



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2024 TMOB 023

**Date of Decision:** 2024-02-05

## **IN THE MATTER OF AN OPPOSITION**

**Opponent:** Nova Cannabis Stores Limited Partnership

**Applicant:** The Niagara Herbalist Ltd.

**Application:** 1988947 for Leaf Design

### **INTRODUCTION**

[1] Nova Cannabis Stores Limited Partnership (the Opponent) opposes registration of the trademark Leaf Design (the Mark) depicted below, which is the subject of application No. 1,988,947 filed by The Niagara Herbalist Ltd. (the Applicant):



[2] The Mark is applied for in association with cannabis-related goods and services (the Goods and Services, respectively) which are set out in full in Schedule A to this decision.

[3] For the reasons set out below, I reject the opposition.

### **THE RECORD**

[4] The Application for the Mark was filed on October 8, 2019 and was advertised for opposition purposes in the *Trademarks Journal* of November 24, 2021.

[5] On January 24, 2022, the Opponent opposed the application by filing a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13, as amended June 17, 2019 (the Act).

[6] The Applicant filed a counter statement denying the grounds of opposition.

[7] In support of its opposition, the Opponent filed the affidavit of Robbie Madan, dated June 17, 2022 (the Madan Affidavit). In support of its application, the Applicant filed the affidavit of Kevin Trethowan dated November 24, 2022 (the Trethowan Affidavit).

[8] Mr. Madan was cross-examined on his affidavit (the Madan Cross-examination). Transcripts of the cross-examination dated October 28, 2022 were filed and made of record.

[9] Both parties filed written representations. The Applicant attended the oral hearing.

### **GROUND OF OPPOSITION AND MATERIAL DATES**

[10] The Opposition is based on two grounds which can be summarized as follows:

- Non-registrability – The Mark is not registrable under section 12(1)(b) of the Act as the Mark is clearly descriptive of the associated Goods and Services. The material date for this ground of opposition is the filing date of the

application, being October 8, 2019 [*Shell Canada Limited v PT Safari Incofood Corporation*, 2005 FC 1040; *Fiesta Barbeques Limited v General Housewares Corporation*, 2003 FC 1021].

- Non-distinctiveness – The Mark is not distinctive of the Applicant within the meaning of section 2 of the Act as the Mark does not actually distinguish the Goods and Services from the goods and services of the Opponent and the Mark is a generic term in the industry. The material date for this ground of opposition is the date of filing of the statement of opposition, namely, January 24, 2022 [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185].

## **OVERVIEW OF THE EVIDENCE**

### ***Opponent’s Evidence - Summary of the Madan Affidavit***

[11] Mr. Madan is the Chief Information Officer for Sundial Growers Inc (Sundial). The Opponent, by virtue of its general partner, NOVA Cannabis Stores GP, Inc. (NOVA), is part of the Sundial Group of Companies. In his role, Mr. Madan is closely involved in overseeing the traditional and digital marketing for the Liquor Retail Operations division of Sundial (which includes NOVA) as well as technology platforms used for marketing activities [Madan Affidavit, paras 1-3].

[12] NOVA is a majority-owned subsidiary of Nova Cannabis Inc. (Value Buds). Value Buds operates over 80 cannabis retail stores across Alberta, Saskatchewan and Ontario, primarily under the “Value Buds” name and associated trademarks [Madan Affidavit, para 5].

[13] In his affidavit, Mr. Madan attests to the following:

- In 2021, Value Buds earned approximately \$130 million in sales and spent approximately \$66,000 in advertising [paras 6 and 7, Exhibit 1].
- NOVA represents Canada’s largest private sector cannabis and liquor retailer by number of stores [para 8].

