



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

Citation: 2011 TMOB 174
Date of Decision: 2011-09-19

**IN THE MATTER OF AN OPPOSITION by
CE.M.O.N. S.R.L. Inc. to application
No. 1,352,632 for the trade-mark
DYNAMISE in the name of Dynamise
Botanicals Inc.**

[1] On June 21, 2007, Dynamise Botanicals Inc. (the Applicant) filed an application to register the trade-mark DYNAMISE (the Mark) based upon use of the Mark in Canada since November 1, 2006 in association with the following wares and services, as revised:

Natural health products and dietary supplement, namely, non-alcoholic drinks, namely herbal beverage, electrolyte drinks, juice drinks, meal replacement drinks, teas, greens and metabolites; printed instructional, educational and teaching materials, namely, handbook, newsletter, brochures, pamphlets, reports and manuals. (the Wares)

Research, formulation and development of natural health products and supplements. Consulting services in the field of health products. Manufacturing, contract manufacturing, labeling, packaging, private labeling, wholesale and retail sale of natural health products and supplements. Operating a website providing information relating to natural health products and supplements. (the Services)

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of July 23, 2008.

[3] On February 20, 2009, CE.M.O.N. S.R.L. (the Opponent) filed a statement of opposition claiming that the application does not conform to the requirements of s. 30(b) and (i) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act). The statement of opposition also claims that the

Mark is not registrable pursuant to s. 12(1)(d) of the Act, that it is non-distinctive of the Applicant pursuant to s. 2 of the Act, and that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(1)(a) of the Act in view of the fact that the Mark is confusing with the trade-mark DYNAMIS of the Opponent, previously registered under No. TMA700,053 and used in Canada by the Opponent in association with various preparations and traditional homeopathic medicines.

[4] The Applicant filed and served a counter statement in which it denies the Opponent's allegations.

[5] In support of its opposition, the Opponent filed the affidavit of Anthony Kunkel, Vice President and General Manager of the private investigation agency Mitchell Partners Investigation Services, sworn August 24, 2009, as well as a certified copy of registration No. TMA700,053 for the DYNAMIS trade-mark. In support of its application, the Applicant filed the affidavit of Ali Iman Pour Navab, a director and co-owner of the Applicant, sworn March 23, 2010.

[6] Only the Applicant filed a written argument. Neither party requested an oral hearing.

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[7] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidentiary 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 [see *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.); and *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)].

Analysis

[8] Applying these principles to the instant case, the grounds of opposition based on s. 30(i), s. 16(1)(a) and s. 2 of the Act can be summarily dismissed as follows:

- The s. 30(i) ground of opposition, as pleaded, does not raise a proper ground of opposition. The Opponent has pleaded that the application does not comply with the requirements of s. 30(i) of the Act in that “the Applicant could not state it was satisfied it was entitled to use the [Mark] in Canada in association with the wares and services claimed therein in view of the Applicant’s knowledge of the Opponent’s prior rights in respect of the Opponent’s confusingly similar trade-mark detailed above”. However, the mere fact that the Applicant may have been aware of the existence of the Opponent’s DYNAMIS trade-mark at the time of filing the application for the Mark does not preclude it from making the statement in its application required by s. 30(i) of the Act.

Even if the ground had been properly pleaded, where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional circumstances such as where there is evidence of bad faith on the part of the applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.)]. There is no such evidence in the present case;

- The s. 16(1)(a) ground of opposition fails because the Opponent has failed to show that as of the date of first use claimed in the Applicant’s application, or for that matter at any time whatsoever, its DYNAMIS trade-mark had been previously used in Canada and had not been abandoned as of the date of advertisement of the Applicant’s application [s. 16(5) of the Act]. The mere existence of registration No. TMA700,053 can establish no more than *de minimis* use of the Opponent’s trade-mark [see *Entre Computer Centers, Inc. v. Global Upholstery Co.* (1992), 40 C.P.R. (3d) 427 (T.M.O.B.)]. Such use does not meet the requirements of s. 16 of the Act [see *Rooxs, Inc. v. Edit-SRL* (2002), 23 C.P.R. (4th) 265 (T.M.O.B.)]; and

