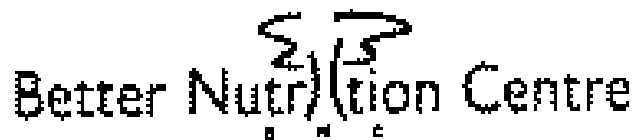


**IN THE MATTER OF AN OPPOSITION by
General Nutrition Investment Company to
Application No. 1,033,518 for the trade-mark
BETTER NUTRITION CENTRE & Design filed
by James Kiss doing business as Better Nutrition
Centre**

On October 28, 1999, James Kiss doing business as Better Nutrition Centre (the "Applicant") filed an application for registration of the trade-mark BETTER NUTRITION CENTRE & Design (the "Mark"), as illustrated hereafter, on the basis of proposed use in Canada.



The statement of wares and services reads as follows:

Wares: (1) Vitamins, minerals, herbal supplements in capsule, tablet, liquid and powder forms, nutritional protein bars, antioxidant supplements, garlic supplements, energy food bars, nutritional meal replacement bars, nutritional weight loss bars, protein drinks in powdered, crystal or liquid form, carbohydrate drinks in powdered, crystal or liquid form, dietary and nutritional drink mixes for use as a meal replacement, electrolyte replacement drinks in powdered, crystal or liquid form; digestive supplements namely bromolin; amino acids, glandular supplements, namely, raw thymus, raw pancreas, and raw adrenal, aloe vera, bran in tablet, capsule or powder form, spirulina supplements, alfalfa supplements, kelp supplements, bee royal jelly, bee propolis and bee pollen for use as a dietary food supplement; brewer's yeast, ginseng, herbal teas for medicinal purposes, weight loss nutritional supplements namely garcinia cambogia, uva ursi, chromium, sylvester gymnema, gugulipid, fucus vesiculosus, ma huang and pyruvate; nutritional supplements which aid in the repair of muscle, tissue and cartilage namely glucosamine sulfate, chondroitin, curcumin extract, l-glutamine; probiotic supplements, namely yogurt, acidophilus, lactobacillus or other bacteria cultures; enzyme supplements. (2) Elixirs, aroma therapy essences, cough syrups, cough drops, lozenges, tablets and capsules for relief of cold, allergy and flu symptoms, herbal extracts, plant extracts, seed extracts, nutritional oil supplements namely flax seed oil, linseed oil, cod liver oil, lecithin, and other fish oils; nutritional cartilage supplements, natural laxative supplements, natural fiber supplements, yeast supplements, sports nutrition products namely, muscle tone enhancers, hormone enhancers, energy boosters, and performance enhancers; and homeopathic supplements, namely aconite, acetaea rac, allium cepa, apis mel, argent nit, arnica, arsen alb, belladonna, berberis vulgaris, bryonia, calc carb, calc fluor, calc phos, calc sulph, causticum, carbo veg, dulcamara, euphrasia, ferr phos, gelsemium, graphites, hepar sulph, hypericum, hydrastis, ignatia, ipecac, kali bich, kali mur, kali phos, kali sulph, lycopodium, lachesis, gag phos, merc sol, nat mur, nat phos, nat sulph, nux vom, pulsatilla, rhus tox, ruta grav, sepia, silicea, sulphur, thuja in capsule,

