Canada Bread Company, Limited as assignee. The term "Applicant" used throughout my decision refers to the owner of the application at the relevant time.

[5] The statement of goods of the application, as amended on March 31, 2010 to conform to ordinary commercial terms in response to a preliminary report by the Examiner, reads as follows:

> (1) Botanical extracts, namely, pomegranate extracts, for use in the preparation of cosmetic and skin care products; cosmetic and skincare preparations, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants for the hands, face, eyes, lips, and body; cosmetic and skincare preparations, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants for the hands, face, eyes, lips, and body, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants containing pomegranate extracts; essential oils and nutritional oils for cosmetic and skincare purposes, namely, essential and nutritional oils containing pomegranate extracts; sunscreens and cosmetic preparations for skin tanning; sun-care preparations containing pomegranate extracts; cosmetic pads containing pomegranate extracts; -medicated skin renewal creams, non-medicated skin renewal lotions, non-medicated skin renewal gels; bath oils and bath products, namely, bath oils and bath products containing pomegranate extracts; hair care preparations, namely, shampoos, conditioners, hair lotions and oils containing pomegranate extracts; nail care preparations containing pomegranate extracts; make-up removing preparations containing pomegranate extracts; shaving and after-shave preparations containing pomegranate extracts; soaps and cleansing preparations containing pomegranate extracts; nutritional oils not for cosmetic purposes, namely, pomegranate oil; Pharmaceutical (*sic*) preparations and nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; pharmaceutical preparations and nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; pharmaceutical preparations and nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for nail care and hair care namely, to promote nail and hair growth and strength; pharmaceutical preparations and nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for nail care and hair care namely, to promote nail and hair growth and strength.

[6] The application was advertised in the May 26, 2010 issue of the *Trade-marks Journal*.

[7] The statement of opposition filed on October 25, 2010 by Jarrow Formulas, Inc. (the Opponent) raises three grounds of opposition under section 38 of the *Trade-marks Act*, RCS 1985, c T-13 (the Act). In summary, the grounds of opposition are premised on allegations that:

(i) the application does not comply with the requirements of section 30(a) of the Act because it does not contain a statement in ordinary commercial terms of the goods associated with the Mark [section 38(2)(a) of the Act];

(ii) the Applicant is not the person entitled to registration of the Mark under section 16(3)(b) of the Act in view of confusion with the Opponent's trade-mark POMEGREAT in respect of which application No. 1,277,280 had been previously filed [section 38(2)(c) of the Act]; and

(iii) the Mark is not distinctive nor is it adapted to distinguish the Applicant's goods from the goods of others, including the Opponent's goods associated with the trade-mark POMEGREAT [section 38(2)(d) of the Act].

[8] The Applicant filed a counter statement denying each ground of opposition.

[9] The Opponent's evidence consists of a certified copy of the file of the Canadian Intellectual Property Office (CIPO) for application No. 1,277,280 for the trade-mark POMEGREAT as of November 18, 2009.

[10] The Applicant's evidence consists of an affidavit of Jessica Rodrigues-Cerqueira, a paralegal employed by the Applicant's trade-marks agent, sworn on May 31, 2013. Ms. Rodrigues-Cerqueira introduces into evidence the particulars of active registrations and allowed applications (the POM Registrations and Applications), which she obtained from the Canadian trade-marks database, and owned by the Applicant for trade-marks consisting of or comprising the term "POM" (the POM Marks). Ms. Rodrigues-Cerqueira was not cross-examined by the Opponent.

[11] Only the Applicant filed a written argument. A hearing was not held.

Legal Onus and Evidential Burden

[12] The legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. This means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant. However, there is also an evidential burden on the Opponent to prove the facts inherent to its pleadings. The presence of an evidential burden on the Opponent means that in order for a ground of opposition to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA); and *Wrangler Apparel Corp v The Timberland Company* (2005), 41 CPR (4th) 223 (FC)].