- The s. 2 (non-distinctiveness) ground of opposition fails because the Opponent has failed to show that as of the filing date of the statement of opposition its DYNAMIS trade-mark had a substantial, significant or sufficient reputation in Canada so as to negate the distinctiveness of the applied-for mark [see *Bojangles' International LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.)]. Again, the Opponent has not filed any evidence demonstrating the extent to which its DYNAMIS trade-mark has become known in Canada.

[9] I will now turn to the s. 30(b) ground of opposition.

Section 30(b) ground of opposition

[10] The Opponent has pleaded that the application does not comply with the requirements of s. 30(b) of the Act in that “the [Mark] has not been continuously used since the claimed date of first use, November 1, 2006, in Canada by the Applicant in association with the claimed wares and services in the ordinary course of trade”.

[11] The material date that applies to such a ground of opposition is the filing date of the application [see *Georgia-Pacific Corp. c. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.)]. To the extent that the relevant facts pertaining to a ground of opposition based upon s. 30(b) of the Act are more readily available to the Applicant, the evidentiary burden on the Opponent with respect to such a ground of opposition is lower [see *Tune Masters v. Mr. P.'s Mastertune Ignition Services Ltd.* (1986), 10 C.P.R. (3d) 84 (T.M.O.B.)]. Also, the Opponent may rely upon the Applicant’s evidence provided however that such evidence is clearly inconsistent with the Applicant’s claim [see *York Barbell Holdings Ltd. v. ICON Health & Fitness, Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)]. In this regard, s. 30(b) of the Act requires that there be continuous use of the trade-mark applied for since the date claimed [see *Labatt Brewing Co. v. Benson & Hedges (Canada) Ltd.* (1996), 67 C.P.R. (3d) 258 (F.C.T.D.)].

[12] This brings me to review the Opponent’s evidence on this point in light of the Applicant’s evidence. The Kunkel affidavit purports to put into issue the correctness of the date

of first use of the Mark claimed by the Applicant in its application.

[13] More particularly, Mr. Kunkel states in his affidavit that he has been a licensed private investigator for over 23 years. In his role as a private investigator, he has conducted many investigations for both corporations and law firms, including investigations concerning trademark use and counterfeit products.

[14] Mr. Kunkel states that he was retained in August 2009 by the law firm representing the Opponent in the instant proceeding to perform an investigation with respect to the use of the Mark by the Applicant. The results of his search are summarized below:

- The Applicant was incorporated on November 1, 2006 as a federal corporation [see Exhibits A and B, which consist respectively of a copy of the Ontario Corporation Profile Report and a printout of the federal corporate information for the Applicant];
- The domain name *www.dynamise.ca* was first registered on November 3, 2006 [see Exhibit C that consists of a printout of Mr. Kunkel's domain name search result from *www.internic.ca*]. The Internet archive site *www.archive.org* first documented pages present at *www.dynamise.ca* in 2007 with an update on December 14, 2007 [see Exhibit D that consists of a printout of the search result from *www.archive.org*];
- Mr. Kunkel checked telephone directories and found no telephone listing for the Applicant, nor any telephone listings for any business incorporating the name DYNAMISE in Canada in recent years;
- Mr. Kunkel conducted reverse searches for the two telephone numbers advertised as contact numbers on the *www.dynamise.ca* website. For telephone number 905-417-7517, he found no listing for this number as either a residence or business. For telephone number 905-417-5088, indicated on the Applicant's website as a fax line, he found it as a residential telephone listing under the name of Navab A. Pour, 26 Love Run Road, Maple, ON. This is the same address as the head office for the Applicant;
- Mr. Kunkel viewed the Health Canada website which accesses the Licensed Natural Health Products database. He searched the Licensed Natural Health Products database using DYNAMISE as the search word for all the possible criteria and found no record of

DYNAMISE within the database [see Exhibit E that consists of printouts from his search results from the Health Canada Licensed Natural Health Products database].