- On December 16, 2020, Nova Cannabis Limited Partnership, under its then name of Alcanna Cannabis Stores Limited Partnership, filed applications for the trademarks **\*Value Buds** and **\*V** (the Value Bud Marks), application nos. 2071325 and 2071322 respectively. The Value Buds Marks are currently owned by NOVA [paras 9 and 10].
- The leaf design element of the Value Buds Marks was adapted and inspired by stock images provided by a contractor who had licensed the leaf image on a royalty-free basis from Shutterstock [para 24, Exhibit 8]. Screenshots of additional depictions of hemp leaves in Shutterstock’s image library are attached as Exhibit 9 [para 26].
- NOVA has accumulated extensive goodwill in connection with the Value Bud Marks including in association with the services of the operation of retail stores featuring the sale of cannabis, products derived from cannabis and accessories therefore (Cannabis Products) [para 11].
- The Mark consists of a standalone design of a 7-point hemp leaf. The hemp leaf is widely understood by producers, retailers, manufacturers, distributors and everyday users and purchasers, to be associated with Cannabis Products [paras 14 and 15].
- The hemp leaf has become synonymous with, and is often a generic indicator of, Cannabis Products [para 16].

[14] The results of an online search of the Canadian Trademarks Database for registered design trademarks using the search criteria “CANNABIS” (the Search) conducted by the Opponent’s agent are attached to the Madan Affidavit as Exhibit 4. The Search revealed 34 designs registered with the Canadian Intellectual Property Office that are associated with Cannabis Products or services and contain a depiction of a hemp leaf, however, only partial details of the registrations were provided as no details as to ownership of registration dates are present [paras 19 and 20].

[15] Exhibits 5 and 6 to the Madan Affidavit contain screenshots and photographs of websites showing retailers of Cannabis Products using depictions of a hemp leaf, all of

which Mr. Madan states he was informed were downloaded and captured on May 27, 2022 [paras 21 and 22].

[16] Mr. Madan reviewed a cease and desist letter dated February 19, 2021 (the C&D Letter) which was received by NOVA from Applicant's counsel regarding use of the Value Bud Marks. The C&D Letter alleges, *inter alia*, that the hemp leaf depicted in the Value Buds Marks is "nearly identical and deceptively similar" to the Mark. A copy of the C&D Letter is attached to the Madan Affidavit [para 23, Exhibit 7].

[17] Mr. Madan attests to the fact that the leaf design in the Value Buds Marks "was adapted from and inspired by a stock image" licensed from a third-party on a royalty-free basis [para 24, Exhibit 8]. A screenshot of stock images from Shutterstock depicting images of hemp leaves similar to the

[18] Relevant details from the cross examination of Mr. Madan on his affidavit will be discussed later in the decision in the context of admissibility issues.

### ***Applicant's Evidence - Summary of the Trethowan Affidavit***

[19] Mr. Trethowan is a co-owner of the Applicant [para 1].

[20] Mr. Trethowan attests to the following in his affidavit:

- The Applicant first used the Mark in April 2019 when it opened its first store in Ontario [para 4]. Attached as Exhibit A is a photo of the Applicant's first store taken in March 2019 by an employee of the Applicant.
- The Applicant sells a variety of Cannabis Products in its retail store and online through its website the *niagaraherbalist.com* for pick up or delivery in the Niagara Region [para 5]. Photos of the Applicant's Cannabis Products and clothing reflective of the Applicant's Goods which have been sold and continue to be sold are attached as Exhibits C to L.

[21] Examples of use of the Mark by the Applicant in advertising, including online and in-store are attached as Exhibits M to T [paras 11 to 14].

[22] Mr. Trethowan attests that the Applicant and the Mark have “gained significant media attention” upon the opening of its first store, which was Ontario’s first retail cannabis store [para 15]. Examples of media coverage of the Applicant’s business are attached as Exhibits U to W [paras 16 to 21].

[23] Finally, Mr. Trethowan provides details on the development of the Mark, stating that the Mark was “inspired by the seven-pointed leaf of a cannabis plant” but has “a unique shape that does not occur naturally” and, as such, “[the] Mark’s unique design gives it less of the appearance of a leaf and looks more like a blossoming flower” [paras 22 and 23]. According to Mr. Trethowan, the Applicant wanted the leaf components of the Mark to “have the rounded lotus-like feel, as opposed to the look of an actual cannabis leaf, which is more angular and jagged” [para 24].

