Federal Court Cour fédérale

Date: 20251010

Docket: T-3685-24

Citation: 2025 FC 1688

Ottawa, Ontario, October 10, 2025

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

YAT SUN FOOD PRODUCTS LTD.

Applicant

and

GRIFFITH FOODS INTERNATIONAL INC.

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Did the Trademarks Opposition Board err in finding that the nearly identical trademarks CHEFS-OWN for bean sprouts and CHEF'S OWN for sauces and seasonings can co-exist because the channels of trade and the nature of the goods are sufficiently dissimilar that confusion is unlikely? That is the overarching question facing the Court in this appeal from the

Opposition Board's decision dismissing the senior registered owner's (CHEFS-OWN) opposition to the junior applicant's (CHEF'S OWN) trademark application.

[2] Having considered the parties' written material and their oral submissions, I find that new material evidence before the Court addresses a gap in the evidence identified by the Opposition Board. This means that a *de novo* review applies to some of the likelihood of confusion factors, as well as the overall weighing exercise, while other factors are subject to review for palpable and overriding error. As a result of these reviews, I determine that, for the more detailed reasons below, the businesses and channels of trade of the parties overlap in a significant respect which, in my view, tips the balance of probabilities in favour of the trademark opponent here. The Opposition Board's decision thus will be set aside, with the result that the opposition will succeed on the registrability, entitlement and distinctiveness grounds, and the trademark application will be refused.

[3] See Annex "A" below for relevant legal provisions.

II. Background

A. *The Parties and Their Trademarks*

[4] The Applicant Yat Sun Food Products Ltd. [Yat Sun] owns the registered trademark CHEFS-OWN, registration number TMA1,114,344 dated November 18, 2021, for fresh bean sprouts in International Class 31. Yat Sun opposed the registration of the trademark CHEF'S

OWN applied for by the Respondent Griffith Foods International Inc. [Griffith] under application number 2,007,740.

[5] Griffith filed its trademark application on January 2, 2020, based on international registration number 1479585 dated May 29, 2019, and listed the goods as seafood and soup bases in International Class 29; and seasoning for soups, for gravies and for meat; gravy bases and sauce bases; food seasonings; coatings for foods, namely, coatings for foods made of breading and seasoned coating mixtures; salad dressings, in International Class 30.

[6] In response to an examiner's report dated May 14, 2021, the trademark application was amended during processing to delete "seafood," and to further specify the Class 30 goods. Griffith also made substantive submissions to the examiner's entitlement objection based on Yat Sun's then pending application number 1,932,730 for CHEFS-OWN. Griffith's trademark application was approved on June 28, 2022. The approval notice indicated that a notice would be sent pursuant to subsection 37(3) of the *Trademarks Act*, RSC 1985, c T-13 [*TMA*] to the owner of trademark registration number TMA1,114,344 (i.e. Yat Sun). Griffith's trademark application for CHEF'S OWN was advertised for opposition purposes on August 10, 2022.

B. *The Opposition*

[7] Yat Sun opposed the trademark application on September 29, 2022, raising 5 grounds of opposition:

A. registrability based on paragraphs 38(2)(b) and 12(1)(d) with regard to Yat Sun's trademark registration number TMA1,114,344 for CHEFS-OWN;

B. entitlement to registration based on paragraphs 38(2)(c) and 16(1)(a) with regard to Yat Sun's prior use of its trademark CHEFS-OWN;

C. entitlement to registration based on paragraphs 38(2)(c) and 16(1)(c), also with regard to Yat Sun's prior use of its trade name CHEFS-OWN;

D. distinctiveness based on paragraph 38(2)(d) and section 2 in that the applied for trademark CHEF'S OWN did not actually distinguish, and was not adapted to distinguish, Griffith's goods to those of Yat Sun with regard to the latter's trademark and trade name CHEFS-OWN; and

E. entitlement to use based on paragraph 38(2)(f) and subsection 34(1) with regard to Yat Sun's previous registration and use of the trademark, and use of the trade name, CHEFS-OWN.

[8] Griffith filed and served the requisite counterstatement.

[9] Both parties filed evidence. Yat Sun's evidence consisted of the affidavit of its President, Ulf Zimmerman, sworn on March 21, 2023 [First Zimmerman Affidavit], while Griffith's evidence comprised the affidavit of its Global Vice President of Marketing, Robert Pellicano, sworn on November 17, 2023 [Pellicano Affidavit].

[10] Both parties also filed written representations and participated in the oral hearing that was held.

[11] Contemporaneous with the filing of its written representations, Griffith amended its trademark application to limit the channels of trade for the goods in Classes 29 and 30 to "all the foregoing sold on a business-to-business basis with commercial clients in the restaurant, healthcare, travel & leisure, food service chains, food processing, and education industries." Although Griffith's cover correspondence to the Canadian Intellectual Property Office [CIPO] indicated that the amendments were made pursuant to the terms of an agreement between the parties, Yat Sun's follow up correspondence to CIPO disputed that the parties discussed the amendments or that they reached any agreement regarding the amendments.

C. *The Decision*

[12] On behalf of the Registrar of Trademarks, the Trademarks Opposition Board [TMOB] rejected the opposition: *Yat Sun Food Products Ltd v Griffith Foods International Inc*, 2024 TMOB 194 [Decision].

[13] Focusing first on the paragraph 12(1)(d) ground of opposition, the TMOB Member acknowledged the applicable test in subsection 6(2) of the *TMA* and noted that, with reference to subsection 6(5), all surrounding circumstances should be taken into account in determining confusion, including the specific listed factors. She identified the date of the opposition decision as the relevant date for assessing confusion under this ground and exercised her discretion to check the register to confirm that Yat Sun's registration for CHEFS-OWN was extant. The Member thus determined that Yat Sun had met its evidential burden to demonstrate that its registration was in good standing and proceeded to assess whether Griffith had met its legal onus of demonstrating that Griffith's applied-for trademark CHEF'S OWN is registrable.

[14] Noting that the listed subsection 6(5) factors may be given different weight in a context-specific assessment and that the paragraph 6(5)(e) degree of resemblance factor often has the greatest effect on the confusion analysis, the Member started with this factor: *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at para 54; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 [*Masterpiece*] at para 49. Unsurprisingly, she found that the trademarks are almost identical in appearance, sound and in the ideas suggested.

[15] Regarding paragraph 6(5)(a) of the *TMA*, the Member determined the trademarks have a low degree of inherent distinctiveness because they are comprised of ordinary words and have a laudatory connotation. Yat Sun's more than 25 years of use versus Griffith's then three years in the marketplace, however, resulted in a determination that, overall, this factor favoured Yat Sun, as did the paragraph 6(5)(b) factor – length of time in use.

[16] Turning to the paragraphs 6(5)(c) and 6(5)(d) factors, the nature of the parties' goods, their businesses, and the associated channels of trade, the Member found Yat Sun's fresh bean sprouts are intrinsically different from Griffith's soup bases, seasonings, sauces, and coatings. She also determined that the channels of trade and target audiences associated with the respective trademarks are sufficiently different that confusion is unlikely. According to the Member, these factors thus favoured Griffith.

[17] The Member also considered the surrounding circumstance of potential product recalls argued by Yat Sun. Given the differences in the nature of the parties' businesses and their

channels of trade, the Member could not see how this factor could impact the determination of likelihood of confusion in this case.