[15] The Applicant submits that “Mr. Kunkel’s evidence is of fairly limited value as it is not based on a particularly elaborate investigation or understanding of [the Applicant], its directors, its history, its business practices, its market, or its wares and services”. I tend to agree. This brings me to review the Applicant’s evidence on this point.

[16] Mr. Navab first provides information concerning his background. He states that he is a homeopathic practitioner and instructor. He is also a certified nutritionist, acupuncturist, hypnotherapist and iridologist.

[17] Mr. Navab is registered with the Homeopathic Medical Association of Canada and was elected in August 2009, to the Board of Directors where he currently holds the position of Secretary. He further states that he is a researcher and formulator in the field of natural medicine.

[18] Mr. Navab operates the Applicant company together with one other director and co-owner, Jaroslav Repcak.

[19] Mr. Navab then goes through the history of the Mark. He states that “[i]n 2002, we [presumably Mr. Navab and his partner, Mr. Repcak] started using the name, ‘Dynamise’, in relation to various business activities. By 2003, we were distributing annual product lists to practitioners in order to generate sales. Attached as Exhibit B are examples of the Dynamise Botanicals Invoices and Product Lists that were issued and distributed in the period between 2002 and November 1st, 2006”. Upon review of these materials, I note that they consist of a product list of “Herbs in Raw, Powder Forms, Tinctures, Essential Oils and Teas” as of January 2004 entitled “Dynamise Botanicals” and two invoices dated December 19, 2005 and September 12, 2006 issued by “Dynamise Botanicals”, which appear to pertain to the sale of some of the products so listed. The only reference to the Mark is found in invoice No. SK091206 issued by “DYNAMISE™ BOTANICALS”.

[20] Mr. Navab states that “[i]n 2006, my business partner and I decided to push ahead with our business on a larger scale, which is the reason we incorporated our business and applied to register the [Mark]. We were already using the “TM” designation next to our logo by September 2006, but we indicated that our date of first use was November 1st, 2006 *to match the incorporation date*” [my emphasis].

[21] Mr. Navab goes on to state that “[w]e registered our domain name, *www.dynamise.ca*, on November 3rd, 2006. [...] We decided to register our trade-mark, DYNAMISE, with an application that the [Canadian Intellectual Property Office (CIPO) trade-marks database] confirms as filed on June 21st, 2007. Our original list of products and services, prepared for us by the trade-mark agent who filed our application, is attached as Exhibit E to my [a]ffidavit”.

[22] Mr. Navab states that the Applicant “has carried on business continuously since the date of [its] incorporation. Attached, as Exhibit F, are sample invoices relating to the operation of [the Applicant], from November 1st, 2006 to the present.” Upon review of these invoices, I note that the earliest of them is dated June 22, 2007. Most of the invoices appear to pertain to some of the products listed in the product list described above under Exhibit B, as well as different kinds of products described as “formula”, “complex”, “infusion”. Two invoices are for services, namely invoice No. ET0801001 dated January 2, 2008 for “Consultation Service” and invoice No. 4272009 dated April 27, 2009 for “Nutritional Analysis”.

[23] Mr. Navab goes on to state that “[m]y business partner and I have advertised our company in a number of ways, both within Canada and internationally. We have distributed thousands upon thousands of flyers and product lists. We have used our website, *www.dynamise.ca*, to advertise our products and services. We have purchased advertising space in magazines, and participated at trade shows. Attached as Exhibit G to my [a]ffidavit are sample advertising materials as well as a printed version of our company’s website. Attached as Exhibit H are sample invoices related to the advertising of our company’s products and services”. Upon review of the materials attached as Exhibit G, I note that except for the printouts of the Applicant’s website, they all pertain to “Dynamise infusion” only, which is described as a new-age refreshing beverage, together with an accompanying photograph of the product clearly