#### **EVIDENTIAL BURDEN AND LEGAL ONUS**

[24] In accordance with the usual rules of evidence, there is an evidential burden on the Opponent to prove the facts inherent in its allegations pleaded in the statement of opposition [*John Labatt Ltd v Molson Companies Ltd*, 1990 CarswellNat 1053 (FC)]. The presence of an evidential burden on the Opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [*John Labatt*, at 298].

[25] For those allegations for which the Opponent has met its evidential burden, the legal onus is on the Applicant to show that the application does not contravene the provisions of the Act as alleged in the statement of opposition. The presence of a legal onus on an Applicant means that, if a determinate conclusion cannot be reached once all the evidence has been considered, then the issue must be decided against it.

## **PRELIMINARY MATTERS**

### ***Judicial Notice of the Legalization of Recreational Cannabis Canada***

[26] At the oral hearing, Applicant's counsel requested that judicial notice be taken of the fact that the sale of cannabis for recreational use in Canada was only legalized in late 2018 under the *Cannabis Act*, S.C. 2018, c. 16 (the Cannabis Act).

[27] Judicial notice of, *inter alia*, Federal statutes and regulations, may be taken in opposition proceedings [see *Marks & Clerk v Sparkles Photo Ltd*, 2005 FC 1012, *Kightley v Canada (Registrar of Trademarks)* (1982), 65 CPR (2d) 36 (FCTD); *Crush International Ltd v Canada Dry Ltd* (1979), 59 CPR (2d) 82 (TMOB) at 89; and, *Pool Insurance Managers Ltd v Allstate Insurance Co* (1986), 11 CPR (3d) 132 (TMOB) at 133].

[28] Given that the material dates applicable to the grounds raised, namely, October 8, 2019 and January 24, 2022, are in fairly close proximity to the creation of the legal recreational cannabis industry, I consider it appropriate to take judicial notice of the Cannabis Act as well as the fact that under this statute, the earliest date of sale for legalized recreational cannabis was October 17, 2018.

### ***Admissibility of Opponent's Evidence***

[29] The Applicant submits that the Opponent's evidence, namely the Madan Affidavit, should be struck and not admitted. In the alternative, the Applicant submits that if admitted, it should be given no weight in respect of the substantive issues in this matter given that Mr. Madan did not prepare his affidavit and that the Madan Affidavit is replete with improper hearsay [Applicant's Written Representations, para 6].

[30] In support of this submission, the Applicant points to the Madan Cross-examination where Mr. Madan, who had been affirmed, confirmed that he did not have personal knowledge of much of the substantive content of his affidavit [Applicant's Written Representations, para 8]. On cross-examination Mr. Madan advised that the "other employees" referred to as sources of information contained in the Madan Affidavit were an in-house counsel and "some developers that provided exhibits related to the

websites and e-commerce”, identified by Mr. Madan as Susan Jantz, Sjoerd Franken, and himself [Madan Cross-examination, p 12, lines 12 to 24]. Mr. Madan goes on to state that he is not aware of any reason why Ms. Jantz and Mr. Franken could not have put the evidence referenced in the Madan Affidavit in affidavits of their own [Madan Cross-examination, p 12, line 25 to p 14, line 7].

[31] Statements made in an affidavit based on information and belief are *prima facie* inadmissible hearsay evidence unless they satisfy the criteria of necessity and reliability [*Labatt Brewing Company Limited v Molson Breweries, a Partnership* (1996), 68 CPR (3d) 216 (FCTD)].

[32] It is clear the Madan Affidavit contains hearsay evidence as several exhibits and statements are admittedly not based on Mr. Madan’s personal knowledge. Specifically, paragraphs 19 to 22 and Exhibits 4 to 6 of the Madan Affidavit describe and contain partial results of trademark and website searches that were admittedly not conducted by Mr. Madan.

[33] Although the Applicant has requested the Madan Affidavit be struck, issues relating to hearsay in opposition evidence will be dealt with based on the weight given to the evidence, rather than admissibility [*Budget Rent a Car International Inc v Discount Car and Truck Rentals Ltd*, 1997 CanLII 15775 (CA TMOB)].