[18] Weighing the above factors, the Member concluded that the intrinsically different goods, the different channels of trade and the different target audiences tipped the balance of probabilities in favour of Griffith. The paragraph 12(1)(d) ground thus was not successful.

[19] The Member was of the view that the different relevant dates for the entitlement grounds of opposition based on paragraphs 16(1)(a) and 16(1)(c) (i.e. the filing date of the trademark application) and the non-distinctiveness ground based on section 2 (i.e. the date of filing of the statement of opposition) did not have any significant impact on the confusion determination between the parties' trademarks.

[20] As for the entitlement to use ground under paragraph 38(2)(f) of the *TMA*, the Member found that the sole allegation – Yat Sun's ownership of a confusingly similar trademark – does not constitute a valid ground of opposition under this provision.

III. Issues

[21] Having read the parties' memoranda of fact and law and heard their oral submissions, I determine that Yat Sun's appeal under section 56 of the *TMA* raises the following issues:

A. Whether Yat Sun's new evidence on appeal is subject to the new leave requirement under current subsection 56(5) which came into force on April 1, 2025;

B. If the answer to A is no, then whether Yat Sun's new evidence on appeal is material;

C. If the answer to B is no, then whether the TMOB made any palpable and overriding error in assessing subsections 6(5)(c) and 6(5)(d) of the *TMA*; if the answer to B is yes, what is the outcome of a *de novo* review under these subsections?

D. Did the TMOB properly consider and weigh the subsection 6(5)(e) factor – degree of resemblance?

E. Did the TMOB properly consider and weigh all the surrounding circumstances, including the potential impacts of product recalls and Yat Sun's status as a small Canadian company?

[22] I add that there is a minor preliminary issue concerning the style of cause that I will address at the outset of the Analysis below.

IV. New Evidence

[23] Yat Sun's new evidence on its appeal comprises two affidavits:

1. the affidavit of Dr. Felix Arndt [Arndt Affidavit], sworn on January 20, 2025, which evaluates the potential risks and consequences of a recall of Griffith's CHEF'S OWN products on Yat Sun's CHEFS-OWN bean sprouts; and

2. the affidavit Ulf Zimmermann [Second Zimmermann Affidavit], sworn on January 20, 2025, which contains new evidence from paragraphs 15 to 20. Paragraphs 1-14 and 21 are repetitive of evidence in the First Zimmerman Affidavit. In his new

> evidence, Mr. Zimmermann outlines Yat Sun's sale of bean sprouts to wholesalers / commercial clients in the same channel of trade as Griffith's CHEF'S OWN products. He also indicates that Yat Sun has "recently made the decision to brand their wholesale products with Yat Sun Food Products Ltd. CHEFS-OWN trademark."

[24] Griffith cross-examined Dr. Arndt and Mr. Zimmerman. The Respondent's Record contains the full transcripts of the cross-examinations.

V. Standard of Review

[25] The appellate standard of review applies to a statutory appeal, such as an appeal under section 56 of the *TMA*: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 36-37, citing *Housen v Nikolaisen*, 2002 SCC 33.

[26] An appellate review standard means that the Court will assess questions of fact or mixed fact and law for palpable and overriding error, as described in *Mahjoub v Canada (Citizenship and Immigration)*, 2017 FCA 157 at paras 61-64, leave to appeal to SCC refused, 37793 (17 May 2018).

[27] For questions of law, including any extricable legal questions, the Court will assess such questions on a correctness standard, affording no deference to the conclusions of the administrative decision-maker: *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 [*Clorox*] at para 23; *Miller Thomson LLP v Hilton Worldwide Holding LLP*, 2020 FCA 134 at para 42.

[28] I add that, until April 1, 2025, when the new subsection 56(5) of the *TMA* came into force requiring a party that wished to file new evidence on appeal to obtain the Court's leave, a party could file new evidence before this Court as of right. The new evidence was subject to a materiality assessment based on the applicable jurisprudence. A materiality determination would permit the Court to "exercise any discretion vested in the Registrar," meaning that an appeal *de novo* would entail the application of the correctness standard: *Clorox*, above at para 21.

[29] With the above in mind, I turn next to the preliminary issue regarding the style of cause, followed by the question of whether the new leave requirement applies to the instant appeal, and if yes, what framework for a leave assessment is appropriate, or whether the previous materiality assessment prevails.

VI. Analysis

Preliminary Issue: Style of Cause

[30] I note that, according to the Applicant's evidence of record, its proper name is Yat Sun Food Products Ltd., with the word "Food" spelled in the singular, instead of in the plural "Foods" as shown in the style of cause. This is evident, for example, on the corporate Certificate of Amalgamation attached to the First Zimmerman Affidavit filed by Yat Sun in support of its opposition to the trademark application for CHEF'S OWN. In addition, Mr. Zimmerman refers to Yat Sun as "Yat Sun Food Products Ltd." consistently throughout his first and second affidavits. The style of cause is amended accordingly, with immediate effect.

A. *New Leave Requirement*

[31] As I explain in more detail below, I am satisfied that the new leave requirement does not apply in this matter. In my view, subsection 56(5) of the *TMA* as it existed prior to April 1, 2025, and the applicable jurisprudence, continue to apply here.

[32] I start by noting that Yat Sun's Notice of Application was filed on December 20, 2024, but that the parties' evidence was filed as part of their respective records after April 1, 2025, the date when the new subsection 56(5) of the *TMA* came into force. That said, the Arndt Affidavit and the Second Zimmerman Affidavit were served, and the cross-examinations were conducted, all before April 1, 2025.

[33] Following an earlier direction from the Court, the parties addressed preliminarily at the hearing the issue of whether the new leave requirement included in the amended subsection 56(5) of the *TMA* applied to Yat Sun's new evidence before the Court. In its direction, the Court asked the parties to consider paragraph 70(1)(d) of the *TMA*, the transition provision that refers to the new subsection 56(5) of the *TMA*.

[34] Having heard the parties' submissions on this point, I agree with them that ultimately paragraph 70(1)(d) does not, or should not be read to, operate so as to deprive Yat Sun of the right to submit new material evidence on its appeal of the Decision. The question remains, however, whether the new subsection 56(5) operates with immediate effect.

[35] Paragraph 70(1)(d) of the *TMA* provides that,

> An application for registration that has been advertised under subsection 37(1) before the day on which section 342 of the Economic Action Plan 2014 Act, No. 1 comes into force shall be dealt with and disposed of in accordance with
>
> …
>
> (d) …subsection 56(5), as enacted by the Budget Implementation Act, 2018, No. 2.

[36] I note that section 342 of the *Economic Action Plan 2014 Act, No. 1* came into force on June 17, 2019, before trademark application number 2,007,740 for CHEF'S OWN was filed on January 2, 2020, and long before the application was advertised for opposition purposes on August 10, 2022. Apart from the reference to subsection 56(5), applicable to appeals in this Court, I otherwise agree with Griffith that subsection 70(1) largely deals with matters before the Registrar of Trademarks.

[37] Relying on the recent Supreme Court of Canada decision in *R v Archambault*, 2024 SCC 35 [*Archambault*], Yat Sun's counsel argued that the new subsection 56(5), on its face, cannot have been intended to be retroactive and that Yat Sun's right to adduce new material evidence vested when the appeal was commenced in 2024, that is, long prior to April 1, 2025. Further, submitted Yat Sun's counsel, his client's strategy on the appeal was made before April 1, 2025, such that the amendment is not simply procedural because, if applied, the amendment would deprive Yat Sun of its previously held right to file new evidence on appeal.