Grounds of Opposition Summarily Dismissed

[13] I summarily dismiss the grounds of opposition raised under sections 38(2)(a) and 38(2)(d) of the Act for the reasons that follow.

[14] The ground of opposition raised under section 38(2)(a) of the Act, which is premised on an allegation that the application does not comply with the requirements of section 30(a) of the Act, appears to be a "boilerplate" pleading in that it merely repeats the wording of the Act. In any event, assuming that the ground of opposition has been sufficiently pleaded, it is dismissed for the Opponent's failure to meet its evidential burden of showing that the application did not comply with section 30(a) of the Act.

[15] The non-distinctiveness ground of opposition raised under section 38(2)(d) of the Act is dismissed for the Opponent's failure to meet its evidential burden. More particularly, the Opponent has failed to show that its alleged trade-mark POMEGREAT had become known sufficiently in Canada as of the filing date of the statement of opposition, namely October 25, 2010, to negate the distinctiveness of the Mark [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC); *Motel 6, Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); and *Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)].

Analysis of the Remaining Ground of Opposition

[16] The remaining ground of opposition raised under section 38(2)(c) of the Act is based on section 16(3)(b) of the Act. It is premised on an allegation of confusion between the Mark and the Opponent's trade-mark POMEGREAT of application No. 1,277,280.

[17] I find it is useful to start my analysis of this ground of opposition by reproducing the following excerpts of the Applicant's written argument as they essentially reflect its position:

> 13. In view of the Applicant's POM Registrations and Applications which were filed prior to the Opponent's POMEGREAT Application (including the Applicant's previously filed application number 1,122,704 for POM that covers the same wares that are listed in the Opponent's POMEGREAT Application as well as the Applicant's prior trade-mark registration for POMWONDERFUL & Design which is the subject of registration number TMA832,083), the Applicant possesses superior rights in and to the trade-mark POM for use in association with the wares listed in the subject application as compared to the Opponent having regard to its POMEGREAT Application.
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> […]
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> 22. […] as is clearly demonstrated by the Applicant's evidence, the Applicant has superior rights in an to the trade-mark POM including all of the variations thereof having regard to the Applicant's long prior use of the POM Marks in Canada and its POM Registrations and Applications which were filed prior to the priority filing date of the Opponent's POMEGREAT Application (including Applicant's prior application number 1,122,704 for POM which covers the same goods as are listed in the Opponent's POMEGREAT Application).
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> 23. Such rights of the Applicant in and to the POM Marks, the POM Registrations and Applications (including previously filed application number 1,122,704) existed well prior to the alleged priority filing date of the Opponent's POMEGREAT Application, namely May 23, 2005. In particular, such rights first starting over 75 years ago.
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> 24. In view of this, it is respectfully submitted that it is not the subject application for POM that should be considered to be confusing with the Opponent's POMEGREAT Application but conversely, it is the Opponent's POMEGREAT Application that should be considered to be confusing with the Applicant's prior POM Marks and prior POM Registrations and Applications. In fact, […] the Opposition Board already arrived at this conclusion in the Applicant's opposition to the POMEGREAT application (*sic*). As a result, this ground of opposition should fail.
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> 25. In any event, the Opponent has not filed any evidence for a finding of confusion to be rendered.

[18] With due respect for the Applicant, the issue arising from the section 16(3)(b) ground of opposition is not the Opponent's entitlement to the registration of the trade-mark POMEGREAT as of May 23, 2005. Rather, the issue is whether the Applicant was the person entitled to the registration of the Mark as of December 13, 2005. Also, it is the Applicant who has the ultimate burden of evidencing its entitlement to the registration of the Mark.