depicting the Mark. The printouts of the Applicant's website pertain to that infusion as well as to a line of seven herbal dietary supplement formulas, also in liquid form and marked with the Mark. The printouts further include a short description of the Applicant's "Professional Services", which cover "Consultation on new formulations, research and development"; "Consultation on the Canadian Application for Natural Product Licence"; "Custom compounding, manufacturing, bottling, labeling [sic] and packaging"; "Custom Exclusive Distribution right for a product for a specific region"; and "Conducting educational lecture in regards to Natural Medecine & GMP". While the website bears a 2007 copyright notice, the printouts are dated December 21, 2009. Except for one publicity dated January/February 2009, the samples of flyers and publicity are undated. The invoices related to the advertising of the Applicant's products and services filed as Exhibit H are dated between August 27, 2007 and March 6, 2009, and pertain to the ordering of business cards, marketing brochures, etc.

[24] Mr. Navab states that "our company has continued to grow since it was incorporated, to the point where my business partner and I recently recognized the need to move to a new location. Attached, as Exhibit I to my [a]ffidavit, is evidence of our new location". Upon review of this exhibit, I note that it consists of a certificate of compliance issued by Health Canada Natural Health Products Directorate in Ottawa.

[25] Mr. Navab states that as noted in the application, the Applicant offers the Wares enumerated above. He adds that "the main product we currently offer is our 'Dynamise' tea-based beverage. This beverage is a regular, non-alcoholic [sic] drink that is available to a very large market, and is currently sold in supermarkets, grocery stores, spas and fitness clubs. This beverage is sold at approximately \$6,25 per bottle". Mr. Navab states that "Health Canada does not require a licence for a regular, non-alcoholic [sic], non-medicinal tea-based beverage, which is why our company does not, and would not, appear in any Health Canada search. Instead, our company is listed on the Agriculture and Agri-Food Canada website, under the Functional Foods and Nutraceuticals section, where "BOTANICALS" is listed under "Bioactive Compound / Ingredients / Products". Mr. Navab further states that "[p]rinted materials that are educational in nature, or are related to our beverage or our client services, are an important part of what our company offers. These printed materials would have nothing to do with any Health Canada

licensing requirements”. I find these statements of Mr. Navab somewhat contradictory to Exhibit I mentioned above.

[26] Mr. Navab states that as noted in the application, the Applicant offers the Services enumerated above. Mr. Navab adds that “[o]ur company spends most of its time assisting practitioners such as naturopath doctors and herbologists, as well other manufacturers and companies that have their own lines of products, and would like us to provide ingredients or tinctures.”

[27] Mr. Navab goes on to state that “[t]he people and companies who contact us regarding our services are very knowledgeable, given the sophisticated level of services they require, and the costs involved. Before requesting our services, they usually give a great deal of thought to the services they need, their expected costs, as well as quotes from other companies. They are usually very familiar with our company and our services before confirming that they would like our assistance”.

[28] Mr. Navab states that he “trust[s] the trade-mark agent who filed our application after informing us that there did not seem to be any problems with our application”. He also “trust[s] the Examiner who reviewed our application with us and helped us with wording that he felt would distinguish our [Mark] from that of [the Opponent]”. This last statement of Mr. Navab concerning the role played by the Examiner has to be put into context. Mr. Navab explains in his affidavit that during the course of examination of the Applicant’s application for the Mark, the Applicant was informed by the Examiner reviewing the application that the Mark, with its original list of wares and services, was confusing with the Opponent’s DYNAMIS trade-mark of registration No. TMA700,053. The Examiner’s report also requested that some of the wares listed in the application be defined in specific and ordinary commercial terms. Mr. Navab states that “[o]n March 19th, 2008, I spoke with the Examiner handling my application. After explaining to him exactly what my company was doing, he adjusted our list of products and services to something he felt would be acceptable, and would differentiate our products from those offered by [the Opponent]”. Upon reviewing this file, and regardless of Mr. Navab’s allegations as to his discussion with the Examiner, I note that by way of Office letter dated

March 27, 2008 - following the filing by the Applicant of a response addressing the issues raised by the Examiner in his first examination report together with a revised application - the Examiner advised the Applicant that the s. 12(1)(d) objection with respect to registration No. TMA700,053 was withdrawn, but the instant application would be treated as “a doubtful case pursuant to s. 37(3) of the Act, and notice will be issued to the other owner accordingly.”