[34] The Opponent has failed to provide any submissions in an attempt to establish the reliability and necessity of the hearsay evidence contained in the Madan Affidavit. In addition, Mr. Madan confirmed during cross-examination that he was not aware of any reason why such evidence could not have been submitted by persons having direct knowledge of the evidence. Accordingly, paragraphs 19 to 22 and Exhibits 4 to 6 of the Madan Affidavit can only be given minimal, if any, weight on the basis of hearsay alone.

[35] In any event, in addition to the hearsay issues, much of the evidence in the Madan Affidavit, is not beneficial to the Opponent and can be given no weight. Specifically:



- There is no indication in the Madan Affidavit as to the date the search of the Canadian Trademarks Database described in paragraphs 19 and 20 was conducted, nor were the registration dates for the registered trademarks or the names of the trademark owners provided. Accordingly, it is not clear that the listed registrations existed as of either material date.
- The photographs and screen shots described in paragraphs 21 and 22 and attached as Exhibits 5 and 6 were downloaded and captured in May 2022, post-dating both material dates in this opposition. It is not clear that the images depicted in these screenshots and photographs existed as of either material date.
- Exhibit 9 containing screen shots of stock images from a third-party website, discussed in paragraph 26 of the Madan Affidavit, is undated, also making it unclear that the images depicted existed as of either material date.
- Paragraphs 15 to 18 of the Madan Affidavit are not only the opinions of Mr. Madan with no supporting evidence, but there is no indication that the statements made by Mr. Madan apply to the material dates for the raised grounds of opposition, especially since the Madan Affidavit was affirmed after both material dates. In any event, as Mr. Madan has not qualified himself as an expert, I am not prepared to give any weight to his opinions on questions of fact and law to be determined by the Registrar in this proceeding.

[36] The Applicant suggested at the oral hearing that the Registrar has the ability to exercise discretion to check the register for details of the trademark registrations listed in the Madan Affidavit. I declined to exercise that discretion as the law is clear that, when adjudicating in an opposition proceeding, the Registrar does not exercise discretion to take cognizance of his own records except to verify whether claimed trademark registrations and applications are extant [see *Quaker Oats at 411 and Royal Appliance Mfg Co v Iona Appliance Inc* (1990), 32 CPR (3d) 525 (TMOB)].

[37] For all of the reasons set out above, I am unable to give any weight to paragraphs 15 to 18, and 19 to 22, including Exhibits 4, 5 and 6, and paragraph 26 and

Exhibits 8 and 9, as all of these submissions are either Mr. Madan's opinions, or are undated or postdate both of the material dates applicable to the pleaded grounds.

### **ASSESSMENT OF THE GROUNDS OF OPPOSITION**

#### ***12(1)(b) – Is the Mark Clearly Descriptive of the Goods and Services?***

[38] The Opponent pleads that the Mark is not registrable as it is clearly descriptive of the character and quality of the Applicant's Goods and/or Services, as they pertain to cannabis, marijuana and hemp-related goods and services.

[39] Section 12(1)(b) of the Act reads as follows:

12 (1) Subject to subsection (2), a trademark is registrable if it is not

...

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the goods or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin

[40] The prohibitions contained in section 12(1)(b) apply to all trademarks, including design marks [see *Anenda Systems Inc. v EasyTrim Reveals Inc.*, 2020 TMOB 96 (CanLII) at para 72]. In the present case, considering the pleading, and given that the Mark does not contain any word matter, the question at issue is whether the Mark, as depicted, is clearly descriptive of the Applicant's Goods and Services.

[41] The purpose of the prohibition in section 12(1)(b) of the Act is to prevent any single trader from monopolizing a term that is clearly descriptive or common to the trade, thereby placing legitimate traders at a disadvantage [*Canadian Parking Equipment v Canada (Registrar of Trade Marks)*, 1990 CarswellNat 834 (FCTD)].