tablet, liquid, lozenges and powder forms. (3) Pet care products, namely pet food, dietary supplements namely vitamins, minerals, yeast and garlic and shampoo. (4) Cosmetics, skin care, body care, hair care, and cleaning preparations namely perfumes, colognes, facial mud packs, skin cleansers namely cleansing liquids, gelees, milks, creams, lotions and eye make-up remover gel, soaps; exfoliating products, namely exfoliating gels, buffing creams and facial scrubs; skin toners and tonics; moisturizers, creams and lotions for skin and hair care; facial cleansing and moisturizing masks; suntan lotions, creams, gels and tan enhancers; toothpaste, dentifrices, foot powders, foot creams, hand lotions and creams; bath oils, milks, gels, foam, beads and salts; shampoos. (5) Liniments, medicated and non-medicated skin creams, lotions and oils, medicated and non-medicated sunburn creams, lotions and oils. (6) All purpose household cleansers and disinfectants. (7) Food products namely flour, dried herbs, nuts, unprocessed grains for eating, beans, crystallized fruit, tofu, breakfast cereals, bread, biscuits, dried fruits, nuts, honey, candy, tea, vinegar, tofu, wheat-based snack foods, edible oils and vegetable oils. (8) Fruit juices, vegetable juices, bottled water, spring water, non-alcoholic fruit drinks, fruit drink crystals, milk, soya based drinks and non-alcoholic carbonated drinks; sports drinks in powdered, crystal or liquid form

Services: (1) Operation of retail store and mail order services featuring health foods, health food supplements, nutritional supplements, sport supplements, diet and weight loss supplements and foods, vitamins, minerals and herbs, homeopathic medicines, fitness equipment, food processing equipment, housewares, pet food and pet care products, wearing apparel, health and beauty products, printed publications namely books, magazines periodicals and manuals. (2) Restaurant services. (3) Nutritional consulting services; naturopathic and, homeopathic consulting services; and laser therapy services. (4) Franchising namely, offering technical assistance in the establishment and/or operation of retail health food and health food supplement stores, restaurants. (5) The Operation of a business selling health foods, health food supplements, nutritional supplements, sport supplements, diet and weight loss supplements and foods, vitamins, minerals and herbs, homeopathic medicines, fitness equipment, food processing equipment, housewares, pet food and pet care products, wearing apparel, health and beauty products, printed publications namely books, magazines periodicals and manuals via the global communications network.

The Applicant has disclaimed the right to the exclusive use of BETTER NUTRITION apart from the Mark in respect of the wares as well as the right to the exclusive use of BETTER NUTRITION CENTRE apart from the Mark in respect of the services. The application was advertised in the *Trade-marks Journal* of September 5, 2001.

General Nutrition Investment Company (the "Opponent") filed a statement of opposition on December 20, 2001. The first ground of opposition is that the Mark is not registrable pursuant to

s. 12(1)(d) of the *Trade-marks Act* R.C.S. 1985 c-13 (the “Act”) since it is confusing with the following registered trade-marks of the Opponent:

- GENERAL NUTRITION CENTRE of Registration No. 353,274 in association with personal care products, namely, cosmetics namely skin treatment and moisturizing lotions, liquids, gels, sprays and creams; complexion powders, creams and soaps; hair shampoo, hair conditioning, setting and loss restricting oils, creams and liquids; cuticle crayons; denture cushions; pain relieving gels and balms; corn, callous and foot care products namely, lotions, powders, antifungal creams, deodorants, balms, pain relieving and protective rubs and ointments, corn and callous removers and reducing sticks, pumice creams for massaging corns and calluses; foot care equipment, namely toe nails clippers, toe positioners supports, regulators and separators; shoes inserts; shoe insoles; skin masking, blotch treating, toner, make-up, softening, cleansing and firming lotions and creams; pumice cream deodorants; eye drops; beauty creams; night creams; lip balms; eye lid creams and pencils; skin softeners; medicated skin creams; depilatories; suntan and protective skin lotions; mascara; lip tick; nail colours and protective base and top coats; facial and make-up powders; after shave lotions; toilet and bath powders; perfumes and colognes.; and the operation of a mail order business for the sale of food, food products and personal care products; operation of retail outlets for the sale of food, food products and personal care products.
- CENTRE DE NUTRITION GENERALE of Registration No. 348,014 in association with food and food products and personal care products, namely, vitamins, food supplements, minerals, cereals, dried fruit, seeds, fish, soft drinks, powdered mixes for making drinks, spices, oils, teas, cookies, nuts, candy, sprouts, cosmetics namely skin treatment and moisturizing lotions, liquids, gels, sprays and creams; complexion powders, creams and soaps; hair shampoo, hair conditioning, setting and loss restricting oils, creams and liquids; cuticle crayons; denture cushions; pain relieving gels and balms; corn, callus and foot care products; skin masking, blotch treating, toner, makeup, softening, cleansing and firming lotions and creams; pumice cream; deodorants; eye drops; beauty creams, night creams; lip balms; eye lid creams and pencils; skin softeners; medicated skin creams; depilatories; suntan and protective skin lotions; mascara; lip stick; nail colours and protective base and top coats; facial and make-up powders; after shave lotions; toilet and bath powders; perfumes and colognes; and the operation of a mail order business for the sale of food, food products and personal care products; operation of retail outlets for the sale of food, food products and personal care products.
- GNC GENERAL NUTRITION CENTER Design of Registration No. 472,850 in association with retail store services specializing in food processing, the sale of health foods, supplements, vitamins and minerals, fitness products and apparel, cosmetics, oral and body care, diagnostic exercise and calorie control products.
- GNC GENERAL NUTRITION CENTRES LIVE WELL Design of Registration No. 484,567 in association with retail store services specializing in food processing, the sale of health foods, supplements, vitamins, minerals and herbs, homeopathic medicines, fitness products and apparel, cosmetics, oral and body care, diagnostic exercise and calorie control products.