[29] The Applicant submits that Mr. Navab’s affidavit shows that the Applicant “was not starting from scratch when it was incorporated. A solid foundation for the corporation, including use of the [Mark], had already been laid by Mr. Navab and Mr. Repcak in the years prior to the company’s incorporation on November 1, 2006. Product lists had been distributed since 2003, sales under the name DYNAMISE had taken place, and use of the trade-mark symbol was deliberately being used on invoices”.

[30] The Applicant further submits that “[t]he evidence indicates that, after [the Applicant]’s incorporation [...], the company has continued to grow, with regular advertising and increasing sales, and with the [Mark] featuring as an important part of all product labelling, advertising and invoicing. The company’s move to a new location is the result of the company’s continued growth and success”.

[31] I partly disagree with the Applicant’s submissions.

[32] I do not question the good faith of the Applicant at the time of filing the instant application. However, the fact is that the application claims November 1, 2006 as the date of first use of the Mark by the Applicant in Canada, which date has been contested by the Opponent in its statement of opposition. While Mr. Kunkel’s affidavit may not be sufficient in itself to satisfy the Opponent’s evidentiary burden, I find that the Applicant’s own evidence is partly clearly inconsistent with the Applicant’s claim for the following reasons.

[33] Concerning first the portion of the Services described as “operating a website providing information relating to natural health products and supplements”, both Mr. Kunkel’s and Mr. Navab’s affidavits evidence that the domain name *www.dynamise.ca* was first registered on

November 3, 2006, that is *after* the date of first use claimed in the Applicant's application for the Mark [see Exhibit C to Mr. Kunkel's affidavit described above; Mr. Navab's sworn statement described above and Exhibit D to Mr. Navab's affidavit, which includes *inter alia*, an invoice dated March 26, 2007 for *dynamise.ca* website design and programming].

[34] Concerning the remaining part of the Services, my reading of Mr. Navab's affidavit is that the Applicant company was incorporated to "push ahead [Messrs. Navab and Repcak]'s business on a larger scale". However, the only business activities described in Mr. Navab's affidavit prior to the Applicant's incorporation date are the distribution of "annual product lists to practitioners in order to generate sales". Furthermore, the only references to such services in the Applicant's documentary evidence are found in Exhibits F and G described above [see invoice No. ET0801001 dated January 2, 2008 for "Consultation Service" and invoice No. 4272009 dated April 27, 2009 for "Nutritional Analysis", and the short description of the Applicant's services provided on the Applicant's website]. However, these exhibits do not show how the Mark is used or displayed in the performance or advertising of those services. They are also dated well after the Applicant's claimed date of first use.

[35] While the Applicant was under no obligation to positively evidence continuous use of the Mark as of the filing date of the application since the date of first use claimed in its application, the fact is that the Applicant elected to file evidence in order to, *inter alia*, rebut Mr. Kunkel's evidence. As I read Mr. Navab's affidavit, the Applicant's business activities have expanded since the Applicant was first incorporated. As per Mr. Navab's statement reproduced above, the Applicant indicated that its date of first use of the Mark was November 1st, 2006 "to match the incorporation date". While Messrs Navab and Repcak's intent at the time of incorporating the Applicant company may well have been to offer all of the Services covered by the instant application, I find the evidence of record does not support the Applicant's claimed date of first use of the Mark in association with all such Services pursuant to s. 4(2) of the Act. To the contrary, and except for the Services described as "wholesale and retail sale of natural health products and supplements", I find the Applicant's evidence clearly inconsistent with such a date.

