

O P I C



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LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2020 TMOB 61**

**Date of Decision: 2020-06-05**

**IN THE MATTER OF AN OPPOSITION**

**Advanced Nutrients Ltd.**

**Opponent**

**and**

**753146 Alberta Ltd., Operating as  
Ultrasol Industries**

**Applicant**

**1,770,962 for JUNGLE JUICE**

**Application**

INTRODUCTION

[1] Advanced Nutrients Ltd. (the Opponent) opposes registration of the trademark JUNGLE JUICE that is the subject of application No. 1,770,962 that was filed by 753146 Alberta Ltd., Operating as Ultrasol Industries (the Applicant).

[2] Filed on March 4, 2016, the application is based on proposed use of the Mark in Canada in association with the following goods and services:

**Goods**

- (1) Insecticides for commercial and domestic use; Pest control agents and formulations, namely, chemical and non-chemical insect and rodent repellent, and insecticides; Pest control products for commercial and domestic use, namely, sprayers, fly traps, wasp traps,

glue boards, fly swatters, and dispensers for essential oil repellent and insecticides;  
Insecticide sprayers and applicators

## Services

- (1) Operation of a retail and wholesale sales business for commercial and domestic use products, namely, insecticides, pest control products, and insect control products;  
Advertising the goods of others, namely marketing of commercial and domestic use products, namely, insecticides, pest control products, and insect control products for others;  
Consultation services, namely, providing assistance by recommending insecticides, pest control products, and insect control products to customers

[3] The application was advertised in the *Trademarks Journal* of July 5, 2017.

[4] The Opponent opposed the application on November 29, 2017, by filing a statement of opposition under section 38 of the Act.

[5] The Opponent alleges that (i) the application does not conform to the requirements of section 30(i) of the *Trademarks Act*, RSC 1985, c T-13 (the Act); (ii) the Mark is not registrable under section 12(1)(d) of the Act; (iii) the Applicant is not the person entitled to the registration of the Mark under section 16 of the Act, and (iv) the Mark is not distinctive under section 2 of the Act.

[6] The Opponent is the owner of TMA855,580 for the trademark JUNGLE JUICE (the Opponent's Mark), registered in association with "plant nutrients, namely, base nutrient formula for plants grown hydroponically" (the Opponent's Goods). Each of the grounds of opposition are related to this registration.

[7] As a preliminary matter, I note that the Act was amended on June 17, 2019. All references in this decision are to the Act as amended, with the exception of references to the grounds of opposition which refer to the Act as it read before it was amended (see section 70 of the Act which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised prior to that date).

[8] For the reasons that follow, I reject the opposition.

## THE RECORD

[9] The Opponent filed its statement of opposition on November 29, 2017. The Applicant filed and served its counter statement on February 14, 2018 denying all of the grounds of opposition.

[10] The Opponent filed a statement that it did not wish to submit evidence.

[11] In support of its application, the Applicant filed the affidavit of Philippa Gaston-Kellock, sworn October 11, 2018, together with Exhibits A to O.

[12] Ms. Gaston-Kellock was not crossed-examined on her affidavit.

[13] Neither party filed a written argument or requested a hearing.

[14] Before assessing the allegations advanced in the statement of opposition, I will provide an overview of the Applicant's evidence.

### **The Applicant's Evidence**

#### *Affidavit of Ms. Gaston-Kellock*

[15] Ms. Gaston-Kellock is the Director of the Applicant. She attests that the Applicant has been carrying on business as a manufacturer and merchant, providing high quality pesticide and insecticide for commercial and domestic use including plant and pest control products, and other ancillary products since at least as early as 1997.

[16] Ms. Gaston-Kellock states that, as of the filing date, the Applicant had commenced use of the Mark in Canada in association with the applied-for goods and services. In particular, she indicates that the Mark is prominently displayed on such products and their packaging sold by the Applicant.

[17] In support, Ms. Gaston-Kellock provides the following:

- Exhibits B and C – copies of the Applicant's product label registration numbers associated with various regulatory agencies/authorities in Canada, such registration dates

being January and February, 2016, related to the Mark extracted from the Health Canada database.