The second ground of opposition is that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(3)(a) of the Act in that, at the date of filing the application, the Mark was confusing with the trade-marks GENERAL NUTRITION CENTRE, CENTRE DE NUTRITION GENERALE, GNC GENERAL NUTRITION CENTER Design and GNC GENERAL NUTRITION CENTRES LIVE WELL previously used and made known in Canada by the Opponent in association with the above-identified wares and services. The third ground of opposition is that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(3)(b) of the Act in that, at the date of filing the application, the Mark was confusing with the Opponent's trade-mark BNBASIC NUTRITION Design of Application No. 893,877 filed on October 20, 1998 in association with vitamins, mineral supplements, herbs, and amino acids. The fourth ground of opposition is that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(2)(c) of the Act in that, at the date of filing the application, the Mark was confusing with the trade-names "General Nutrition" and "General Nutrition Centre" previously used by the Opponent in association with the above-identified wares and services. The last two grounds of opposition are that the Mark is not distinctive, in that it does not, and is not adapted to, distinguish the wares and services of the Applicant from the wares and services associated with the Opponent's trade-marks and trade-names.

The Applicant filed a counter statement. In addition to denying the grounds of opposition, the Applicant submitted that the ground of opposition based on s. 16(2)(c) is invalid since the application is based upon proposed use in Canada. However, I am prepared to consider the reference to s. 16(2)(c) rather than s. 16(3)(c) as a technical deficiency because it does not prejudice the Applicant.




As rule 41 evidence, the Opponent filed affidavits of Sally Orviss, dated January 10, 2002 (the "Orviss affidavit"), and of J. H. C. van der Ven, dated February 5, 2003. As rule 42 evidence, the Applicant filed his affidavit and an affidavit of Karin Binder, both dated September 11, 2003. The Opponent filed a second affidavit of Sally Orviss, dated February 11, 2004 (the "second Orviss affidavit") as rule 43 evidence. No cross-examinations were conducted.

Only the Opponent has filed written argument. No oral hearing has been held.

Opponent's Rule 41 evidence

- *The Orviss Affidavit*

Ms. Orviss, who has been employed by the Opponent's trade-mark agents for more than 10 years, introduces into evidence Certificates of Authenticity for the following trade-mark application and registrations:

<u>Trade-mark</u>	<u>Application / Registration No.</u>	<u>Filing / Registration Date:</u>
	893,877	October 20, 1998
CENTRE DE NUTRITION GENERALE	TMA348,014	November 18, 1988
GENERAL NUTRITION CENTRE	TMA353,274	March 17, 1989
	TMA 484,567	October 24, 1997
	TMA472,850	March 18, 1997

The Certificates of Authenticity confirm that the Opponent owns the application and the registrations. According to the footnotes of Registration Nos. TMA348,014 and TMA353,274, the Opponent became their owner by assignment from General Nutrition Incorporated on November 19, 1996. I should note that the statements of wares and services identified in the statement of opposition correspond to those evidenced by the Certificates of Authenticity except for “retail store services specializing in food processing” that is not part of the statement of services identified in Registration No. 484,567.