[36] Turning to the portion of the Wares described as "printed instructional, educational and

teaching materials, namely, handbook, newsletter, brochures, pamphlets, reports and manuals”, I also find the Applicant’s evidence clearly inconsistent with the date of first use claimed by the Applicant in its application. As per my review above of Mr. Navab’s affidavit, it is apparent that the only printed materials that have been used by the Applicant consist of promotional flyers and printed advertising in magazines [see Exhibit G]. Such use does not amount to use of the Mark in association with “printed instructional, educational and teaching materials, namely, handbook, newsletter, brochures, pamphlets, reports and manuals” pursuant to s. 4 of the Act.

[37] However, I do not find the Applicant’s evidence concerning the remaining part of the Wares to be clearly inconsistent with the date of first use claimed by the Applicant in its application. It may well be that the Applicant made a first sale of those wares on the very date of its incorporation considering Messrs. Navab and Repcak’s sales made prior to their incorporating the Applicant company.

[38] In view of the above, the s. 30(b) ground of opposition fails with respect to the wares and services described as “natural health products and dietary supplement, namely, non-alcoholic drinks, namely herbal beverage, electrolyte drinks, juice drinks, meal replacement drinks, teas, greens and metabolites” and “wholesale and retail sale of natural health products and supplements”. It does however succeed with respect to the remaining wares and services on the basis that the Applicant has not satisfied its ultimate burden.

Section 12(1)(d) ground of opposition

[39] The Opponent has pleaded that the Mark is not registrable having regard to the provisions of s. 12(1)(d) of the Act in that it is confusing with the Opponent’s trade-mark DYNAMIS, registered on November 2, 2007 under No. TMA700,053 in association with the following wares:

Preparations and traditional Homeopathic medicines made from a combination of herbal extracts, vitamins, minerals and animal extracts in the form of liquid capsules, cream, tinctures, tablets, soft gels, powders, suppository for human and veterinary use for the treatment of indigestion, constipation, esophagitis, enteritis, duodenal ulcer, dysentery,

hepatitis, liver diseases, laryngitis, pharyngitis, stomach ailments, stomach ulcer, gastrointestinal diseases, insomnia, headache, neurasthenia, migraines, memory loss, improvement of memory, stress, depression, anxiety, fears, anguish, phobia, fever, influenza, rheumatic arthritis, poliomyelitis, tonsillitis, colds; for enhancing immune system, promoting blood circulation, and for anti-aging, prevention of flu, cough, tracheitis, pneumonia, asthma, acne, rubella, eczema, dermatitis, apoplexy, heat stroke, anemia, bruise, endocrinopathy, menstrual disorder, endocrine diseases, cervical lesion, joint pain, arthritis, joint cartilage degeneration, sprains, lubrication of joints, prostate malfunction, reproductive system ailment, trachoma, conjunctivitis, exanthematic diseases, and malaria.

[40] As indicated above, the Opponent has provided a certified copy of such registration. I have exercised the Registrar's discretion to confirm that it is in good standing as of today's date.

[41] As the Opponent's evidentiary burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's DYNAMIS trade-mark.

[42] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that 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 wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[43] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those listed at s. 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 wares, 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. This list is not exhaustive; all relevant factors are to be considered, and are not necessarily attributed equal weight [see *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.); and *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée* (2006), 49 C.P.R. (4th) 401 (S.C.C.) for a thorough discussion of the general principles that govern the test for confusion].

[44] The Applicant's Mark is a coined word. Mr. Navab states in his affidavit that "Dynamise" [...] is an original word my business partner and I came up with in 2002 by combining two words, the English word 'dynamize' and the homeopathic term, 'dynamis'. Obviously, having a similar look and the same pronunciation as 'dynamize', we liked this name because we felt it represented the effort and hard work involved in extracting goodness out of herbs to assure their efficacy and quality. We obviously also liked the word's similarity to 'dynamis', which suggested the link of our business operations to natural medicine and good health. Attached, as Exhibit C, is a dictionary excerpt that includes the definition of the word, 'dynamize'".