[38] Griffith agreed that *Archambault* applies in the circumstances, pointing to paragraphs 28 and 29 of the Supreme Court decision. Griffith also referred to sections 43 and 44 of the

Interpretation Act, RSC 1985, c I-21 [*Interpretation Act*], regarding the temporal application of a law enacted by Parliament.

[39] I note *Archambault* states (at para 29) that "[p]urely procedural legislation, which is meant to govern the manner in which rights or privileges are asserted without affecting their substance, is presumed to apply immediately," unless the lawmaker expressed a contrary intention.

[40] The Supreme Court remarks that sections 43 and 44 of the *Interpretation Act* "codify the presumption against interference with vested rights and the exception based on the immediate application of purely procedural provisions": *Archambault*, above at para 30. The first question to consider in determining how new legislation applies temporally, according to the Supreme Court, is whether the legislative amendment is purely procedural. If, however, the amendment may affect a vested right or privilege under the prior provision, the time at which that right or privilege vested must be determined. The previous legislation will apply only in respect of persons for whom it actually vested before the legislative amendment came into force: *Archambault*, above at para 32.

[41] This Court has not determined yet whether the new leave requirement is purely procedural or what criteria must be satisfied for the Court to grant leave. Subsection 45 of the *Interpretation Act* provides that a legislative amendment is not a declaration as to the previous state of the law. In fact, all of section 45 explains what a legislative amendment is not or does not

do. Regardless, I am not convinced that it is necessary for the purpose of this opposition appeal to decide these questions.

[42] Yat Sun's counsel submitted that Yat Sun's new evidence was filed as of right before April 1, 2025. I agree.

[43] Before that date, subsection 56(5) provided that "[o]n an appeal under subsection (1), evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar." While the Applicant's Record containing the Arndt Affidavit and the Second Zimmerman Affidavit was filed on April 17, 2025, which falls after April 1, 2025, rule 306 of the *Federal Courts Rules*, SOR/108-96 [*Rules*] provides in part that an applicant's supporting affidavits and documentary exhibits are deemed to be filed when the proof of service is filed in the Registry.

[44] Here, although the affidavits of service of the Arndt Affidavit and the Second Zimmerman Affidavit are not contained in the Applicant's Record, I note that subrule 309(2) of the *Rules* does not require the affidavit of service of each supporting affidavit and documentary exhibits to be included in the contents of an applicant's record.

[45] Generally, parties should not expect the Court to root around in the Registry records for documents on which they wish to rely but did not include in their records. In light of the unique circumstances described above, however, I have exercised my discretion to confirm that Yat Sun's affidavits of service of the Arndt Affidavit and the Second Zimmerman Affidavit on

Griffith and on CIPO respectively were placed on the Court file for this matter on January 20, 2025.

[46] I find that Yat Sun's new evidence therefore is deemed to have been filed as of January 20, 2025, when the previous subsection 56(5) was still in effect and was not subject to a leave requirement. In other words, Yat Sun had, in my view, a vested right or privilege of simply filing new evidence, without seeking leave, having regard to the state of the law at least as of the time it filed the evidence in question, if not as of the time it filed its Notice of Application.

[47] As mentioned above, applicable jurisprudence requires a materiality determination regarding any additional evidence filed on appeal before the Court can engage in a *de novo* review and exercise the Registrar's discretion, where warranted. I thus will move on to consider the materiality of the new evidence.

B. *Materiality of Yat Sun's New Evidence on Appeal*

[48] I find that the Arndt Affidavit is not only immaterial but also inadmissible, while only a portion of the Second Zimmerman Affidavit is material. After summarizing the test for materiality of new evidence, I deal with each affidavit in turn.

[49] To be considered material, new evidence must be sufficiently substantial and significant, and of probative value: *Clorox*, above at para 21, citing *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 [*Vivat*] at para 27 and *Tradition Fine Foods Ltd v Groupe Tradition'l Inc*, 2006 FC 858 at para 58. Evidence that is merely supplemental or repetitive will not meet this

threshold: *Scott Paper Limited v Georgia-Pacific Consumer Products LP*, 2010 FC 478 [*Scott Paper*] at paras 48-49; *Caterpillar Inc v Puma SE*, 2021 FC 974 at para 33, appeal dismissed *Puma SE v Caterpillar Inc*, 2023 FCA 4, leave to appeal to SCC refused, 40641 (7 September 2023).

[50] The test for materiality is not about whether the new evidence would have changed the Registrar's mind; instead, the question is whether it would have had a material effect on the decision: *Scott Paper*, above at para 49. The focus is on the quality, not quantity, of the evidence: *Vivat*, above at para 27.

(1) Arndt Affidavit

[51] Dr. Felix Arndt is a professor at the University of Guelph who was retained by Yat Sun to provide an expert opinion about the potential risks and consequences of a CHEF'S OWN product recall on Yat Sun's business and sales of its CHEFS-OWN bean sprouts.

[52] Yat Sun argues the Arndt Affidavit demonstrates that a potential recall of Griffith's product would significantly impact Yat Sun because both parties' goods are food products, recall notices are available to the public, and Yat Sun's products are sold to the public through retailers. Yat Sun's public sales therefore could be impacted negatively because a consumer, somewhat in a hurry, with no more than an imperfect recollection, would be likely to confuse the two marks.

[53] Griffith submits that the Arndt Affidavit is not admissible because it is not accompanied by the requisite signed Code of Conduct for Expert Witnesses, and Professor Arndt testified on

cross-examination that he did not recall signing one: *Rules*, s 52.2(1)(c). I agree with Griffith for at least three reasons. First, a signed Code of Conduct accompanying the expert affidavit or statement is mandatory.

[54] Second, while Professor Arndt testified in cross-examination that he has received the Code of Conduct and that he is aware that an expert has an overriding duty to assist the Court impartially on matters relevant to their expertise, there is no evidence that he was aware of these things when he prepared and swore the Arndt Affidavit.

[55] Third, I am of the view that the evidence would not have affected the Decision materially as it relates to Yat Sun's recall arguments. The TMOB, at paragraph 38 of its decision, did not disagree with Yat Sun that a recall "could potentially be damaging to a party with a confusingly similar trademark for similar goods sold through similar outlets" but found that this was not relevant to the confusion analysis in this case. Thus, Professor Arndt's evidence, even if it were admissible, does nothing but confirm a finding the TMOB already made and determined to be irrelevant.

[56] I add that, in my view, Yat Sun appears to conflate depreciation of goodwill under section 22 of the *TMA*, which has not been pleaded, with a likelihood of confusion under subsection 6(2) in the context of the registrability and entitlement grounds of opposition.

[57] I thus determine that the Arndt Affidavit does not meet at least two of the four *Mohan* criteria for the admissibility of expert evidence described recently by Justice Tsimberis:

Promotion in Motion, Inc v Hershey Chocolate & Confectionery LLC, 2024 FC 556 at para 71. Specifically, I find that Professor Arndt has not been qualified properly as an expert, nor is the content of the Arndt Affidavit relevant to the issue of a likelihood of confusion, bearing in mind that the confusion analysis involves, at its heart, a question of the source of the relevant goods. In other words, I am persuaded that the Arndt Affidavit is not sufficiently substantial and significant, nor of probative value.