I am disregarding the “list of retail stores operated in Canada under the trade-mark, *inter alia*, GNC NUTRITION CENTRES” and the “list of products sold in these stores”, both having been provided to Ms. Orviss by “an authorized representative of the opponent”. In addition to the hearsay deficiency of Ms. Orviss' statements, these lists do not evidence use of any of the Opponent's alleged trade-marks.

- *The van der Ven affidavit*

Ms. van der Ven, the Opponent's Legal Counsel, states that she has access to the Opponent's corporate records and has a detailed knowledge of the Opponent's business. She specifically identifies the registrations and application alleged in the statement of opposition as being owned by the Opponent (paragraph 4).

At paragraph 5 of her affidavit, Ms. van der Ven identifies several individuals who have been licensed by the Opponent to use its trade-marks in the operation of independent retail stores specializing in food processing, the sale of health foods, supplements, vitamins and minerals, fitness products and apparel, cosmetics, oral and body care, diagnostic exercise and calorie control products. She specifically identifies the trade-marks being used by these licensees as GNC GENERAL NUTRITION CENTERS, GNC GENERAL CENTRES LIVE WELL and CENTRE DE NUTRITION GENERALE. She does not refer to the trade-marks BN BASIC NUTRITION or GENERAL NUTRITION CENTRE. The only information provided regarding the independent stores is their location (Windsor, Ottawa, Calgary, Toronto, Saskatoon, Mississauga and North Bay). We do not know since when any has been in operation nor is there any material evidence supporting the allegations that the licensees have used the Opponent's trade-marks. Ms. van der Ven also provides the full addresses of sixty-six (66) stores operated by the Opponent at the date of her affidavit (paragraph 6). While these stores appear to be located throughout Canada, I again note the lack of information on the opening dates and of material evidence showing use of any of the Opponent's trade-marks in the operation of these stores.

At this time, I should note that with the exception of her references to specific trade-marks at paragraphs 4 and 5 of the affidavit, Ms. van der Ven does not make any distinctions between the trade-marks alleged in support of the opposition. Any ambiguity resulting from Ms. van der Ven referring collectively to the Opponent's trade-marks throughout her affidavit will be resolved against the Opponent [see *Conde Nast Publications Inc. v. Union des Editions Modernes* (1979), 46 C.P.R. (2d) 183 (F.C.T.D.)].

As discussed hereafter, I find that the statements at paragraphs 7 to 9, reproduced below, are of no assistance to the Opponent's case:

“7. The Opponent also operates a website under the domain name GNC.CA through its Canadian licensee which offers for sale and sells health foods, supplements, vitamins, minerals and herbs, homeopathic medicines, fitness products and apparel, cosmetic, oral and body care, diagnostic exercise and calorie control products over the internet.

8. The Opponent started using the trade marks in Canada well before October 30, 1996 and has used its marks continuously since that date. Its first retail operation opened in Canada well before October 30, 1996 and has been continuously operating since that time.

9. Now shown to me and marked as Exhibit A to this my affidavit is a collection of labels illustrating the product sold in Canada by The (sic) Opponent and its licensee.”

Paragraph 7 does not provide any material evidence pertaining to the Opponent’s alleged trade-marks or trade-names. Moreover, the vagueness of the reference to the Canadian licensee only adds to the ambiguity of the evidence, as does the vagueness of “well before October 30, 1996” at paragraph 8. Furthermore, the statement at paragraph 8 does not evidence use of the Opponent’s alleged trade-marks in association with wares or services within the meaning of s. 4 of the Act at any time whatsoever. In so far as Exhibit A is concerned, I would note that it includes labels and packaging for products such as vitamins, minerals and herbal supplements, but none of the Opponent’s alleged trade-marks appears on the labels or packaging. For all intents and purposes, I note that the common trade-mark displayed on the labels and packaging is GNC[®]. Depending on the product, the manufacturer is identified as either General Nutrition Canada, in Mississauga (Ontario), General Nutrition Products, in Greenville (SC, USA) or GNC Canada, in Mississauga (Ontario).