[45] Concerning more particularly the word "dynamis" forming the entirety of the Opponent's trade-mark, Mr. Navab states in his affidavit that "[it] is a commonly used, extremely important word in the field of Homeopathy. Originally an Ancient Greek word meaning, 'vital force', it was Dr. Samuel Hahnemann, a German doctor considered by many to be the founder of modern day Homeopathy, who first used this word in association with Homeopathy in the early 1800s. Since that time, the word has become a regular and important part of Homeopathy in many languages around the world. Attached as Exhibit O [...] is a sampling of references to the word 'dynamis', in various English-language published texts". Upon review of Exhibit O, I note that it consists of pages taken from over fifty English-language reference works on homeopathy. It also includes excerpts from a few magazines such as *Yoga Journal* having circulation in Canada. All of these publications make reference to the term "dynamis", including in many cases its origin and meaning.

[46] Having exercised my discretion to check dictionaries, I further note that the above statements of Mr. Navab are corroborated by the following definitions:

"dynamis/energeia": "The former refers to the powers inherent in things. In Aristotle it becomes a potential in contrast to energeia which is the actualization of the potential" - *The Oxford Dictionary of Philosophy*

"dynamis": "the state of that which is not yet fully realized: power, potentiality – contrasted with *energeia*" - *Merriam-Webster Unabridged Dictionary*

“dynamis”: “*n.* word coined by Hahnemann to describe an organism's life force (i.e., prana, ch'i, etc.) See also bioenergetics, dynamisation, life force, potency, potency energy, vital force, and Wesen” - *Free Dictionary by Farlex*

[47] In view of the foregoing, I agree with the Applicant that the Opponent's DYNAMIS trade-mark is of low inherent distinctiveness in the context of the Opponent's wares. That said, I also find the Applicant's Mark to be a relatively weak mark given its suggestive connotation in the context of the Wares, as per Mr. Navab's explanations reproduced above concerning the coining of the Mark.

[48] The strength of a trade-mark may be increased by means of it becoming known through promotion or use. However, as indicated above, there is no evidence that the Opponent's trade-mark has been used in Canada or that it has become known to any extent whatsoever in Canada. The mere existence of registration No. TMA700,053 can establish no more than *de minimis* use of the Opponent's trade-mark.

[49] Turning to the Applicant's Mark, Mr. Navab's affidavit does not provide much information as to the extent to which the Mark has been used and become known in Canada. No sales or marketing figures are provided. Furthermore, while Mr. Navab states that he and his partner started using the name “Dynamise” in 2002, the above evidence of use falls short of establishing continuous use of the Mark by the Applicant in association with all of the Wares and Services since the date of first use of November 1, 2006 claimed in the application. To sum up, I can hardly ascribe any reputation of note to the Mark.

[50] Turning to the nature of the wares and services and the nature of the trade, I must compare the Applicant's statement of Wares and Services with the statement of wares in the Opponent's registration [see *Henkel Kommanditgesellschaft auf Aktien v. Super Dragon Import Export Inc.* (1986), 12 C.P.R. (3d) 110 (F.C.A.); and *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. The evidence of the parties'

actual trades is useful in this respect [see *McDonald's Corp. v. Coffee Hut Stores Ltd.* (1996), 68 C.P.R. (3d) 168 (F.C.A.); *Procter & Gamble Inc. v. Hunter Packaging Ltd.* (1999), 2 C.P.R. (4th) 266 (T.M.O.B.); and *American Optional Corp. v. Alcon Pharmaceuticals Ltd.* (2000), 5 C.P.R. (4th) 110 (T.M.O.B.)].