(2) Second Zimmermann Affidavit

[58] Given that paragraphs 1-14 and 21 of the Second Zimmerman Affidavit repeat evidence in the First Zimmerman Affidavit that was before the TMOB, I find that these paragraphs do not meet the materiality threshold: *Scott Paper*, above at para 49.

[59] Paragraphs 15-19 of, and related exhibits to, the Second Zimmerman Affidavit provide evidence that Yat Sun has been selling its bean sprouts in the wholesale channel of trade since 2017, identify several wholesale customers, and describe how the bean sprouts are packaged for wholesale.

[60] Paragraph 20 of the Second Zimmerman Affidavit attests that Yat Sun recently made the decision to brand its wholesale products with its trademark CHEFS-OWN. The related exhibit is described as “mock-ups of the boxes which will enter into circulation within this year, 2025.” The mock-up shows CHEFS-OWN on packaging for Yat Sun bean sprouts. In cross-examination, Mr. Zimmerman testified that Yat Sun started using boxes with CHEFS-OWN printed on them in the wholesale channel of trade in February 2025. Mr. Zimmerman disagreed

with Griffith's counsel, however, that his decision to request the mock-up was triggered by the Decision.

[61] Regarding paragraphs 15-19 of the Second Zimmerman Affidavit, I am persuaded that this new evidence is material in that it would have influenced the Member's conclusions on a finding of fact or exercise of discretion, had it been available at the time of the Decision: *Blaze Pizza, LLC v Carbone Restaurant Group Ltd*, 2024 FC 1770 [*Blaze Pizza*] at para 42. As I will explain, I have a different view regarding paragraph 20 of the Second Zimmerman Affidavit because, unlike paragraphs 15-19, it pertains to facts that arose after the Decision.

[62] Griffith argues that Yat Sun's new evidence is irrelevant because there is little to no evidence that Yat Sun's new mock-up of wholesale packaging with CHEFS-OWN applied has been used at all or to any significant extent. While I do not disagree in so far as paragraph 20 is concerned, the TMOB Member's reasons are premised on a lack of evidence that Yat Sun would extend its use of CHEFS-OWN to the wholesale channel of trade in light of evidence of more than 25 years in the retail channel. For example, at paragraph 30 of the Decision, the Member states: "While the Opponent's goods could conceivably be used in the same recipes as some as [*sic*] the Applicant's goods, I do not find that this would be likely given that the average consumer of the parties' goods, as well as their channels of trade, are different, …"

[63] Yat Sun's new evidence in paragraphs 15-19 of the Second Zimmerman Affidavit shows that Yat Sun already was in the wholesale channel of trade as of 2017 and that Yat Sun and Griffith have overlapping customers (i.e. Sysco and Gordon Food Service) in that sphere. In my

view, this evidence would have influenced the Member's assessment of the likelihood of confusion, notwithstanding that Yat Sun had not used its trademark CHEFS-OWN in the wholesale channel yet. This is not a situation where Yat Sun would have had to expand its existing channels of trade; they already included wholesale sales and Yat Sun would have been entitled to use its registered trademark in that channel of trade because its trademark registration was unrestricted regarding the applicable channels of trade.

[64] Despite the fact that the registration for CHEFS-OWN does not contain any channel-limiting language in the statement of goods, the TMOB Member felt constrained by jurisprudence to read the statement of goods "with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording": Decision, above at para 26. She concludes, at paragraph 35 of the Decision, that because Yat Sun had "spent almost 30 years selling its goods in the same channels of trade, I do not find any reason for me to infer that the Opponent is likely to change how it sells its products in the future." (Emphasis added.)

[65] Bearing in mind that Yat Sun's evidence in the form of the First Zimmerman Affidavit focused on the retail sales of its CHEFS-OWN branded bean sprouts, I am satisfied that had there been evidence before the TMOB Member that Yat Sun had been selling bean sprouts wholesale for six or seven years by that point, albeit without the CHEFS-OWN branding, it would have impacted her analysis of "the probable type of business or trade intended by the parties." In other words, I find the evidence in paragraphs 15-19 of the Second Zimmerman

Affidavit material because it would have clarified the record in a way that might have influenced the TMOB Member's finding of fact regarding Yat Sun's probable type of business or trade.

[66] I find Griffith's submission in oral argument that Yat Sun did not mention the commercial or wholesale channel before the TMOB unconvincing. The file history for Griffith's trademark application discloses that Griffith first filed an amended application limiting the channels of trade contemporaneously with its written representations, that is long after the evidentiary stage had closed and after Yat Sun had filed its written representations. Before the application was amended, Yat Sun had no reason to disclose that it was selling its bean sprouts to wholesale customers. As a result, there was no evidence of record from Yat Sun on which it could have relied to support submissions about already selling in the wholesale channel of trade.

[67] Further, while Griffith's cover correspondence filing the amended trademark application for CHEF'S OWN states that the amendment was made pursuant to an agreement between the parties, Yat Sun wrote to CIPO the same day to dispute the existence of any such agreement. Acknowledging both parties' correspondence regarding the amendment, CIPO subsequently accepted the late-stage amendment.

[68] In any event, I come to a different conclusion regarding paragraph 20 of the Second Zimmerman Affidavit because it involves post-Decision facts (i.e. facts that arose after the Decision). Because the relevant date for assessing the likelihood of confusion under paragraph 12(1)(d) at first instance is the date of the TMOB's decision, here October 23, 2024, the evidence comprising paragraph 20 could not have been before the TMOB for consideration

and, thus, could not have been material to the Member's opinion: *Wrangler Apparel Corp v Timberland Co*, 2005 FC 722 at para 10; *Hayabusa Fightwear Inc v Suzuki Motor Corporation*, 2014 FC 784 [*Hayabusa*] at para 29.

[69] Paragraph 20 of the Second Zimmerman Affidavit is short. The first sentence states that Yat Sun "recently made the decision to brand their wholesale products with [Yat Sun's] CHEFS-OWN trademark." Although Mr. Zimmerman denied in cross-examination that the branding decision was prompted by the TMOB Decision, his affidavit is silent as to a timeframe for the decision apart from the vague word "recently." I nonetheless am prepared to infer that "recently" means between the date of the Decision, namely October 23, 2024, and the date of the Second Zimmerman Affidavit, namely January 20, 2025.

[70] I make the above inference based on the second sentence of paragraph 20 and related cross-examination. The second sentence describes the attached Exhibit "V" as "mock-ups of the boxes which will enter into circulation within this year, 2025" and which show the intended use of CHEFS-OWN on packaging for Yat Sun bean sprouts. Mr. Zimmerman confirmed in cross-examination that the mock-ups are dated January 17, 2025. When Griffith's counsel asked Mr. Zimmerman when he asked the supplier to prepare the mock-ups that comprise Exhibit "V," Mr. Zimmerman answered "[e]arly this year" which I take to mean early in 2025.

[71] Had Mr. Zimmerman wished the Court to have a different understanding, it was within his control, especially in the context of a written affidavit, to depose to a more specific timeframe than "recently."

[72] Further, these post-Decision facts are of a different character than the cancellation or expungement of a previously relied-on registration: *GRC Food Services Ltd v Chocoladefabriken Lindt & Sprüngli AG*, 2025 FC 940 at para 47.