[19] It is true that the Opponent's application No. 1,277,280 for the trade-mark POMEGREAT was refused under sections 16(3)(b) and 12(1)(d) of the Act by the Registrar further to the Applicant's opposition. I rendered the decision on behalf of the Registrar as I concluded to confusion between the Opponent's trade-mark POMEGREAT and the Applicant's trade-mark POM WONDERFUL & Design of application No. 1,176,267 and registration No. TMA832,083. The decision issued on June 18, 2013, indexed as *Canada Bread Company, Limited v Jarrow Formulas Inc*, 2013 TMOB 108 (CanLII), is currently under appeal before the Federal Court [Court File No. T-1539-13].

[20] Nevertheless, all that is required from the Opponent to discharge its initial burden for the section 16(3)(b) ground of opposition is to show that its application No. 1,277,280 had been filed before the priority filing date of the application for the Mark, i.e. December 13, 2005, and was pending at the date of advertisement of the Applicant's application, i.e. May 26, 2010 [section 16(4) of the Act]. In other words, even if the Federal Court dismisses the appeal in *Canada Bread Company, Limited*, *supra*, the refusal of the Opponent's alleged application subsequently to the material date is of no consequence when considering the section 16(3)(b) ground of opposition [see *ConAgra Inc v McCain Foods Ltd* (2001), 14 CPR (4th) 228 (FCTD) where the abandonment of the opponent's application subsequent to the material date was found not to be a relevant circumstance in the assessment of confusion under section 16(3)(b) of the Act].

[21] In the present case, the Opponent has met its initial burden. Indeed, its alleged application was filed on October 27, 2005 claiming a priority filing date of May 23, 2005, and was pending at the date of advertisement of the application for the Mark.

[22] Thus, the question becomes whether the Applicant has met its legal onus to show that, as of December 13, 2005, the Mark was not likely to cause confusion with the trade-mark POMEGREAT of application No. 1,277,280.

[23] The certified copy of CIPO's file, as of November 18, 2009, shows that the Opponent originally applied for registration of the trade-mark POMEGREAT in association with "dietary and nutritional supplements; powder drink mixes; powder meal replacements; fruit juices, fruit drinks and juice concentrates". The statement of goods was subsequently amended to conform to ordinary commercial terms in response to Examiner's reports.

[24] As indicated before, there is a legislative requirement that an application alleged in support of a section 16(3)(b) non-entitlement ground of opposition be pending at the date of advertisement of the opposed application. Accordingly, in my assessment of confusion as of December 13, 2005, I believe it is consistent with the intention of the legislator to consider the statement of goods of the Opponent's alleged application as it read at the date of advertisement of the application for the Mark.

[25] I have exercised the Registrar's discretion to review the trade-marks register to inspect application No. 1,277,280 [see *Royal Appliance Mfg Co v Iona Appliance Inc* (1990), 32 CPR (3d) 525 (TMOB) at 529]. I have determined that on May 26, 2010 the statement of goods of application No. 1,277,280 read "dietary supplements namely fruit juice concentrates and vitamin and fruit extract supplements in liquid form" further to a voluntary amendment of November 12, 2009.

[26] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that the use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class.

[27] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in section 6(5) of the Act, namely: a) the inherent distinctiveness of the trade-marks and the extent to which they have become known;

b) the length of time the trade-marks 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 trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See *Mattel, Inc v 3894207 Canada Inc* (2006), 49 CPR (4th) 321 (SCC); *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée et al* (2006), 49 CPR (4th) 401 (SCC); and *Masterpiece Inc v Alavida Lifestyles Inc* (2011), 92 CPR (4th) 361 for a thorough discussion of the general principles that govern the test for confusion.]

[28] In *Masterpiece, supra*, the Supreme Court of Canada stated that the degree of resemblance between marks, although the last factor listed in section 6(5) of the Act, is often likely to have the greatest effect on the confusion analysis; the Court chose to begin its analysis by considering that factor. Thus, I turn to the assessment of the section 6(5) factors starting with the degree of resemblance between the trade-marks.

Section 6(5)(e) - The degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[29] When considering the degree of resemblance, the law is clear that the trade-marks must be considered in their totality; it is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trade-marks.