[42] The issue as to whether a trademark is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of the associated goods or services. Character means a feature, trait or characteristic of the goods and services and "clearly" means "easy to understand, self-evident or plain"

[*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. The Mark must not be carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 40 CPR (2d) 25 (FCTD); *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 2 CPR (3d) 183 (FCTD)]. In other words, the Mark must not be considered in isolation, but rather in its full context in conjunction with the applied-for goods and services [*Ontario Teachers' Pension Plan Board v Canada* (2012), 2012 FCA 60]. Finally, one must apply common sense in making the determination about descriptiveness [*Neptune SA v Canada (Attorney General)*, 2003 FCT 715].

#### Has the Opponent Met its Burden?

[43] In order to meet the initial evidential burden for this ground, the Opponent must provide sufficient evidence from which it could reasonably be concluded that the Mark is clearly descriptive of the character or quality of the Goods and Services to the average Canadian purchaser of these goods and services. For the reasons set out below, I am of the view that the Opponent has not met its evidential burden.

[44] As discussed above under Preliminary Matter, as a result of, *inter alia*, deficiencies in content and hearsay issues, none of the content of the Madan Affidavit relating to the cannabis industry can be given any weight. As a result, the only evidence I can consider to come to the conclusion that the Opponent has met its burden is the fact that the Mark is a design with seven segments depicted in a similar arrangement to that of a hemp leaf [Madan Affidavit, para 14, Trethowan Affidavit, para 22]. I am not satisfied that this fact alone is sufficient to meet the Opponent's burden.

[45] Even if I am incorrect in concluding that the Opponent has not met its burden for this ground, for the following reasons, I am also not satisfied that the Mark is "clearly" descriptive of the Goods and Services.

[46] The Applicant provided evidence and submissions regarding the creation of the Mark including the stages of development of the Mark commencing in February 2019 when a third party was engaged to design the Mark [Trethowan Affidavit, para 24]. Mr. Trethowan states that the Applicant wanted the Mark to have a "rounded lotus-like

feel” as opposed to the appearance of a cannabis leaf “which is more angular and jagged” [para 24].

[47] I do not consider the Applicant’s intention as to how the Mark should look to be relevant *per se* given that regardless of the intention behind the development of a design, it may nonetheless result in a trademark that is clearly descriptive of the associated goods and services.

[48] However, applying common sense and approaching the matter from the point of view of an average purchaser of the Goods and Services, I am of the view that the Mark has an appearance that could reasonably be viewed as a flower/petals of a flower as well as that of a cannabis leaf. In my view, the most recognizable features of the typical depiction of a cannabis or hemp leaf are the orientation of the leaf segments and the jagged/pointy edges of each leaf segment. While the Mark does have a similar configuration to that of a hemp leaf, I consider the smooth petal-like segments in the Mark make it reasonable to conclude that an average consumer may well consider the Mark to be a lotus or floral design in addition to that of a fanciful depiction of a hemp leaf. As a result, the Mark has more than one plausible interpretation on first impression and, accordingly, I would not have concluded that the Mark is “clearly” descriptive of the associated Goods and Services even if the Opponent had met its burden for this ground.

[49] For the following reasons, I find this case distinguishable from the main case law relating to design-only trademarks being found clearly descriptive relied on by the Opponent, specifically *Ralston Purina Co v Effam Foods Ltd*, 1990 CarswellNat 1433 (TMOB), and *Anenda Systems Inc v EasyTrim Reveals Inc*, 2020 TMOB 96 (CanLII):

- In *Ralston*, the trademark at issue was the image of an actual cat for use in association with pet food. The evidence on record was found to demonstrate significant use of cat images by the Opponent as well as third parties in association with pet food. The Opponent’s use of its cat design trademarks was found to be extensive and over an extended period of time. The opposition succeeded on the ground of non-distinctiveness based on the

evidence of record. While it was noted in the decision that the section 12(1)(b) ground of opposition may also have “in all likelihood” been successful, a finding on this ground was not actually made. In any event, *Ralston* is distinguishable from the present case given that the trademark at issue had only one interpretation, being the image of a cat, and the strong evidential record put forth by the opponent, something that is not present in this case.