[73] I thus conclude that paragraph 20 of the Second Zimmerman is immaterial in that it could not have influenced the TMOB Member's finding of fact or exercise of discretion because it simply could not have been available.

C. *De Novo Review Regarding Paragraphs 6(5)(c) and 6(5)(d)*

[74] Because I find paragraphs 15-19 of the Second Zimmerman Affidavit material, this leads to a *de novo* review by the Court of the paragraphs 6(5)(c) and 6(5)(d) factors – nature of the parties' goods, business and nature of the trade – with regard to all the accepted evidence now before the Court. Of necessity, this will include the overall weighing of the confusion factors. The analysis of the other challenged factors, paragraph 6(5)(e) and the additional surrounding circumstances of potential product recall and Yat Sun's status as a small Canadian company, will be reviewable, however, on the palpable and overriding error standard: *Blaze Pizza*, above at para 52, citing *Align Technology, Inc v Osstemimplant Co, Ltd*, 2022 FC 720 at para 19. I will review the TMOB's overall weighing of the confusion factors after considering the TMOB's treatment of the additional surrounding circumstances.

[75] Yat Sun argues that the parties' goods are not so different that this factor should have weighed against Yat Sun. It takes issue with the case law on which the TMOB relied and points to other more recent case law analyzing similarities in goods and services that Yat Sun says

should have a greater bearing on the confusion analysis. Yat Sun also submits that the TMOB erred by limiting Yat Sun's channels of trade to food retailers, rather than following the Supreme Court of Canada's guidance concerning registered trademarks and the broader scope of potential uses granted through registration: *Masterpiece*, above at para 59. I agree.

[76] Griffith essentially counters that the parties' goods are intrinsically different, as found by the TMOB, and because Yat Sun's trademark CHEFS-OWN is relatively weak, it was entitled to a narrow scope of protection. Further, says Griffith, Yat Sun's sales of CHEFS-OWN bean sprouts historically have been to retail accounts, and evidence of its business strategy to extend the use of its trademark to the wholesale channel of trade was contrived for the purposes of the appeal.

[77] I am not persuaded that the parties' goods are as disparate as found by the TMOB.

[78] I do not disagree necessarily with the TMOB Member's finding that Yat Sun's CHEFS-OWN fresh bean sprouts are intrinsically different from Griffith's CHEF'S OWN soup bases, seasonings, sauces, and coatings for foods. I also do not disagree with the Member that the category of "food products" is broad. That said, the Member acknowledged that Yat Sun's goods could be used in the same recipes as some of Griffith's goods, but she found it unlikely because of the differences in the average consumers and channels of trade: Decision, above at para 30. Yat Sun's new material evidence on appeal, however, undermines this conclusion by demonstrating an overlap in the parties' customers (i.e. Sysco and Gordon Food Services), as

well as the channels of trade (i.e. wholesale): *Absolute Software Corporation v Valt.X Technologies Inc*, 2015 FC 1203 [*Absolute Software*] at para 38.

[79] The TMOB did not consider the parties' businesses to any appreciable degree but rather combined or equated the businesses with the channels of trade. Mr. Zimmerman's cross-examination on the Second Zimmerman Affidavit touched on the growing of fresh bean sprouts, while the Pellicano Affidavit describes that Griffith "develops and manufactures a wide range of food ingredients." Regardless of how the parties accomplish it, I find that they both produce food products intended for sale in overlapping (i.e. wholesale) channels of trade that could be used in some of the same recipes or dishes: *Subway IP LLC v Budway, Cannabis & Wellness Store*, 2021 FC 583 at para 28.

[80] As alluded above, the TMOB Member's analysis of the differences in the parties' goods was linked to or bound up in the perceived differences in the businesses and channels of trade based on the evidence before the TMOB. In my view, this is evident when the Member indicated that the statement of goods in Griffith's application and Yat Sun's registration respectively "must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording": Decision, above at para 26, citing *Mr Submarine Ltd v Amandista Investments Ltd*, 1987 CanLII 8953 (FCA), and *Miss Universe, Inc v Bohna*, 1994 CanLII 3534 (FCA).

[81] As another example, the Member relied on this Court's decision in *Canada Wire & Cable Ltd v Heatex Howden Inc et al*, 1986 CanLII 7678 (FC) [*Canada Wire*], to determine that, after

30 years of selling its goods in the same channels of trade, there is no reason to infer that Yat Sun is likely to change how it sells its products in the future.

[82] I find, however, that in relying on the older jurisprudence mentioned above, the Member fell into the very trap against which Justice Rothstein cautions in the more recent Supreme Court decision in *Masterpiece* (at para 59): "it was incorrect in law to limit consideration to Alavida's post-application use of its trade-mark to find a reduced likelihood of confusion[; a]ctual use is not irrelevant, but it should not be considered to the exclusion of potential uses within the registration." This is precisely what the Member did, in my view, when she inferred that Yat Sun is unlikely to change how it sells its products in the future based on its evidence of how it has operated in the past.

[83] While it was not incorrect for the Member to take Yat Sun's actual use into account, she did so to the exclusion of the scope of the registration, i.e. unrestricted as to the channels of trade. Further, the Member's inference could not have been supported had Yat Sun's new evidence, that it had been selling in the wholesale channel already for six or seven years by the time of the TMOB hearing, been put before her.

[84] Justice Rothstein's caution has been followed more recently in this Court and in the Federal Court of Appeal. See, for example, *Hayabusa*, above at para 46, citing *Marlboro Canada Limited v Philip Morris Products SA*, 2012 FCA 201 at paras 55-56; *Absolute Software*, above at paras 37-38.

[85] Although there is no new material evidence before the Court of Yat Sun's actual use of the trademark CHEFS-OWN in the wholesale channel, I am mindful that, as expressed in subsection 6(2) of the *TMA*, the test is one of a likelihood of confusion were the parties' marks to be used in the same area. Also, as mentioned, there is no channel-limiting language in the registration for CHEFS-OWN.

[86] Griffith contends that there is no basis to conclude that Yat Sun's trademark CHEFS-OWN is known to professional buyers in the wholesale channel. The Pellicano Affidavit filed on behalf of Griffith before the TMOB deposes that Griffith's goods are targeted at foodservice and food processing professionals. Further, Griffith argues that a "professional consumer purchasing at the wholesale level is less likely to be confused than a casual shopper in a retail setting": *Pink Panther Beauty Corp v United Artists Corp*, 1998 CanLII 9052, [1998] 3 FC 534 (FCA) [*Pink Panther*] at para 31, citing *Canada Wire*, above.

[87] When I asked Griffith's counsel whether this aspect of *Pink Panther* was eclipsed by *Masterpiece*, he responded that it has not been completely eclipsed. I disagree, notwithstanding counsel's qualifier that one still has to look at all the surrounding circumstances, with which qualifier I do agree.

[88] Justice Rothstein carefully and in some detail explains the "first impression" test with examples, including a description of what it does not include: *Masterpiece*, above at paras 66-74. As Justice Rothstein states (at para 71), "[i]t is not relevant that … consumers are 'unlikely to make choices based on first impressions' or that they 'will generally take considerable time to

inform themselves about the source of expensive goods and services' … [; b]oth of these — subsequent research or consequent purchase — occur *after* the consumer encounters a mark in the marketplace." (Emphasis in original.)