- Exhibits D and E – copies of pesticide classification documents indicating the Applicant’s goods fall under Class 6 pesticides (per the *Pesticides Act and Pest Control Products Act*), designated as domestic products intended for household use.
- Exhibit F – photographs of the Applicant’s products which bear the Mark, which Ms. Gaston-Kellock states are “sold by the Applicant”. The products are identified on their labels as insect repellent spray.
- Exhibit G – pages from the Applicant’s website (printed October 10, 2018), which Ms. Gaston-Kellock states “show the products sold by the Applicant” bearing the Mark. The products once again are insect repellent sprays.
- Exhibit H – a copy of market labels used on the products sold by the Applicant. The Mark appears prominently on the label.
- Exhibits I and J – copies of pages from catalogues advertising goods sold by the Applicant bearing the Mark. The product appearing on the pages is indicated to be an insect repellent spray.
- Exhibit K – tables detailing sales figures surpassing \$400,000 for the years 2017 and 2018 to different customers of the Applicant’s products bearing the Mark. I note that the specific goods sold are not identified, however, I am prepared to infer that the sales figures pertain to the “insect repellent spray” that has been shown throughout the evidence.
- Exhibit L – copies of website listings of the Applicant’s channels of distribution for its products, namely, national retail outlets and distributors. Among others, the following are listed: Dutch Growers, Eddi’s Wholesale Garden Supplies Ltd., Home Hardware Building Centre, Remedy Animal Health, and Salisbury Greenhouse.

- Exhibit M – copies of the Applicant’s accounting system indicating advertising disbursements over \$50,000 dating between 2016 and 2018.
- Exhibit N – printouts of the particulars of the results of a trademark search using the words JUNGLE and JUICE together, excluding the Opponent’s Mark. There are five such results which are for the following: JUNGLE JUICE BAR & DESIGN (TMA998918), JUNGLE JUICE PLATINUM & Design (TMA913848), JUNGLE JUICE PLUS & Design (TMA913847), JUNGLE JUICE BLACK LABEL & Design (TMA913866), and JUNGLE JUICE (TMA827291).
- Exhibit O – particulars of 61 trademarks which the Registrar has accepted “composed of the word string JUNGLE, and 151 trademarks composed of the word string JUICE.”

#### THE PARTIES’ RESPECTIVE BURDEN OR ONUS

[18] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the application complies with the requirements of the Act. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v The Molson Companies Limited* (1990), 30 CPR (3d) 293 (FCTD) at 298].

#### ANALYSIS

##### Section 30(i) Ground Dismissed

[19] The Opponent pleads that the application does not conform to section 30(i) of the Act because the Applicant could not have been satisfied that it was “entitled to use [the Mark] in Canada in association with the goods and services described in the Application in accordance with Section 30(i) notwithstanding the statement in the Application.” More particularly, the Opponent pleads that the Applicant, at the time of filing of the Application, was aware or

reasonably ought to have been aware that the Opponent had used or made known the Opponent's Mark in association with the Opponent's Goods; such that, the Applicant knew or reasonably should have known that any use of the Mark in Canada by the Applicant in association with the applied-for goods and services would be reasonably likely to: (i) cause confusion with the Opponent's Mark contrary to sections 7(b) and 20 of the Act; (ii) depreciate the value of the goodwill in the Opponent's Mark contrary to section 22 of the Act; or (iii) both (i) and (ii).

[20] The material date for assessing a section 30 ground is the filing date of the application, namely, March 4, 2016 [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475].

[21] Section 30(i) of the Act requires an applicant to declare in the application that it is satisfied that it is entitled to use the trademark in Canada. Where an applicant has provided the required statement, the Registrar has previously found that an applicant has failed to substantively comply with section 30(i) where, for example:

- there is evidence of bad faith on the part of the applicant [see *Sapodilla Co Ltd v Bristol Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155] which has been found where a licensee or distributor has attempted to register their principal's trademark or a confusingly similar variant [see *Suzhou Parsun Power Machine Co. Limited v Western Import Manufacturing Distribution Group Limited*, 2016 TMOB 26; *Flame Guard Water Heaters, Inc v Usines Giant Inc*, 2008 CanLII 88292 (TMOB); see also *McCabe v Yamamoto & Co (America) Inc* (1989), 23 CPR (3d) 498 at 503 (FCTD)];
- there is evidence of a *prima facie* case of non-compliance with a federal statute such as the *Copyright Act*, RSC 1985, c C-42 or *Food and Drugs Act*, RSC 1985, c F-27 [see *Interactiv Design Pty Ltd v Grafton-Fraser Inc* (1998), 87 CPR (3d) 537 (TMOB) at 542-543]; and
- there is evidence that a contractual relationship such as licensor-licensee existed and that the registration of a trademark would constitute a breach of the relationship [see *AFD China Intellectual Property Law Office v AFD China Intellectual Property Law (USA) Office, Inc*, 2017 TMOB 30].

