



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2024 TMOB 114

**Date of Decision:** 2024-06-17

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

**Opponent:** L-Nutra, Inc.

**Applicant:** Nanton Nutraceuticals Ltd.

**Application:** 2097190 for Nutra & Design

### **INTRODUCTION**

[1] Nanton Nutraceuticals Ltd. (the Applicant) has applied to register the trademark Nutra & Design (the Mark), shown below, which is the subject of application No. 2097190 (the Application) in association with “herbal supplements for general health and well-being” (the Goods).



[2] L-Nutra, Inc. (the Opponent) has opposed the Application.

[3] For the reasons that follow, the opposition succeeds.

### **THE RECORD**

[4] The Application was filed on April 5, 2021 and was advertised for opposition purposes in the *Trademarks Journal* on January 11, 2023.

[5] On January 26, 2023, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Opponent raises grounds of opposition based on non-registrability of the Mark under section 12(1)(d) of the Act, non-entitlement of the Applicant to register the Mark under sections 16(1)(a) and 16(1)(c) of the Act, non-distinctiveness of the Mark under section 2 of the Act, bad faith of the Applicant under section 38(2)(a.1) of the Act, no use and no proposed use of the Mark by the Applicant under section 38(2)(e) of the Act, and non-entitlement of the Applicant to use the Mark under section 38(2)(f) of the Act.

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

[7] Only the Opponent submitted evidence. Neither party submitted written representations and no hearing was held.

### **THE PARTIES' RESPECTIVE BURDEN OR ONUS**

[8] The Opponent has the initial evidential burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once that burden is met, the Applicant bears the legal

onus of establishing, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*John Labatt Ltd v Molson Companies Ltd*, 1990 CanLII 11059, 30 CPR (3d) 293 (FCTD); *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155].

**ANALYSIS OF THE GROUNDS OF OPPOSITION**

***Non-registrability of the Mark under section 12(1)(d) of the Act***

[9] The Opponent has pleaded that the Mark is not registrable because it is confusing with the following registered trademarks of the Opponent (collectively, the L-NUTRA Marks or the L-NUTRA Registrations):

<p>Reg. No. TMA1026246 L-NUTRA</p>	<p><u>Goods:</u> (1) Nutritionally balanced prepared meals for medical use, namely for promoting general health and well-being during fasting, consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use namely for promoting general health and well-being during fasting; herbal teas for medical treatments namely for promoting general health and well-being during fasting; dietary supplements for promoting general health and well-being during fasting; food supplements for promoting general health and well-being during fasting; nutritional supplements for promoting general health and well-being during fasting; vitamin and mineral supplements; plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals (2) Nutritional supplement energy bars (3) Nutritional additives for medical purposes namely for promoting general health and well-being during</p>
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	<p>fasting, used in foods and dietary supplements for human consumption</p> <p><u>Services:</u></p> <p>Dietary and nutritional guidance; providing information about dietary supplements and nutrition; nutrition, dietary and food nutrition counseling; food nutrition consultation</p>
<p>Reg. No. TMA1142570</p> 	<p><u>Goods:</u></p> <p>5 (1) Nutritionally balanced prepared meals for medical use, namely for promoting general health and well-being during fasting, consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use namely for promoting general health and well-being during fasting; herbal teas for medical treatments namely for promoting general health and well-being during fasting; dietary supplements for promoting general health and well-being during fasting; food supplements for promoting general health and well-being during fasting; nutritional supplements for promoting general health and well-being during fasting; vitamin and mineral supplements; plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals; nutritional supplement energy bars; nutritional additives for medical purposes namely for promoting general health and well-being during fasting, used in foods and dietary supplements for human consumption</p> <p><u>Services:</u></p> <p>44 (1): Dietary and nutritional guidance; providing information about dietary supplements and nutrition;</p>

	nutrition, dietary and food nutrition counseling; food nutrition consultation
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[10] I have exercised my discretion to check the register and confirm that each of the Opponent's pleaded registrations remains extant [see *Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)].

[11] As the Opponent's burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is not a reasonable likelihood of confusion between the Mark and any one of the Opponent's pleaded registrations.

The test for confusion

[12] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act provides that the 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.