According to the yearly breakdown provided by Ms. Van der Ven, the Opponent spent an approximate total amount of 1.12 million dollars between 1999 and 2002 for promoting “its products and its operation of retail stores in Canada”. There is no distinction between the advertisement of wares and of services. In addition to the lack of specimens showing use of any of the Opponent’s alleged trade-marks or trade-names in advertisement, there is no information with respect to the means of advertisement.

According to the yearly breakdown provided by Ms. van der Ven, the approximate total sale value of “products” has amounted to slightly less than 2.4 million dollars from 1996 to 2002. There is no breakdown of the value of sales by product nor is there any evidence from which I could conclude that any products, at the time of their sale, were associated with any of the Opponent’s alleged trade-marks.

In rounding up my analysis of the evidence introduced by the Orviss affidavit and the van der Ven affidavit, I find that apart from evidencing the Opponent’s ownership of the registrations and application alleged in the statement of opposition, the evidence fails to show that any of the Opponent’s trade-marks and trade-names have been used in Canada within the meaning of s. 4 of the Act, at any time whatsoever, in association with the wares and services alleged in the statement of opposition.

Applicant’s Rule 42 evidence

- *The Kiss Affidavit*

The Applicant is the owner and proprietor of Better Nutrition Centre, a proprietorship registered with the British Columbia Registrar of Companies. Prior to establishing his business, the Applicant was involved in a family-operated business selling health foods and nutritional supplements. Mr. Kiss provides information on the process that led to the opening of his retail store at Port Alberni Plaza, 3717 10th Avenue, Port Alberni, British Columbia on January 15, 2000. He provides photographs of the signage displaying the Mark outside the retail store and on the pillar advertising in the plaza parking lot.

According to the yearly breakdown provided by Mr. Kiss, the “annual gross revenue of Better Nutrition Centre” amounted to \$422,000 from 2000 to 2002, the annual gross revenue for 2003 being forecasted at \$174,000. From 2000 to 2002, the expenses for promoting his retail store amounted to \$25,200.

While Mr. Kiss deposes that the retail store services have been continuously advertised in “various print media across Canada” since February 20, 2000, he provides as exhibits sampling of advertising in Port Alberni, Tofino, Ucluelet, Bamfield, Parksville and Qualicum areas in

British Columbia. The specimens provided as exhibits (phone book advertisement in 2001, cooperative flyers advertisements, sampling of newspaper advertisements for the years 2000 to 2003) all display the Mark. The circulation figures provided by Mr. Kiss are not reliable evidence to show the extent of circulation of the newspapers in which advertisements have appeared or flyers have been distributed. Also provided as exhibits to the affidavit are printed materials used in the operation of the retail stores (business card, identification and price stickers, frequent buyer customer card, gift certificate, and discount coupons), all of which display the Mark.

Finally, Mr. Kiss refers to the publication of an annual newsletter containing health and nutritional supplement information that is distributed in store, through various newspapers and by mail. He provides the Spring 2001 newsletter, which displays the Mark.

Based on a fair reading of the affidavit, I come to the conclusion that the evidence of use of the Mark relates to the operation of a retail store featuring health foods, sport supplements, nutritional supplements, vitamins, minerals and herbs. I have to agree with the Opponent's argument that the affidavit does not evidence that any of the products sold in the Applicant's store are associated with the Mark or identify the Applicant as their source. However, there was no burden on the Applicant to evidence use of the Mark in association the wares and services identified in the application. For all intents and purposes, I note that the Opponent seems to argue a ground of opposition that would have been presumably based on non-conformity with the requirement of s. 30(e), but no such ground of opposition was raised in the statement of opposition. In any event, the absence of use the Mark in association with any of the wares or services identified in the application would not have provided any basis for saying that the Applicant did not intend to use the Mark because there is no requirement to use a proposed trademark until it is approved.