- In *Aneda Systems*, the trademarks at issue were designs that had previously been used as images of functional components in a US patent filing, solidifying a finding that the trademarks were primarily functional and descriptive in nature. Accordingly, the opposition in *Aneda Systems* was successful given the finding of functionality of the trademark, something that is not at issue in the present case.

[50] I also note that the material date for this ground is roughly one year from the date that recreational cannabis sales became legal in Canada under the Cannabis Act. Given that the industry was so new at the material date, average consumers in Canada would have had minimal exposure to recreational cannabis and recreational cannabis retailers. As there is no evidence of any weight as to the use of cannabis/hemp leaves in Canada in association with Cannabis Products, I question whether the average consumer would have known that a hemp leaf has seven segments and the configuration of the leaf *per se*. While not a determinative factor given my reasoning above, in my view, it is reasonable to conclude that consumers had had minimal exposure to the cannabis industry as of the material date, making it less likely that they would be aware of the specifics of hemp leaves such that their immediate impression of the Mark was a hemp leaf as opposed to a fanciful floral design.

[51] For all the reasons set out above, the section 12(1)(b) ground is rejected.

**38(2)(d) – Is the Mark Distinctive of the Applicant?**

[52] Pursuant to section 38(2)(d) of the Act, the Opponent pleads that the Mark is not distinctive of the Applicant, within the meaning of section 2 of the Act, as the Mark does

not actually distinguish the Applicant's Goods and Services from those of the Opponent, nor is it adapted so to distinguish them, as the Mark is a generic design common to the trade.

[53] In its written representations, the Opponent describes this ground as encompassing two separate allegations: 1) that the Mark is not distinctive in light of the use of the Value Buds Marks, and 2) that the Mark is not distinctive as it is clearly descriptive of the associated Goods and Services.

[54] Section 2 of the Act defines "distinctive" as follows:

***distinctive***, in relation to a trademark, describes a trademark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or that is adapted so to distinguish them.

[55] A trademark "actually distinguishes" by acquiring distinctiveness through use, resulting in distinctiveness in fact. On the other hand, a trademark that is "adapted so to distinguish" is one that does not depend upon use for its distinctiveness because it is inherently distinctive [*Astrazeneca AB v Novopharm Ltd*, 2003 FCA 57 at para 16].

[56] Given that I have concluded that no weight can be given to the Opponent's evidence relating to the "generic" nature of the Mark in the cannabis trade (see Preliminary Matters above), the Opponent has not met its burden in respect of the second prong of this allegation for the same reasons described above in the section 12(1)(b) analysis. In any event, considering that I have also found that the Mark is not clearly descriptive of the Goods and Services, even if the Opponent had met its burden for this prong of the non-distinctiveness assertion, the later material date for this ground does not affect my conclusion with respect to distinctiveness. I will therefore proceed to assess this ground solely in relation to the assertion that the Mark does not distinguish the Applicant's Goods and Services from those of the Opponent.

[57] Under this ground, an opponent's initial burden is not merely to evidence that its trademark(s) had been used, but rather that as of the material date, its trademark(s): i) had become known to some extent in Canada in association with the relevant goods and services; and ii) had a reputation in Canada that was "substantial, significant or

sufficient” so as to negate the distinctiveness of the applied-for trademark [see *Bojangles’ International LLC v Bojangles Café Ltd*, 2006 FC 657 at paras 33 and 34; and *Canadian Dental Association v Ontario Dental Assistants Association*, 2013 FC 266 at para 42, aff’d 2013 FCA 279].

Has the Opponent met its Burden?

[58] The Opponent submits there is sufficient evidence on record from which it could be concluded that one or more of the Value Buds Marks had become sufficiently known to negate the distinctiveness of the Mark. More specifically, the Opponent submits that the fact that the leaf design in the Value Buds Marks was inspired by a stock photo from a third-party website indicates that the Mark is a generic standalone stock image [Opponent’s Written Representations, para 54].