[13] Thus, section 6(2) of the Act does not concern confusion of the trademarks themselves, but of the goods or services from one source as being from another. Also, where it is likely the public will assume an applicant's goods or services are approved, licensed, or sponsored by the opponent so that a state of doubt and uncertainty exists in the minds of the purchasing public, it follows that the trademarks are confusing [see *Glen-Warren Productions Ltd v Gertex Hosiery Ltd* (1990), 29 CPR (3d) 7 (FCTD) at para 21].

[14] 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. The weight to be given to each factor may vary, depending on the circumstances [see *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23; and *Masterpiece Inc v Alavida*

*Lifestyles Inc*, 2011 SCC 27 for a thorough discussion of the general principals that govern the test for confusion]. These factors are considered below.

[15] In *Masterpiece, supra* at paragraph 49, 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' trademarks in accordance with section 6 of the Act:

[...] 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.

[16] Under the circumstances of the present case, I consider it appropriate to analyse the degree of resemblance between the parties' trademarks first.

*The degree of resemblance between the trademarks in appearance or sound or in the ideas suggested by them*

[17] When considering the degree of resemblance between trademarks, they must be considered in their totality; it is not correct to lay them side by side and compare and observe similarities or differences among the elements or components of the trademarks [*Veuve Clicquot, supra* at para 20].

[18] In *Masterpiece, supra* at paragraph 64, the Court further advised that, while in some cases, the first word or syllable of a trademark will be the more important for the purpose of distinction, the preferable approach to considering resemblance "is to first consider whether there is an aspect of the trade-mark that is particularly striking or unique".

[19] In my view, the striking element of the Opponent's word mark L-NUTRA and design mark L-NUTRA & Design is the word NUTRA. Likewise, I find the striking element of the Mark is the word NUTRA. Indeed, I do not find either of the single letters L or N prefacing the word NUTRA to be particularly striking or unique because of (i) the inherently low distinctiveness generally attributed to letters or initials, and (ii) it is the

word NUTRA, evocative of nutraceuticals or nutritional products in the context of the parties' respective goods and/or services, that would likely be given any significant consideration on first impression by Canadian consumers encountering the parties' trademarks. Likewise, I do not consider the design features and the phrase NUTRITION FOR LONGEVITY to create a striking visual impression when the Opponent's design mark is considered in its entirety because of the very small print size of the phrase and the rather banal aspect of the design features. The same finding applies to the design features comprising the Mark. Indeed, I do not consider the design element appearing in the upper left-hand corner of the Mark, nor the stylized font or script of the letter N, to be particularly striking or unique.

[20] As the parties' trademarks share the common striking element NUTRA and, incidentally, the same construction in that they each comprise a one letter prefix, I find there is a high degree of resemblance between the parties' trademarks in all three aspects of resemblance. This is arguably even more so when considering the somewhat similar wavy shape of the stylized script of the letter N comprising the Mark and the design features comprising the Opponent's design mark.

[21] Accordingly, I find that the overall assessment of this factor favours the Opponent with respect to each of its trademarks at issue.

*The inherent distinctiveness of the trademarks and the extent to which they have become known*

[22] The inherent distinctiveness of a trademark refers to its originality. Trademarks consisting wholly or in part of words descriptive of the articles to be sold or of the services to be rendered attract a more limited range of protection than does an invented, unique, or non-descriptive word or an original design [see *General Motors Corp v Bellows*, [1949] SCR 678, citing *Office Cleaning Services Ltd v Westminster Window & General Cleaners, Ltd* (1946), 63 RPC 39 at 41 (HL); and *Fairmount Properties Ltd v Fairmount Management LLP*, 2008 FC 876].

[23] As per my comments above, I assess the inherent distinctiveness of the parties' trademarks as about the same and relatively weak.

[24] The degree of distinctiveness of a trademark may be increased by means of it becoming known through promotion or use.

[25] There is no evidence that the Mark has been used or has become known in Canada in association with the applied-for goods to any extent.

[26] In contrast, the Opponent's evidence filed through the affidavit of Thomas J. Speiss III (the Speiss Affidavit) establishes that the L-NUTRA Marks have been used and become known at least to a minimal extent in Canada, as per my review below of this affidavit.