- *The Binder Affidavit*

Ms. Binder, a trade-mark searcher, introduces into evidence the results of her search of the *CD NameSearch* database, conducted on September 10, 2003, with respect to active applications and/or registrations for trade-marks incorporating, as a whole or in part, the terms "nutrition

centre”, “nutrition center”, “general” or “better” with any of the words “dietary”, “herb”, “mineral”, “nutrition”, “supplement”, or “vitamin” incorporated in the statement of wares and services. Ms. Binder states that the search turned up 26 trade-marks incorporating the words “nutrition” and “centre” (or “center”) (Enclosure B), 58 trade-marks incorporating the word “general” (Enclosure C) and 20 trade-marks incorporating the word “better” (Enclosure D).

The case law makes it clear that state of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace. Moreover, inferences concerning the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located [*Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 (T.M.O.B.); *Del Monte Corporation v. Welch Foods Inc.* (1992), 44 C.P.R. (3d) 205 (F.C.T.D.); *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (F.C.A.)]. Having reviewed the enclosures to the affidavit, I come to the conclusion that the number of relevant entries introduced into evidence is not as significant as it may seem from the deponent’s statements. For example, once the Mark and 7 trade-marks of the Opponent are excluded from the 26 trade-marks provided as Enclosure B, there are 5 registrations and 3 applications for trade-marks incorporating the words “nutrition” and “centre” (or “center”) and 2 registrations for trade-marks incorporating the word “nutritional” and “centre” (or “center”). There are 8 registrations for trade-marks incorporating the word “nutrition” without incorporating the word “centre” (or “center”). Also, once the 5 trade-marks of the Opponent are excluded from the 58 trade-marks provided as Enclosure C, we are left with 24 official marks and 11 trade-marks (7 registrations and 4 applications) incorporating the word “general” (or “generale”). The remaining 18 entries are for design trade-marks that do not incorporate the word “general” (or “generale”).

Opponent’s Rule 43 evidence

Ms. Orviss appends to her affidavit various exhibits, in all instances declaring that her statement relating thereto is based on what she has been “advised” by Andra Terrell, counsel for the Opponent. The exhibits are: a collection of texts of radio advertisements broadcasted in Canada in 1999; a newspaper insert distributed in Peterborough on April 20, 1998; advertisements and flyers mailed to all the Gold Card Customers of the Opponent in Toronto on September 10, 1997

and on December 15, 1997; a picture of the GNC General Nutrition Centre which was doing business in the Eaton centre in Toronto in 1997; mailers that were mailed to all the Gold Card Customers of the Opponent throughout Canada on May 8, 1997 and on April 1998; a flyer and a summary of the number of flyers distributed by the Opponent on March 23, 1997; copies of invoices and contracts for the placement of media advertisements; and copies of approval by the Canadian Advertising Foundation for advertisements of April 23, 1997.

As the purported reply evidence relates to the Opponent's trade-marks rather than to evidence introduced by the Applicant, the Opponent is obviously seeking to rely on rule 43 to introduce evidence that should have been filed as part of its evidence in chief. I find that the second Orviss affidavit does not constitute proper reply evidence and I shall disregard its content. I would add that, in any event, the second Orviss affidavit constitutes inadmissible hearsay evidence.

Analysis of the grounds of opposition

Section 12(1)(d)

Since the Opponent has met its burden by filing a Certificate of Authenticity of each alleged registration, the burden of proof lies on the Applicant to convince the Registrar, on a balance of probabilities, that there is no reasonable likelihood of confusion between the trade-marks [see *Dion Neckwear Ltd. v. Christian Dior, S.A.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)]. The material date for considering the issue of confusion pursuant to s. 12(1)(d) is the date of my decision [see *Park Avenue Furniture Corp v. Wickers/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.)].