[22] In the present case, the Opponent did not submit any evidence nor present any arguments in support of its allegations set out in this ground of opposition. The section 30(i)

ground of opposition is therefore summarily dismissed for the Opponent's failure to meet its initial evidential burden.

#### Sections 16 Grounds Dismissed

[23] The Opponent alleges that the Applicant is not the person entitled to registration of the Mark pursuant to sections 16(3)(a) and (3)(b) of the Act, on the ground that it is confusing with the Opponent's Mark which has been previously used or made known in Canada, and in which an application for registration had been previously filed by the Opponent in Canada.

[24] As the Application is based on proposed use, the material date for considering this ground of opposition is the filing date of the application.

[25] Since there is no evidence of prior use or of making known of the Opponent's Mark, the ground of opposition based on section 16(3)(a) is summarily dismissed for the Opponent's failure to meet its initial evidential burden.

[26] With respect to the ground of opposition based on section 16(3)(b) of the Act, the Opponent has the initial burden to prove not only that its application relied upon was filed prior to the claimed date of first use, but also that it was pending at the date of advertisement of the present application (July 5, 2017) [see section 16(4) of the Act].

[27] I have exercised my discretion to check the Register in order to confirm the existence of the application relied upon by the Opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. In doing so, I note that in the present case, while the Opponent's application was filed prior to the material date, it had matured to registration prior to July 5, 2017. Thus, the Opponent's application was no longer pending at the date of advertisement of the Mark.

[28] Consequently, this ground of opposition is also dismissed.

## Section 2 Ground Dismissed

[29] The Opponent alleges that the Mark is not distinctive of the goods and services of the Applicant since it does not actually distinguish, nor is it adapted to distinguish, the goods or services in association with which it is intended to be used from the goods associated with the Opponent's Mark.

[30] The material date for assessing distinctiveness is generally accepted as being the date of filing of the opposition, which in this case is November 29, 2017 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 2004 FC 1185, 34 CPR (4th) 317 (FCTD)].

[31] In order to meet its initial burden with respect to the non-distinctiveness ground of opposition, the Opponent is required to show that its trademark had become known sufficiently in Canada, as of the filing date of the statement of opposition, to negate the distinctiveness of the Applicant's Mark [see *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)].

[32] As the Opponent filed no evidence to demonstrate the extent to which the Opponent's Mark had become known in Canada, the section 2 ground is summarily dismissed for the Opponent's failure to satisfy its initial evidential burden.

## Section 12(1)(d) Ground Rejected

[33] In its statement of opposition, the Opponent alleges that the Mark is not registrable pursuant to section 12(1)(d) of the Act on the ground that it is confusing with the Opponent's Mark.

[34] The material date for considering this issue is the date of my decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[35] An opponent's initial onus is met with respect to a section 12(1)(d) ground of opposition if the registration relied upon is in good standing. In this regard, the Registrar has



the discretion to check the register in order to confirm the existence of the registration relied upon by an opponent [see *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Having exercised the Registrar's discretion, I confirm that registration No. TMA855,580 is in good standing.

[36] Since the Opponent has satisfied its initial evidential burden for this ground of opposition, the issue becomes whether the Applicant has met its legal burden to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's Mark.

[37] For the reasons that follow, this ground of opposition is rejected.

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

[39] 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 trademarks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the goods, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them. These 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 (SCC)].

[40] In *Masterpiece*, the Supreme Court of Canada discussed the importance of the section 6(5)(e) factor in conducting an analysis of the likelihood of confusion between the parties' marks in accordance with section 6 of the Act (see para 49):

...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start...

[48] Under the circumstances of the present case, I consider it appropriate to analyze the degree of resemblance between the parties' marks first.

*Section 6(5)(e) – the degree of resemblance*

[49] The parties' marks are identical and as a result this factor overwhelmingly favours the Opponent.

[50] Having found that the parties' marks are identical, I must now assess the remaining relevant surrounding circumstances to determine whether any of these other factors are significant enough to shift the balance of probabilities in favour of the Applicant [see *Masterpiece, supra* at para 49].