#### The Speiss Affidavit

[27] In his affidavit dated July 3, 2023, Mr. Speiss identifies himself as an attorney at, and shareholder of a full-service law firm in the United States of America, and further indicates that he acts as in-house counsel for the Opponent. In this respect, Mr. Speiss explains that by virtue of his position and the length of his tenure in his role as in-house intellectual property counsel, he has extensive knowledge of the Opponent's trademark and branding practices worldwide, and he has personal knowledge of the matters deposed to in his affidavit [paras 1-3].

[28] Mr. Speiss first provides a background of the Opponent, which is headquartered in Plano, Texas, and has offices and distributors globally, including in Australia, Japan, Italy, Mexico, and in Kelowna, British Columbia, Canada. The Opponent is a technology company that researches, develops, and manufactures nutritional products and solutions focused on improving consumer health, wellness, and longevity through diet. More particularly, Mr. Speiss indicates that the Opponent has pioneering specific food, drinks, and nutritional supplements that can be consumed while maintaining the body in a state of periodic fasting, and offering services to the public including guidance, information and consultation about nutrition, dietary supplements, and healthy living [paras 4-9].

[29] Mr. Speiss then goes on to focus on the use of the L-NUTRA Marks (and, incidentally, the Opponent's tradename L-Nutra, Inc. (the Tradename)) in Canada.



Since he refers to the L-NUTRA Marks collectively, and furthermore refers to the products and services, as described in the L-NUTRA Registrations, as the Goods and Services respectively, I will do the same in my review of his affidavit.

[30] Mr. Speiss attests to the following:

- The Goods are an extension of the Opponent's goal to help people achieve optimal health and live to their fullest potential. Since its inception, the Opponent has continued innovating and expanding, bringing new and improved products to the market. By way of example, Mr. Speiss states that the Opponent has sold in Canada for several years the L-Nutra FAST BAR, a nutritional bar, and the L-Nutra PROLON fasting kits which contain either a one day's or five days' worth of food, drinks and supplements that are tailored to allow the consumer's body to enter in a beneficial fasting state while nourishing the body [paras 11-13].
- The Services are provided through the Opponent's informative website located at *l-nutra.com* (the Website). The Opponent further offers the Services by online consultations with registered dietitians as well as through their toll-free phone line listed on the Website [paras 14-15].
- The L-NUTRA Marks and Tradename have been used continuously in Canada since at least as early as 2017. They have been prominently and consistently displayed on the L-NUTRA Goods, namely, on the Goods' packaging [para 17].
- The majority of sales of L-NUTRA Goods and Services are (and were) made in Canada through the Website [para 22]. Since 2017, the Goods have been sold to Canadians in every territory, and every province of Canada other than Newfoundland. Mr. Speiss provides a table outlining the approximate number of orders made by Canadians of L-NUTRA Goods for the years 2019 to June of 2023. He further stresses that the numbers (which total 8,266) only represent the number of orders made, not the number of Goods ordered (which is higher than the number of orders made, since many customers order multiple L-NUTRA Goods at the same time) [para 24].
- Canadian sales over the last six and a half years of L-NUTRA Goods bearing the L-NUTRA Marks have exceeded \$2.9 million US dollars [para 26].

- The L-NUTRA Goods have been promoted and advertised in Canada in a variety of ways, including via the Website; dietary guidance and consultation via toll free phone line and customer service representatives; paid press releases; online articles; newsletters/email mailing lists; and social media (Instagram, Facebook, and Pinterest).

[31] In support of his assertions, Mr. Speiss attaches the following exhibits to his affidavit:

- Exhibits B and C respectively: representative images of the L-NUTRA Goods, the FAST BARS, covered by the L-NUTRA Registrations (being, at least “nutritional supplement energy bars”), bearing the L-NUTRA Marks and Tradename on their packaging; and representative images of the pamphlet included in the Opponent’s PROLON Meal Carton (five days fasting kit), also displaying the L-NUTRA Marks and Tradename. Mr. Speiss specifies that these exhibits are representative of the manner in which the L-NUTRA Marks and Tradename have been continuously used on the packaging of the Opponent’s goods, including the L- NUTRA Goods sold in Canada since at least as early as 2017.
- Exhibit D: screenshots that are representative of the manner in which the Opponent’s Tradename has been, and continues to be prominently displayed at the bottom of the Website displaying and offering the Goods, and on the checkout screen at the time of purchase of the Goods, since at least as early as 2017.
- Exhibits E and F respectively: excerpts from the current version and archived versions of the Website for the years 2010 to 2023. Upon review of these excerpts, I note that the products featured therein are essentially the FAST BARS nutrition bars and the PROLON fasting kits referred to above.
- Exhibits G and H respectively: representative examples of press releases on the *Businesswire News Platform* and articles about the Opponent’s L-NUTRA Goods published by news agencies such as *CNBC*.