[89] Further, Justice Rothstein observes (at para 72) that "[c]areful research which may later remedy confusion does not mean that no confusion ever existed or that it will not continue to exist in the minds of consumers who did not carry out that research." What is key is the attitude of the consumer at the time when they first encounter the trademarks in question in the marketplace (at para 70), and not whether the consumers are professional purchasers who could unconfuse themselves through research or purchasing. In my view, they are at least as entitled to the benefit of the "first impression" test as the average consumer of less expensive or less specialized goods or services (at para 73).

[90] There was no evidence before the TMOB and none before the Court about what the first impression of a professional purchaser of food products was or is at the time they encounter a trademark in the marketplace, as distinct from subsequent researching or consequent purchasing.

[91] In any event, with regard to all the above, and having considered the parties' written material and their submissions on this appeal, including the evidence before the TMOB and Yat Sun's admitted new material evidence, I conclude that the nature of the goods and business factor described in paragraph 6(5)(c) somewhat favours Yat Sun, bearing in mind that both parties' food products businesses encompass a wholesale component. In addition, I find the nature of the trade factor described in 6(5)(d) favours Yat Sun given the overlapping channels of

trade and customers, i.e. Sysco and Gordon Food Services mentioned above, in the wholesale channel, as demonstrated by Yat Sun's new material evidence.

[92] In arriving at this conclusion, I note Parliament's intention that the nature of the goods, services or business are one factor, i.e. paragraph 6(5)(c), while the nature of the trade is a separate, albeit related factor, i.e. paragraph 6(5)(d), despite the fact that they sometimes are considered together, as occurred here before the TMOB. This is evident, for example, in the Member's conclusion in the overall weighing of the confusion factors that the differences in the nature of the parties' businesses and channels of trade were significant factors "that caused the balance of probabilities to tip in [Griffith's] favour under the section 12(1)(d) ground."

D. *Palpable and Overriding Error Review Regarding Paragraph 6(5)(e)*

[93] I am not persuaded that the TMOB made any palpable and overriding error in the paragraph 6(5)(e), degree of resemblance, analysis. The TMOB Member acknowledged the guidance in *Masterpiece* that, in most instances, the degree of resemblance is the most important factor. She then determined that because the parties' trademarks are virtually identical in appearance, sound and in the ideas suggested, there is a significant degree of resemblance between them. She continued with her analysis of the other confusion factors with a view to determining if any of them tipped the balance of probabilities in Griffith's favour.

[94] Yat Sun's arguments concerning this factor are focused largely on the weight the Member assigned to the degree of resemblance in the weighing exercise, which I address later in these reasons.

E. *Additional Surrounding Circumstances, and Overall Weighing of Subsection 6(5) Confusion Factors*

[95] I am not persuaded that the TMOB made a palpable and overriding error regarding its treatment of the potential product recalls issue, nor in failing to take into account Yat Sun's asserted status as a small Canadian company.

(1) Additional Surrounding Circumstance: Potential Product Recalls

[96] Yat Sun submitted before the TMOB that the possibility of it being harmed in the case of a recall of Griffith's product was a relevant surrounding circumstance to consider in the confusion analysis. The Member did not disagree with Yat Sun that a recall "could potentially be damaging to a party with a confusingly similar trademark for similar goods sold through similar outlets." She could not see, however, how this factor could impact the determination of likelihood of confusion in this case because of the differences in the nature of the parties' businesses and their channels of trade: Decision, at para 38.

[97] The above rationale does not explain, in my view, the relevance (or lack) of the product recall issue to the likelihood of confusion test. I find at best it was a palpable error to refer to damage of reputation in the context of a likelihood of confusion analysis, but it was not an overriding one because it would not have changed the result.

[98] As mentioned above, Yat Sun appears to conflate depreciation of goodwill under section 22 of the *TMA*, which has not been pleaded, with a likelihood of confusion under

subsection 6(2) in the context of the registrability and entitlement grounds of opposition. In other words, Yat Sun's submissions regarding potential product recalls reflect an attempt to shoehorn irrelevant depreciation of goodwill considerations into the confusion analysis disguised as a surrounding circumstance.

[99] The penultimate issue for determination, however, was and is whether the average consumer somewhat in a hurry and with an imperfect recollection of the senior registered mark likely would be confused into thinking that the owner of the junior mark was the same as the owner of the senior mark. As described in *Masterpiece*, it is the attitude of the average consumer at the time they first encounter the trademarks in the marketplace that matters for the analysis, and not whether that attitude could change through subsequent research or knowledge. For this reason, I believe that the issue is irrelevant and, hence, the outcome of the analysis concerning potential product recalls would not have been different.

(2) Additional Surrounding Circumstance: Yat Sun's Status as a Small Canadian Company

[100] I note that Yat Sun did not raise this issue in its written representations filed with the TMOB, nor did the First Zimmerman Affidavit contain any evidence directed to Yat Sun's relative size in Canada. Yat Sun makes this argument for the first time in the Applicant's Memorandum of Fact and Law on this appeal by comparing its gross profits described in the First Zimmerman Affidavit with Griffith's net revenues described in the Pellicano Affidavit.

[101] Putting aside for the moment that gross profits and net revenues are “apples and oranges” (i.e. different comparators), the TMOB cannot be faulted, in my view, for not considering an issue that was not raised before it. Given the paucity of evidence and arguments on this issue, I will not consider it further, particularly in connection with the overall weighing of the subsection 6(5) factors.

(3) Overall Weighing of Subsection 6(5) Confusion Factors

[102] Taking all the subsection 6(5) factors into account, including the reconsidered paragraphs 6(5)(c) and 6(5)(d) factors based on Yat Sun’s new material evidence, I find that the likelihood of confusion balance tips in favour of Yat Sun and that Griffith has not met its legal onus of establishing that the trademark is registrable and distinctive and that it is entitled to the registration of the Mark in Canada.

[103] I also am unpersuaded that the TMOB made any palpable and overriding error regarding the subsection 6(5) elements that are not subject to a *de novo* or correctness standard of review.

[104] Regarding the degree resemblance factor under paragraph 6(5)(e), the TMOB found that Griffith’s applied-for trademark is almost identical with Yat Sun’s registered trademark in appearance, sound, and the ideas suggested and, thus, the parties’ marks share a significant degree of resemblance. Concerning inherent distinctiveness and extent known under paragraph 6(5)(a), the TMOB determined that the parties’ marks possessed low inherent distinctiveness or are weak in relation to their goods but that, overall, this factor favours Yat Sun,

having regard to the over 25 years its trademark had been in use. The TMOB also held that the length of time in use factor described in paragraph 6(5)(b) favours Yat Sun.

[105] With regard to Yat Sun's new material evidence, I have concluded that the nature of the goods or business under paragraph 6(5)(c) somewhat favours Yat Sun, while the nature of the trade under paragraph 6(5)(d) favours Yat Sun. These new findings, in my view, tip the balance of probabilities in Yat Sun's favour regarding the likelihood of confusion under subsection 6(2) of the *TMA*, bearing in mind that the test for confusion is a matter of first impression and imperfect recollection.