[30] The first portion of a trade-mark is usually considered more important for assessing the likelihood of confusion [see *Conde Nast Publications Inc v Union des Editions Modernes* (1979), 46 CPR (2d) 183 at 188 (FCTD)]. At paragraph 64 of the *Masterpiece* decision, the Court writes that to measure the degree of resemblance, a preferable approach is to first consider whether there is an aspect of the trade-mark that is particularly striking or unique.

[31] Considering the trade-marks as a matter of first impression and not of close scrutiny, I do find that there is a fair degree of resemblance in appearance and sound. Indeed, as I do not consider the laudatory adjective “great” forming the suffix of the Opponent’s trade-mark to be particularly striking or unique, I conclude that its prefix “pome” is somewhat more important for the purposes of distinction. While not identical, the Mark and the “pome” component of the Opponent’s trade-mark share a great deal of similarity in appearance. Also, even though one

could argue that "pom" and "pome" are distinguishable in sound when considering an English speaking consumer, my own knowledge of my mother tongue leads me to conclude that "pom" and "pome" would be pronounced identically by a French speaking consumer; both "pom" and "pome" sounds like the French word "*pomme*" (in English: apple). It should be remembered that a trade-mark cannot be registered when there is confusion on the part of either the average English speaking consumer, the average French speaking consumer or the average bilingual consumer [see *Pierre Fabre Medicament v SmithKline Beecham Corporation v* (2001), 11 CPR (4th) 1 (FCA)].

[32] In terms of ideas suggested, while not particularly striking, the suffix "great" does result in differences between the ideas suggested by the trade-marks. Indeed, I find it can fairly be concluded that the Opponent's trade-mark suggests the idea that the associated goods are above average. The Mark does not suggest the idea of above average goods.

Section 6(5)(a) - The inherent distinctiveness of the trade-marks and the extent to which they have become known

[33] I find that the Opponent's mark POMEGREAT does not possess an important degree of inherent distinctiveness in the context of the goods listed in application No. 1,277,280. Besides the laudatory connotation of the suffix "great", to the extent that "pome" sounds like the French word "*pomme*", the prefix "pome" to a French speaking consumer in the context of "dietary supplements namely *fruit* juice concentrates and vitamin and *fruit extract supplements* in liquid form" (emphasis added) is evocative of apple juice concentrates and apple extract supplements.

[34] By comparison, there is no connotation attaching to the Mark in the context of the Applicant's goods, except for those goods referencing pomegranate. When considering the Applicant's goods described as "nutritional oils not for cosmetic purposes, namely, pomegranate oil" as well as the goods described as "containing pomegranate extracts", it can fairly be concluded that the Mark is evocative of pomegranate.

[35] In the end, I find that both trade-marks possess some measure of inherent distinctiveness. However, I assess the inherent distinctiveness of the Mark in the context of the non-related pomegranate goods to be greater than that of the trade-mark POMEGREAT. When considering

the Mark in the context of pomegranate related goods I assess its inherent distinctiveness as about the same than the trade-mark POMEGREAT, although the inherent distinctiveness of the latter is arguably less given its laudatory connotation.

[36] Finally, neither party has filed evidence to establish that its trade-mark acquired distinctiveness through promotion or use in Canada.

Section 6(5)(b) - The length of time the trade-marks have been in use

[37] This factor is of no significance. The Mark and the trade-mark POMEGREAT have both been applied for registration on a proposed use basis and neither party filed evidence of use in Canada.

Sections 6(5)(c) and (d) - The nature of the goods and the nature of the trade

[38] As mentioned before, I find it is appropriate to consider the statement of goods of the application for the trade-mark POMEGREAT as it read at the advertisement date of the application for the Mark, namely "dietary supplements namely fruit juice concentrates and vitamin and fruit extract supplements in liquid form" (the Opponent's dietary supplements).