[51] The Applicant submits that “[p]ut simply, [the Applicant] sells drinks and helps customers with creating their own products. Put simply, the Opponent claims that it is selling medicines that cure diseases”. The Applicant further submits that “[p]ut simply, consumers of the Applicant’s products are people looking for a beverage, while consumers of the Opponent would be looking to cure diseases. In terms of their dealings with health care practitioners and manufacturers, [the Applicant] cannot serve the customers of the Opponent, as the Applicant does not have the necessary licensing from Health Canada to produce homeopathic medicines. The Opponent cannot serve the customers of [the Applicant] who do not have the necessary licensing from Health Canada to distribute homeopathic medicines.”

[52] As per my review above of Mr. Navab’s affidavit, the Applicant’s main product, the DYNAMISE tea-based beverage is sold in supermarkets, grocery stores, spas and fitness clubs. By comparison, it is fair to assume that the Opponent’s preparations and traditional homeopathic medicines would be offered for sale in pharmacies or a store’s natural remedies section. As such, I agree with the Applicant that the parties’ wares and channels of trade would appear to differ.

[53] This brings me to address the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them, and the Applicant’s submissions as to the commonality of the word “dynamis”.

[54] As acknowledged by the Applicant itself in its written argument, there is a high degree of resemblance between the parties’ marks in appearance. However, the Applicant submits that the two trade-marks are different in sound, as the Mark has the same pronunciation as the English word “dynamize”, while the Opponent’s DYNAMIS trade-mark is pronounced “dee-nah-meess”. The Applicant further submits that the Applicant’s typical customers are not familiar with the homeopathic term “dynamis”, so the English word “dynamize”, both in terms of its appearance

and pronunciation, comes to mind when seeing the Mark. The Applicant submits that the Opponent's typical customers would be aware of the homeopathic term "dynamis" and the only thing that would come to mind would be the Opponent's deliberate use of this word for its products.

[55] These submissions of the Applicant appear to be based on Mr. Navab's statement that "[m]any people around the world use the word 'dynamis', in association with their homeopathic organizations, businesses and websites, as a way to identify, for the public, what they do. Attached as Exhibit P is a sample list of nineteen organizations, businesses and websites, both in Canada and the rest of the world, as well as the Trade-marks Database entry for an expunged 'DYNAMIS' trade-mark". They further appear to be based on Exhibit O discussed above.

[56] Upon review of Exhibit P, I note that it consists of a compiled table of both Canadian and international organizations, businesses and websites using the word "dynamis", as well as a printout from CIPO trade-marks database pertaining to an expunged registration for the trade-mark DYNAMIS in the name of "Les éditions Similia Les éditions Internationales d'Homéopathie et de Biothérapie S.A." The table lists three Canadian entities namely: Dynamis Health Center located in St-John, Newfoundland; Dynamis Fitness and Lifestyle located in Halifax, Nova Scotia; and Dynamis Health located in Toronto, Ontario. While the existence of such trade-mark registration and business names or trading styles tends to support the finding made above as to the descriptive connotation of the word DYNAMIS in the context of the Opponent's wares, their number is not significant enough for inferences about the state of the marketplace to be drawn.

Conclusion regarding the likelihood of confusion

[57] Considering my analysis above, and particularly in view of the relatively low inherent distinctiveness of the parties' marks in the context of their associated wares, the Opponent's default in establishing a significant reputation for its mark in Canada, and the differences existing between the parties' wares and services and channels of trade, I find that the Applicant

has satisfied its burden to show that there is not a reasonable likelihood of confusion between the marks in issue.

[58] Accordingly, the s. 12(1)(d) ground of opposition is dismissed.

Disposition

[59] In view of the foregoing and pursuant to the authority delegated to me under s. 63(3) of the Act, I reject the opposition with respect to the wares and services described as “natural health products and dietary supplement, namely, non-alcoholic drinks, namely herbal beverage, electrolyte drinks, juice drinks, meal replacement drinks, teas, greens and metabolites” and “wholesale and retail sale of natural health products and supplements”, and I refuse the application with respect to the remaining wares and services, pursuant to s. 38(8) of the Act [see *Produits Menagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH* (1986), 10 C.P.R. (3d) 492 (F.C.T.D.) as authority for a split decision].

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office