- Exhibits I to L respectively: screen-capture of the Website displaying how Canadians can sign up for the Opponent's newsletter and email blasts, and representative screenshots from the Opponent's posts on Instagram, Facebook and Pinterest.

#### Conclusion on this factor

[32] Based on my review of the Speiss Affidavit and accompanying exhibits, I have no difficulty accepting that the Opponent has shown use of the L-NUTRA Marks in Canada in association with at least part of the Opponent's Goods in the form of nutritional supplement energy bars and fasting kits. Indeed, while the Opponent's sales figures are not broken down per category of products, I find it reasonable to assume, based on a fair reading of the Speiss Affidavit as a whole, that the majority (if not all) of the Opponent's sales relate to the Opponent's FAST BARS nutritional supplement energy bars and PROLON fasting kits. Thus, while the penetration of the Opponent's advertising efforts in Canada remain unclear in that for example, the numbers of Canadians who have signed up for the Opponent's newsletter or Canadian followers to the Opponent's social media accounts are not provided, I find it reasonable to conclude, based on the Opponent's sales figures, that the L-NUTRA Marks have become known in Canada to, at least, a minimal extent in association with the Opponent's nutritional supplement energy bars and fasting kits.

[33] The overall assessment of the section 6(5)(a) factor, which is a combination of inherent and acquired distinctiveness, thus favours the Opponent.

#### *The length of time the trademarks have been in use*

[34] As noted by the Federal Court of Appeal, "[a] mark that has been in use a long time, versus one newly arrived on the scene, is presumed to have made a certain impression which must be given some weight" [*United Artists Pictures Inc v Pink Panther Beauty Corp*, 1998 CanLII 9052 (FCA), [1998] 3 FC 534].

[35] As there is no evidence of use of the Mark in Canada and as the Opponent has evidenced use of the L-NUTRA Marks in association with nutritional supplement energy

bars and fasting kits since at least as early as 2017, this factor also favours the Opponent.

*The nature of the goods, services or business; and the nature of the trade*

[36] When considering the nature of the goods, services or business and the nature of the trade, I must compare the Applicant's statement of goods with the statement of goods and services in the registrations relied upon by the Opponent [*Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export Inc* (1986), 12 CPR (3d) 110 (FCA); *Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA)].

[37] In the absence of evidence or submissions to the contrary, I find there is a clear overlap between the Applicant's applied-for goods and the Opponent's registered goods and their corresponding channels of trade. While the Opponent's evidence establishes that its nutritional supplement energy bars and fasting kits have been sold so far exclusively through its Website, there is nothing preventing the Opponent from offering its Goods for sale through the same channels of trade as those of the Applicant.

[38] Accordingly, these factors favour the Opponent.

Conclusion – likelihood of confusion

[39] As indicated above, the Applicant bears the legal onus of establishing on a balance of probabilities that there is no likelihood of confusion between the trademarks at issue. The presence of a legal onus on the Applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant.

[40] Having considered all the circumstances of the case, I am not satisfied that the Applicant has met its legal burden of establishing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and each of the Opponent's L-NUTRA Marks.

[41] Accordingly, the ground of opposition based on section 12(1)(d) of the Act succeeds.

***Remaining grounds of opposition***

[42] As the Opponent has already succeeded under the section 12(1)(d) ground of opposition, I do not consider it necessary to address the remaining grounds of opposition. However, suffice to say that the Opponent would likely have succeeded also on the sections 16 and 2 grounds of opposition revolving around the likelihood of confusion between the Mark and the Opponent's L-NUTRA Marks and Tradename.

**DISPOSITION**

[43] Pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the Application pursuant to section 38(12) of the Act.

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Annie Robitaille  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

# Appearances and Agents of Record

**HEARING DATE:** No hearing held

## **AGENTS OF RECORD**

**For the Opponent:** Borden Ladner Gervais LLP

**For the Applicant:** Stacey L. Bothwell