[106] At various points in its written and oral submissions, Griffith submitted that it typically uses the applied-for trademark CHEF'S OWN in conjunction with its registered trademark CUSTOM CULINARY, and that this should weigh in favour of rejecting the opposition. I note, however, that if that outcome prevailed, Griffith's trademark application would be allowed and, upon registration, Griffith would be entitled to use the trademark alone, without reference to CUSTOM CULINARY: *Masterpiece*, above at paras 55-58. As such, considering the totality of the rights granted through registration, the potential limited use of the trademark, without more, does not weigh in Griffith's favour.

[107] As I have found above, the additional surrounding circumstances raised by Yat Sun are not relevant considerations in the overall balancing.

[108] With this new overall weighing in mind, I find that Yat Sun's paragraph 12(1)(d) ground of opposition is successful.

[109] Because the entitlement grounds under paragraphs 16(1)(a) and 16(1)(c) involve a much earlier relevant date, i.e. the date of filing of the trademark application, when Griffith's trademark was not in use yet in Canada, I determine that Yat Sun's opposition also now succeeds on these grounds based on the above re-worked confusion analysis.

[110] The distinctiveness ground under section 2 also involves an earlier relevant date, namely the date on which the opposition was commenced in October 2022, than the registrability ground. Although Griffith's evidence shows that its trademark CHEF'S OWN was in use in Canada by then, because this ground, like the entitlement grounds, turns on the likelihood of confusion, I find that, in the circumstances, Yat Sun succeeds on this ground as well.

[111] Finally, for completeness, I note that Yat Sun has not challenged the TMOB's finding regarding the paragraph 38(2)(f) ground of opposition. It thus remains unchanged on this appeal.

VII. Conclusion

[112] For the above reasons, I conclude that Griffith's applied-for trademark CHEF'S OWN is likely to be confused with Yat Sun's registered trademark CHEFS-OWN. The Decision thus will be set aside, with the result that Yat Sun's opposition will succeed on the registrability, entitlement and distinctiveness grounds, and Griffith's trademark application consequently will be refused.

VIII. Costs

[113] Subsequent to the hearing of this matter, the parties advised the Court that they agreed the successful party should be awarded $4,500 in costs. I find this quantum reasonable in the circumstances and, therefore, I award Yat Sun costs in the amount of $4,500 payable by Griffith.

JUDGMENT in T-3685-24

THIS COURT'S JUDGMENT is that:

1. The Applicant's name is corrected to read Yat Sun Food Products Ltd. in the style of cause, with immediate effect.
2. Yat Sun Food Products Ltd.'s application appealing the October 23, 2024 decision of the Trademarks Opposition Board, on behalf of the Registrar of Trademarks, and having citation 2024 TMOB 194, is allowed.
3. The October 23, 2024 decision of the Trademarks Opposition Board, on behalf of the Registrar of Trademarks (2024 TMOB 194) rejecting Yat Sun Food Products Ltd.'s opposition against Costs Griffith Foods International Inc.'s trademark application number 2,007,740 for the trademark CHEF'S OWN is set aside.
4. Trademark application number 2,007,740 for the trademark CHEF'S OWN filed on January 2, 2020 is refused pursuant to subsection 38(12) of the *Trademarks Act*, RSC 1985, c T-13.
5. Costs are payable to Yat Sun Food Products Ltd. by Griffith Foods International Inc. in the amount of $4,5000.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Trademarks Act*, RSC 1985, c T-13**
***Loi sur les marques de commerce*, LRC 1985, c T-13**

2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
[…]	[…]
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; (*distinctive*)	***distinctive*** Se dit de la marque de commerce qui distingue véritablement les produits ou services en liaison avec lesquels elle est employée par son propriétaire de ceux d'autres personnes, ou qui est adaptée à les distinguer ainsi. (*distinctive*)
6 (1) For the purposes of this Act, a trademark or trade name is confusing with another trademark or trade name if the use of the first mentioned trademark or trade name would cause confusion with the last mentioned trademark or trade name in the manner and circumstances described in this section.	**6 (1)** Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.
(2) 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.	**(2)** L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les produits liés à ces marques de commerce sont fabriqués, vendus, donnés à bail ou loués, ou que les services liés à ces marques sont loués ou exécutés, par la même personne, que ces produits ou services soient ou non de la même catégorie générale ou figurent ou non dans la même classe de la classification de Nice.
[…]	[…]
(5) In determining whether trademarks or trade names are confusing, the court or the	**(5)** En décidant si des marques de commerce ou des noms commerciaux créent de la

Registrar, as the case may be, shall have regard to all the surrounding circumstances including	confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris :
(a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known;	**a)** le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;
(b) the length of time the trademarks or trade names have been in use;	**b)** la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
(c) the nature of the goods, services or business;	**c)** le genre de produits, services ou entreprises;
(d) the nature of the trade; and	**d)** la nature du commerce;
(e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.	**e)** le degré de ressemblance entre les marques de commerce ou les noms commerciaux, notamment dans la présentation ou le son, ou dans les idées qu'ils suggèrent.
12 (1) Subject to subsection (2), a trademark is registrable if it is not	**12 (1)** Sous réserve du paragraphe (2), la marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :
[…]	[…]
(d) confusing with a registered trademark;	**d)** elle crée de la confusion avec une marque de commerce déposée;
16 (1) Any applicant who has filed an application in accordance with subsection 30(2) for the registration of a registrable trademark is entitled, subject to section 38, to secure its registration in respect of the goods or services specified in the application, unless at the filing date of the application or the date of first use of the trademark in Canada, whichever is earlier, it was confusing with	**16 (1)** Tout requérant qui a produit une demande conforme au paragraphe 30(2) en vue de l'enregistrement d'une marque de commerce enregistrable a droit, sous réserve de l'article 38, d'obtenir cet enregistrement à l'égard des produits ou services spécifiés dans la demande, à moins que, à la date de production de la demande ou à la date à laquelle la marque a été employée pour la première fois au Canada, la première éventualité étant à retenir, la marque n'ait créé de la confusion :

(a) a trademark that had been previously used in Canada or made known in Canada by any other person; […] **(c)** a trade name that had been previously used in Canada by any other person.	**a)** soit avec une marque de commerce antérieurement employée ou révélée au Canada par une autre personne; […] **c)** soit avec un nom commercial qui avait été antérieurement employé au Canada par une autre personne.
34 (1) Despite subsection 33(1), when an applicant files an application for the registration of a trademark in Canada after the applicant or the applicant's predecessor in title has applied, in or for any country of the Union other than Canada, for the registration of the same or substantially the same trademark in association with the same kind of goods or services, the filing date of the application in or for the other country is deemed to be the filing date of the application in Canada and the applicant is entitled to priority in Canada accordingly despite any intervening use in Canada or making known in Canada or any intervening application or registration, if **(a)** the filing date of the application in Canada is within a period of six months after the date on which the earliest application was filed in or for any country of the Union for the registration of the same or substantially the same trademark in association with the same kind of goods or services; **(b)** the applicant files a request for priority in the prescribed time and manner and informs the Registrar of the filing date and country or office of filing of the application on which the request is based;	**34 (1)** Malgré le paragraphe 33(1), lorsqu'un requérant produit une demande pour l'enregistrement d'une marque de commerce au Canada après que lui ou son prédécesseur en titre a produit une demande d'enregistrement, dans un autre pays de l'Union, ou pour un autre pays de l'Union, de la même marque de commerce, ou sensiblement la même, en liaison avec le même genre de produits ou services, la date de production de la demande dans l'autre pays, ou pour l'autre pays, est réputée être la date de production de la demande au Canada, et le requérant a droit, au Canada, à une priorité correspondante malgré tout emploi ou toute révélation faite au Canada, ou toute demande ou tout enregistrement survenu, dans l'intervalle, si les conditions suivantes sont réunies : **a)** la date de production de la demande d'enregistrement au Canada ne dépasse pas de plus de six mois la production, dans un pays de l'Union, ou pour un pays de l'Union, de la plus ancienne demande d'enregistrement de la même marque de commerce, ou sensiblement la même, en liaison avec le même genre de produits ou services; **b)** le requérant produit une demande de priorité selon les modalités prescrites et informe le registraire du nom du pays ou du bureau où a été produite la demande d'enregistrement sur laquelle la demande de priorité est fondée, ainsi que de la date de