*Section 6(5)(a) - the inherent distinctiveness of the trademarks and the extent to which they have become known*

[41] As the parties' marks are identical, containing ordinary dictionary words, I assess both parties' marks to have a similar degree of inherent distinctiveness.

[42] The strength of a trademark may be increased by means of it becoming known in Canada through promotion or use. In the present case, only the Applicant provided evidence in support of its trademark. The evidence however, is only with respect to a product identified as insect repellent spray, wherein \$400,000 in sales have been demonstrated since 2017, combined with \$50,000 in advertising expenditures.

[43] Consequently, this factor favours the Applicant insofar as goods related to insect repellent sprays are concerned.

*Section 6(5)(b) - the length of time the trademarks have been in use*

[44] The application for the Mark is based upon proposed use in Canada. However, as per my review of the Gaston-Kellock affidavit, I am satisfied that the Applicant has shown use of the Mark in association with insect repellent sprays since some point in 2017 (per the sales figure data from Exhibit K).

[45] In comparison, the Opponent's registration No. TMA855,580 claims use of the trademark in Canada since March 1, 2011. However, the Opponent did not provide any evidence of actual use of the Opponent's Mark. As such, I am unable to make any assessment regarding its use within the meaning of the Act.

[46] Under these circumstances, the section 6(5)(b) factor favours the Applicant, insofar as the goods related to insect repellent sprays are concerned.

*Sections 6(5)(c) and (d) - the nature of the goods, services, business and trade*

[47] When considering sections 6(5)(c) and (d) of the Act, the statements of goods and services as defined in the application for the Mark and in the Opponent's registration govern the assessment of the likelihood of confusion under section 12(1)(d) of the Act [see *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); and *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[48] The Opponent's Mark is registered for use in association with "plant nutrients, namely, base nutrient formula for plants grown hydroponically". The Opponent has not provided any evidence of the actual trade it is engaged in.

[49] In comparison, the Mark is applied for use in association with goods and services pertaining to insect and pest control products, which are sold through national retail outlets and distributors.

[50] While it is possible that the Applicant's goods could have agricultural applications, there is absolutely no evidence that the parties' channels of trade overlap. Furthermore, the

goods of the parties are quite disparate and there is no evidence that they would be sold in close proximity to one another. Lastly, while there is no evidence of the Opponent's channels of trade, the Opponent's goods appear to relate to a niche market, that is, hydroponic gardening.

[51] Accordingly, these two factors favour the Applicant.

*Additional surrounding circumstance - State of the Register Evidence*

[52] State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace, and inferences about the state of the marketplace can only be drawn where large numbers of relevant registrations are located [*Ports International Ltd v Dunlop Ltd* (1992), 41 CPR (3d) 432 (TMOB); and *Welch Foods Inc v Del Monte Corp* (1992), 44 CPR (3d) 205 (FCTD), 36 CPR (3d) 562 (TMOB); and *Kellogg Salada Canada Inc v Maximum Nutrition Ltd* (1992), 43 CPR (3d) 349 (FCA)].

[53] In the present case, a large number of registrations have been identified in Exhibit O, namely 61 trademarks "composed of the word string JUNGLE, and 151 trademarks composed of the word string JUICE." However, I do not consider these registrations to be of assistance to the Applicant in that they do not contain the words JUNGLE and JUICE together, but only one of those words either in isolation or in combination with other matter. Furthermore, the five registrations which include the words JUNGLE JUICE together, identified at Exhibit M of the Gaston-Kellock affidavit, are simply insufficient in number to present any meaningful conclusion with respect to the state of the marketplace.

*Conclusion regarding the likelihood of confusion*

[54] While the degree of resemblance factor set out in section 6(5)(e) of the Act is often likely to have the greatest effect in deciding the issue of confusion, and clearly favours the Opponent, I consider the substantial differences in the nature of the parties' goods and trade would negate any likelihood of confusion

[55] Thus, I find that the balance of probabilities between finding that there is no reasonable likelihood of confusion and finding that there is a reasonable likelihood of

confusion, strongly favours the Applicant. Accordingly, the Applicant has met its legal onus. This ground of opposition is therefore rejected.

DISPOSITION

[56] Pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

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Kathryn Barnett  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No hearing was held.

**AGENTS OF RECORD**

MCMILLAN LLP

FOR THE OPPONENT

FLANSBERRY, MENARD &  
ASSOCIATES/ASSOCIÉS

FOR THE APPLICANT