[59] In support of the assertion that the Value Buds Marks have become sufficiently known in Canada to negate the distinctiveness of the Mark, the Opponent relies on the following evidence from the Madan Affidavit:

- Value Buds earned approximately \$130 million in sales in 2021 [para 6]; and
- Value Buds spent approximately \$66,000 in advertising in 2021 [para 7, Exhibit 1].

[60] While these sales and advertising figures pre-date the material date for this ground, I do not find that they support the Opponent’s case to any significant degree. This is so given that the evidence does not make it clear that the sales referenced were actually for goods and services associated with one or both of the Value Buds Marks, and there is no indication that the visits to the Opponent’s website and social media account were from customers in Canada. Further, a review of Exhibit 1 reveals references to “Latest News” articles on the *novacannabis.ca* website from March and May 2022 and a “Latest Presentation” to investors dated May 2022, dates which post-date the material dates in this proceeding.

[61] In any event, even if the Opponent had specified that the sales figures provided for 2021 were exclusively for goods and services associated with the Value Buds Marks

and that the visits to its social media site were by consumers in Canada, I would not consider this relatively small sample of use of the Value Buds Marks to be sufficient to establish that the Value Bud Marks had a “substantial, significant or sufficient” reputation in Canada to negate the distinctiveness of the Mark.

[62] Accordingly, I find the Opponent has not met its initial evidential burden for this ground.

[63] In light of all of the above, this ground of opposition is rejected.

**DISPOSITION**

[64] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition.

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Leigh Walters  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



## **SCHEDULE A**

### **Goods**

- CL 3 (1) Skin care preparations; body soap, skin cleansing preparations; lip balm; body lotion, beauty balm creams, moisturizing body sprays; essential oils for aromatherapy; essential oils for personal use; massage oil; recreational cannabis products, namely, topicals, concentrates, creams, salves, tinctures, infusions, resin capsules, shatter, budder, cannabis sprays
- CL 4 (2) Candles
- CL 5 (3) Medical cannabis products, namely, topicals, concentrates, vaporizer cartridges/cartomizers, creams, salves, tinctures, infusions, resin capsules, shatter, budder, honey oil, cannabis-infused olive oil and cannabis sprays; beauty balm creams, body lotions, moisturizing body sprays, all containing cannabis plant derivatives and for medicinal use only; tampons; edibles, namely, oils, candies, cookies, cakes, brownies, butter, carbonated and non-carbonated drinks, liqueurs, chocolate bars, and chewing gum, all containing cannabis plant derivatives and for medicinal use only; body soaks & scrubs, body rubs, namely medicated muscle soaks, vaginal moisturizers; hemp protein powder as dietary supplement; Live cannabis plants and cannabis seeds for medicinal purposes
- CL 7 (4) Machines for processing marijuana, cannabis and derivatives thereof, namely, cannabis extraction machines
- CL 9 (5) Electronic publications, namely newsletters, brochures, reports and guides in the field of marijuana, medical and recreational marijuana and cannabis; pre-recorded DVDs containing educational information about marijuana and medical and recreational marijuana
- CL 10 (6) Medical cannabis products, namely, vaporizer cartridges/cartomizers
- CL 16 (7) Magazines, books and newsletters; Printed publications, namely newsletters, brochures, reports and guides in the field of marijuana, medical and recreational marijuana and cannabis
- CL 18 (8) All-purpose sport bags, all-purpose athletic bags; backpacks
- CL 21 (9) Silicone mats for baking, silicone containers for household and kitchen use; incense burners;
- CL 25 (10) Casual clothing; dress clothing; t-shirts, shirts, sweatshirts, hoodies, tank tops, jackets, headwear, namely hats, caps, visors and toques, dresses, skirts, sweatpants, pants, undergarments, scarves, belts, gloves;