[39] Absent representations from the Opponent to convince me otherwise, I find that the Opponent's dietary supplements are distinguishable from the goods listed in the application for the Mark, except for the following goods for which it seems reasonable to conclude to an overlap with the Opponent's dietary supplements:

> (1) […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for nail care and hair care namely, to promote nail and hair growth and strength; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for nail care and hair care namely, to promote nail and hair growth and strength (the Applicant's nutritional supplements).

[40] I acknowledge that the application for the Mark specifies that the Applicant's nutritional supplements are "for the improving of skin texture and appearance and to counteract formation of wrinkles" or "to promote nail and hair growth and strength". However, this specification does not take away from the fact that nutritional supplements are goods intended to supplement one's diet as are dietary supplements. In other words, I am not prepared to conclude that the aforementioned specification by itself is sufficient to conclude to significant differences between the Applicant's nutritional supplements and the Opponent's dietary supplements nor did the Applicant made any submissions to convince me that I should do so.

[41] I wish to add that my reading of the statement of goods of the application for the Mark leads me to conclude that the specification of goods that follow "pharmaceutical preparations and nutritional supplements" apply to "pharmaceutical preparations" on the one hand and to "nutritional supplements" on the other hand. In other words, my finding concerning an overlap between the Applicant's nutritional supplements and the Opponent's dietary supplements in the circumstances of this case should not be understood as a finding of an overlap between the pharmaceutical preparations as specified in the application for the Mark and the Opponent's dietary supplements.

[42] Finally, to the extent that I conclude to an overlap between the Applicant's nutritional supplements and the Opponent's dietary supplements, for the purposes of assessing confusion and without evidence to convince me otherwise, I also conclude to a potential for overlap between the parties' channels of trade for these goods.

[43] Accordingly, I conclude that the overall consideration of the sections 6(5)(c) and (d) factors favours the Opponent only as regards the Applicant's nutritional supplements.

Additional surrounding circumstances

[44] The Applicant's evidence and submissions arguably advance the Applicant's ownership of registrations for trade-marks consisting of or comprising the term "POM" as an additional surrounding circumstance.

[45] The Applicant's evidence does establish that four of its POM Marks were registered at the material date of December 13, 2005. These trade-marks are: POM of registration No. TMDA49765, POM LITE of registration No. TMA335,814, "POM GOLD"(POM D'OR) of registration No. UCA40516, and POM & Design of registration No. TMA469,001. However, not only do the goods covered by these registrations are essentially bakery goods, but it is trite law that the ownership of a registration does not give the automatic right to obtain further registrations no matter how closely they may be related to the original registration [see *Groupe Lavo Inc v Procter & Gamble Inc* (1990), 32 CPR (3d) 533 (TMOB) at 538].

[46] Accordingly, I do not consider the existence of the Applicant's registrations noted above to be of relevance to the determination of the section 16(3)(b) ground of opposition.

[47] Finally, despite not being relevant to the assessment of the issue before me, the Applicant's submissions regarding the Opponent's non-entitlement to the registration of the trade-mark POMEGREAT arguably advance the fact that the application for the Mark was approved by CIPO's Examination Section despite the Opponent's previously filed application. I wish to stress that the burden on an applicant differs whether the application is at the examination stage or at the opposition stage. More particularly, at the examination stage, the Registrar is under an obligation to advertise an application unless he is satisfied that the applicant is not the person entitled to registration of the trade-mark [section 37 of the Act]. At the opposition stage, the burden is on the applicant to satisfy the Registrar that it is the person entitled to registration of the trade-mark.

Conclusion on the likelihood of confusion

[48] In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. In weighing all of the factors enumerated at section 6(5) of the Act and their relative importance, I am not satisfied that the Applicant has discharged its legal onus of establishing that there was no reasonable likelihood of confusion between the Mark in association with the Applicant's nutritional supplements and the Opponent's trade-mark POMEGREAT of application No. 1,277,280 for the average French speaking consumer as of December 13, 2005.