Given the Opponent's evidence in the present record, or lack thereof, I consider that Registration No. 353,274 for the trade-mark GENERAL NUTRITION CENTRE and Registration No. 472,850 for the trade-mark GNC GENERAL NUTRITION CENTERS Design are the most relevant. Thus, a determination of the issue of confusion between each of these trade-marks and the Mark will effectively decide the ground of opposition based upon confusion with the registered trade-marks of the Opponent.

It has been held repeatedly that in determining whether trade-marks are confusing, the test to be applied is one of first impression and imperfect recollection. In assessing whether there would be any reasonable likelihood of confusion between the trade-marks in question, within the scope of s. 6(2) of the Act, factors to be considered are set out at s. 6(5). These factors are: (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. Each of these factors does not necessarily have equal weight as the significance of one may far outweigh that of the others [see *Classic Door & Millwork Ltd. v. Oakwood Lumber & Millwork Co.* (1995), 63 C.P.R. (3d) 337 (F.C.T.D.)]. In addition, all the factors listed at S. 6(5) are not exhaustive since all the surrounding circumstances have to be considered.

In my view, none of the trade-marks is inherently strong. The words “better”, “nutrition” and “centre” in the Mark have a descriptive connotation. I do not consider that the letters “bnc” significantly enhance the distinctiveness of the Mark, but I consider that the design feature adds to its inherent distinctiveness. In so far as the Opponent’s trade-marks are concerned, the words “nutrition” and “centre” (or “centers”) have a descriptive connotation. The word “general” does not significantly enhance the distinctiveness of each of the Opponent’s trade-marks nor do the letters “gnc” in the trade-mark GNC GENERAL NUTRITION CENTERS Design. I do not consider that the design feature of the Opponent’s trade-mark GNC GENERAL NUTRITION CENTERS Design adds to its inherent distinctiveness since the fanciful script and the font employed are intrinsic with the words [see *Canadian Jewish Review Ltd. v. The Registrar of Trade Marks* (1961), 37 C.P.R. 89 (Ex. C.)]. Given the evidence of record, I cannot draw any conclusion with respect to the extent to which the Opponent’s trade-marks have become known whereas I can conclude that the Mark has become known at least in some areas of British Columbia. Thus, the overall consideration of the inherent distinctiveness of the trade-marks and the extent to which they have become known favours the Applicant.

The Applicant has evidenced use of the Mark in association with the operation of its retail stores since January 15, 2000. While Registration No. 353,274 issued on March 17, 1989 based upon

use of the trade-mark since at least as early as 1971, it was assigned to the Opponent on November 19, 1996. As for Registration No. 472,850, it issued on March 18, 1997 on the basis of use and registration of the trade-mark in the United States. As the Opponent has failed to file any material evidence of its use of the trade-marks in Canada, I find the length of time the trade-marks have been in use also favours the Applicant.

In considering the nature of the wares and services and the nature of the trade, it is the statement of wares and services in the application and the statement of wares and/or services in the registrations that govern the assessment of the likelihood of confusion under s. 12(1)(d) [see *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.)]. The services identified in the application as “*operation of retail store and mail order services featuring health foods, health food supplements, nutritional supplements, sport supplements, diet and weight loss supplements and foods, vitamins, minerals and herbs, homeopathic medicines...wearing apparel, health and beauty products...*” either do not differ from or overlap with the services identified in Registration No. 353,274 and No. 472,850. In addition to the fact that the cosmetic products described in the application are similar to the wares identified in Registration No. 353,274, it could reasonably be argued that most of the wares listed in the application overlap with the services identified in the Opponent’s registrations. Accordingly, for the purpose of determining the likelihood of confusion, I find that the parties’ channels of trade are either identical or overlap. Thus the nature of the wares and services as well as the nature of the trade are factors that favour the Opponent.