- CL 29 (11) Edible oils; edible oils and edible butters containing cannabis plant derivatives; hemp hearts, processed hemp seeds and hemp oil for food; recreational cannabis products, namely, honey oil, cannabis-infused olive oil;
- CL 30 (12) Baked goods, namely cakes, brownies, cupcakes, cookies and muffins infused with cannabis, including dried flower and derivatives; Hemp-based bars, granola, flours, mixes for baked goods namely mixes for cakes, brownies, cupcakes, cookies and muffins, pancake mixes, ready-to-eat cereals, breakfast cereals, cereal bars, cereal-based snack food, pasta and condiments namely ketchup, relish, mustard, chutney, mayonnaise, horseradish, hot sauce, chili paste, hemp paste, soya bean paste, salad dressings; Cakes, cereal bars, cookies, brownies, muffins, cupcakes, chocolate, chocolates, chocolate confectionery, sugar confectionery, candies and biscuits, all containing cannabis plant derivatives; Cocoa-based beverages, coffee-based beverages, herbal tea beverages; Candies; Sugar confectionery, chocolate confectionery; Coffee, tea; Baked goods, namely cakes, cereal bars, biscuits, muffins, cupcakes, brownies, cookies; Mixes for baked goods, namely mixes for cakes, brownies, cupcakes, cookies and muffins, pancake mixes; Energy bars; Granola-based snack food and bars; Cereal-based snack food; Rice-based snack food; Ice cream; Condiments namely, ketchup, relish, mustard, chutney, mayonnaise, horseradish, hot sauce, chili paste, hemp paste, soya bean paste, salad dressings; non-alcoholic tea-based beverages
- CL 31 (13) Live cannabis plants, unprocessed cannabis seeds;
- CL 32 (14) Fruit-flavoured beverages, non-alcoholic honey-based beverages, non-alcoholic carbonated beverages, carbonated soft drinks, non-dairy soy beverages, energy drinks; Cannabis infused beverages namely, carbonated and non-carbonated soft drinks, energy drinks, and waters; hemp-based beverages namely, carbonated and non-carbonated soft drinks, energy drinks, and waters
- CL 34 (15) Recreational marijuana and cannabis for smoking; recreational dried marijuana and dried cannabis; recreational cannabis products, namely, vaporizer cartridges/cartomizers and atomizers for cannabis, namely rolling papers; pre-rolled smoking cones; rolling machines; rolling trays; ashtrays; lighters; matches, match books; grinders; grinder cards; weighing scales; filters; wicks; storage containers for tobacco; smoking pipes; hand pipes; water pipes; hookahs; nebulizers; atomizers; oral vaporizers for smokers; electronic cigarettes; electronic cigarette liquid (e-liquid); cartridges sold filled with e-liquid; Bags and cases specially adapted for holding or carrying marijuana, medical and recreational marijuana, cannabis and cannabis oils and accessories; machines allowing smokers to make cigarettes by themselves; medical cannabis products, namely, atomizers for cannabis, namely rolling papers

## **Services**

- CL 35 (1) Retail sales of medical and recreational marijuana, medical and recreational cannabis, medical and recreational cannabis oils, extracts and edibles

- CL 39 (2) Packaging of medical and recreational marijuana, medical and recreational cannabis, marijuana and cannabis; distribution, namely delivery by truck of medical and recreational marijuana, medical and recreational cannabis, marijuana and cannabis
- CL 40 (3) The production of medical and recreational marijuana, medical and recreational cannabis, marijuana and cannabis
- CL 42 (4) Development of medical and recreational marijuana and cannabis and equipment and products for administering medical and recreational marijuana and cannabis and food and non-alcoholic beverages, namely, product development for others; development of recreational marijuana and cannabis and equipment and products for administering recreational marijuana and cannabis and food and non-alcoholic beverages, namely, product development for others; research services in the field of medical and recreational marijuana and cannabis
- CL 44 (5) Operation of medical/recreational marijuana and medical/recreational cannabis dispensaries

# Appearances and Agents of Record

**HEARING DATE:** 2024-01-15

## **APPEARANCES**

**For the Opponent:** No one appearing

**For the Applicant:** Kenneth R. Clark

## **AGENTS OF RECORD**

**For the Opponent:** Bennett Jones LLP

**For the Applicant:** Kenneth R. Clark (Aird & Berlis LLP)