[49] Indeed, given the overlap between the Applicant's nutritional supplements and the Opponent's dietary supplements and the potential for overlap in the channels of trade, when I factor in the degree of resemblance between the trade-marks in sound and appearance, at best for the Applicant I find that there is an even balance of probabilities between a finding of confusion and a finding of no confusion. As the onus is on the Applicant to establish on a balance of probabilities that the Mark in association with the Applicant's nutritional supplements was not confusing with the trade-mark POMEGREAT of application No. 1,277,280 as of December 13, 2005, I must decide against the Applicant.

[50] However, I am satisfied that the Applicant has discharged its legal onus of establishing that there was no reasonable likelihood of confusion between the Mark in association with the goods other than the Applicant's nutritional supplements and the Opponent's trade-mark POMEGREAT of application No. 1,277,280 as of December 13, 2005. Indeed, despite the degree of resemblance between the trade-marks, when I factor in the fact that the trade-mark POMEGREAT does not benefit from acquired distinctiveness with my finding that the other goods listed in the application for the Mark are distinguishable from the Opponent's dietary supplements, I find that the balance of probabilities tips in favour of the Applicant.

[51] Accordingly, the section 16(3)(b) ground of opposition succeeds only with respect to the following goods:

> (1) […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for nail care and hair care namely, to promote nail and hair growth and strength; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for nail care and hair care namely, to promote nail and hair growth and strength.

[52] I wish to add that had the Applicant provided evidence to establish that its POM Marks had been used or had become known to some extent in Canada as of the material date, I might have concluded that the overall consideration of the section 6(5) factors weighs in its favour

when considering the Applicant's nutritional supplements. However, the outcome of an opposition is based on the evidence and pleadings of the parties and not on the unsupported submissions of the parties.

Disposition

[53] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the application under section 38(8) of the Act for the following goods:

> (1) […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals for nail care and hair care namely, to promote nail and hair growth and strength; […] nutritional supplements namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for nail care and hair care namely, to promote nail and hair growth and strength.

[54] However, I reject the opposition under section 38(8) of the Act for the following goods:

> (1) Botanical extracts, namely, pomegranate extracts, for use in the preparation of cosmetic and skin care products; cosmetic and skincare preparations, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants for the hands, face, eyes, lips, and body; cosmetic and skincare preparations, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants for the hands, face, eyes, lips, and body, namely, oils, moisturizers, lotions, creams, topical sprays, gels, serums, masks, toners and exfoliants containing pomegranate extracts; essential oils and nutritional oils for cosmetic and skincare purposes, namely, essential and nutritional oils containing pomegranate extracts; sunscreens and cosmetic preparations for skin tanning; sun-care preparations containing pomegranate extracts; cosmetic pads containing pomegranate extracts; -medicated skin renewal creams, non-medicated skin renewal lotions, non-medicated skin renewal gels; bath oils and bath products, namely, bath oils and bath products containing pomegranate extracts; hair care preparations, namely, shampoos, conditioners, hair lotions and oils containing pomegranate extracts; nail care preparations containing pomegranate extracts; make-up removing preparations containing pomegranate extracts; shaving and after-shave preparations containing pomegranate extracts; soaps and cleansing preparations containing pomegranate extracts; nutritional oils not for cosmetic purposes, namely, pomegranate oil; Pharmaceutical (*sic*) preparations namely, tablets, liquids, powders,

vitamins and minerals for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; pharmaceutical preparations namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for skin care treatment namely, for the improving of skin texture and appearance and to counteract formation of wrinkles; pharmaceutical preparations namely, tablets, liquids, powders, vitamins and minerals for nail care and hair care namely, to promote nail and hair growth and strength; pharmaceutical preparations namely, tablets, liquids, powders, vitamins and minerals containing pomegranate extracts for nail care and hair care namely, to promote nail and hair growth and strength.

[See *Produits Menager Coronet Inc v Coronet-Werke Heinrich Schlerf Gmbh* (1986), 10 CPR (3d) 492 (FCTD) as authority for a split decision.]

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Céline Tremblay
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office