The remaining criterion is the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested. It is not appropriate to dissect the trade-marks to consider their similarities. The trade-marks must be considered in their entirety [see *Sealy Sleep Products Ltd. v. Simpson’s-Sears Ltd.* (1960), 33 C.P.R. 129 (Ex. Ct.)]. Thus, the fact that they all involve the words “nutrition” and “centre” (or “centres”), which may result in similarities in the ideas suggested, is not sufficient to conclude that the trade-marks are confusing. Despite their common feature, the Mark as a whole is distinguishable from each of the Opponent’s trade-marks both visually and aurally. It is well established that the first portion of a trade-mark is far the more important for the purpose of distinction [see *Conde Nast Publications Inc. v. Union des Editions*

Modernes (1979), 46 C.P.R. (2d) (F.C.T.D.)]. There is no similarity between the first portion of the Mark, i.e. “better”, and the first portion of the trade-mark GENERAL NUTRITION CENTRE. There is also no similarity between the first portion of the Mark and the letters “gnc” which are the first portion of the trade-mark GNC GENERAL NUTRITION CENTERS Design. I would add that the letters “gnc” are the dominant feature of the Opponent’s trade-mark GNC GENERAL NUTRITION CENTERS Design, which is far from being the case of the letters BNC found in the Mark. In my view, the design feature of the Mark also assists in distinguishing the Mark from each of the Opponent’s trade-marks when viewed.

I find it is not necessary to consider the state of the register evidence to find in favour of the Applicant. Indeed, in view of my conclusions above, and particularly in view of the differences between the trade-marks, I find that the Applicant has satisfied its burden to show that on a balance of probabilities there is no reasonable likelihood of confusion between the Mark and the Opponent’s trade-marks GENERAL NUTRITION CENTRE of Registration No. 353,274 and GNC GENERAL NUTRITION CENTERS Design of Registration No. 472,850. I therefore dismiss the ground of opposition that the trade-mark is not registrable pursuant to s. 12(1)(d).

Non-entitlement

The relevant date in assessing the non-entitlement grounds of opposition is the filing date of the application.

Following my analysis of the evidence, I find that the Opponent has failed to discharge its initial onus of proving that any of the trade-marks alleged in support of the second ground of opposition as well as any of the trade-names alleged in support of the fourth ground of opposition were being used in Canada at the relevant date. Therefore both the non-entitlement grounds of opposition based upon s. 16(3)(a) and s. 16(3)(c) are dismissed.

The Opponent has met its initial onus of proving that Application No. 893,877 alleged in support of the third ground of opposition was pending at the relevant date and had not been abandoned at the date of advertisement of the application [s. 16(4)]. The burden of proof lies on the Applicant to convince the Registrar, on a balance of probabilities, that there is no reasonable likelihood of

confusion between the Mark and the Opponent's trade-mark BNBASIC NUTRITION Design. In applying the test for confusion, I have considered it as a matter of first impression and imperfect recollection. I come to the conclusion that the differences between the trade-marks in appearance, sound and in the ideas suggested are more than sufficient to make confusion unlikely. Therefore, I also dismiss the non-entitlement ground of opposition based upon s. 16(3)(b).

Distinctiveness

While the legal onus is on the Applicant to show that the Mark is adapted to distinguish or actually distinguishes its wares and services from those of others throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)], the Opponent has the initial evidential burden to show that, at the filing date of the statement of opposition, its alleged trade-marks and trade-names had become known sufficiently to negate the distinctiveness of the Mark [see *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.); *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)]. As the evidence of record does not allow me to conclude that any of the alleged trade-marks or trade-names had acquired any reputation through use or promotion at the relevant date, the Opponent has not met its initial burden. Thus, the grounds of opposition based upon non-distinctiveness are also unsuccessful.

Conclusion

Having regard to the foregoing, and with the authority delegated to me under s. 63(3) of the Act, I reject the Opponent's opposition pursuant to s. 38(8) of the Act.

DATED AT MONTREAL, QUEBEC, THIS 24th DAY OF MARCH 2006.

Céline Tremblay
Member
Trade-marks Opposition Board