	production de cette demande d'enregistrement;
(c) the applicant, at the filing date of the application in Canada, is a citizen or national of or domiciled in a country of the Union or has a real and effective industrial or	**c)** à la date de production de la demande d'enregistrement au Canada, le requérant est un citoyen ou ressortissant d'un pays de l'Union, ou y est domicilié, ou y a un établissement industriel ou commercial effectif et sérieux;
(d) the applicant furnishes, in accordance with any request under subsections (2) and (3), evidence necessary to fully establish the applicant's right to priority.	**d)** le requérant, sur demande faite en application des paragraphes (2) ou (3), fournit toute preuve nécessaire pour établir pleinement son droit à la priorité.
37 (3) Where the Registrar, by reason of a registered trademark, is in doubt whether the trademark claimed in the application is registrable, he shall, by registered letter, notify the owner of the registered trademark of the advertisement of the application.	**37 (3)** Lorsque, en raison d'une marque de commerce déposée, le registraire a des doutes sur la question de savoir si la marque de commerce indiquée dans la demande est enregistrable, il notifie, par courrier recommandé, l'annonce de la demande au propriétaire de la marque de commerce déposée.
38 (1) Within two months after the advertisement of an application for the registration of a trademark, any person may, on payment of the prescribed fee, file a statement of opposition with the Registrar. **(2)** A statement of opposition may be based on any of the following grounds: […] **(b)** that the trademark is not registrable; **(c)** that the applicant is not the person entitled to registration of the trademark; **(d)** that the trademark is not distinctive; […] **(f)** that, at the filing date of the application in Canada, determined without taking into	**38 (1)** Toute personne peut, dans le délai de deux mois à compter de l'annonce de la demande, et sur paiement du droit prescrit, produire au bureau du registraire une déclaration d'opposition. **(2)** Cette opposition peut être fondée sur l'un des motifs suivants : […] **b)** la marque de commerce n'est pas enregistrable; **c)** le requérant n'est pas la personne ayant droit à l'enregistrement; **d)** la marque de commerce n'est pas distinctive; […] **f)** à la date de production de la demande au Canada, déterminée compte non tenu du

account subsection 34(1), the applicant was not entitled to use the trademark in Canada in association with those goods or services.	paragraphe 34(1), le requérant n'avait pas le droit d'employer la marque de commerce au Canada en liaison avec ces produits ou services.
[…]	[…]
(12) After considering the evidence and representations of the opponent and the applicant, the Registrar shall refuse the application, reject the opposition, or refuse the application with respect to one or more of the goods or services specified in it and reject the opposition with respect to the others. He or she shall notify the parties of the decision and the reasons for it.	**(12)** Après avoir examiné la preuve et les observations des parties, le registraire rejette la demande, rejette l'opposition ou rejette la demande à l'égard de l'un ou plusieurs des produits ou services spécifiés dans celle-ci et rejette l'opposition à l'égard des autres. Il notifie aux parties sa décision motivée.
56 (1) An appeal lies to the Federal Court from any decision of the Registrar under this Act within two months from the date on which notice of the decision was dispatched by the Registrar or within such further time as the Court may allow, either before or after the expiration of the two months. […] **(5)** If, on an appeal under subsection (1), the Federal Court grants leave to adduce evidence in addition to that adduced before the Registrar, the Court may exercise, with respect to that additional evidence, any discretion vested in the Registrar.	**56 (1)** Appel de toute décision rendue par le registraire, sous le régime de la présente loi, peut être interjeté à la Cour fédérale dans les deux mois qui suivent la date où le registraire a expédié l'avis de la décision ou dans tel délai supplémentaire accordé par le tribunal, soit avant, soit après l'expiration des deux mois. […] **(5)** Si, lors de l'appel, le tribunal permet la présentation d'une preuve qui n'a pas été fournie devant le registraire, il peut, à l'égard de cette preuve, exercer toute discrétion dont le registraire est investi.
70 (1) An application for registration that has been advertised under subsection 37(1) before the day on which section 342 of the *Economic Action Plan 2014 Act, No. 1* comes into force shall be dealt with and disposed of in accordance with […] **(d)** subsections 9(3) and (4), sections 36.1, 38.1 and 45.1, and subsection 56(5), as	**70 (1)** La demande d'enregistrement qui a été annoncée, au titre du paragraphe 37(1), avant la date d'entrée en vigueur de l'article 342 de la *Loi n^{o} 1 sur le plan d'action économique de 2014* est régie, à la fois : […] **d)** par les paragraphes 9(3) et (4), les articles 36.1, 38.1 et 45.1 et le paragraphe

enacted by the *Budget Implementation Act, 2018, No. 2*.	56(5), édictés par la *Loi n^{o} 2 d'exécution du budget de 2018*.

Federal Courts Rules, SOR/98-106
Règles des Cours Fédérales, DORS/98-106

52.2 (1) An affidavit or statement of an expert witness shall […] **(c)** be accompanied by a certificate in Form 52.2 signed by the expert acknowledging that the expert has read the Code of Conduct for Expert Witnesses set out in the schedule and agrees to be bound by it;	**52.2 (1)** L'affidavit ou la déclaration du témoin expert doit : […] **c)** être accompagné d'un certificat, selon la formule 52.2, signé par lui, reconnaissant qu'il a lu le Code de déontologie régissant les témoins experts établi à l'annexe et qu'il accepte de s'y conformer;
306 Within 30 days after issuance of a notice of application, an applicant shall serve its supporting affidavits and documentary exhibits and file proof of service. The affidavits and exhibits are deemed to be filed when the proof of service is filed in the Registry.	**306** Dans les trente jours suivant la délivrance de l'avis de demande, le demandeur signifie les affidavits et pièces documentaires qu'il entend utiliser à l'appui de la demande et dépose la preuve de signification. Ces affidavits et pièces sont dès lors réputés avoir été déposés au greffe.
309(2) An applicant's record shall contain, on consecutively numbered pages and in the following order, **(a)** a table of contents giving the nature and date of each document in the record; **(b)** the notice of application; **(c)** any order in respect of which the application is made and any reasons, including dissenting reasons, given in respect of that order; **(d)** each supporting affidavit and documentary exhibit;	**309 (2)** Le dossier du demandeur contient, sur des pages numérotées consécutivement, les documents suivants dans l'ordre indiqué ci-après : **a)** une table des matières indiquant la nature et la date de chaque document versé au dossier; **b)** l'avis de demande; **c)** le cas échéant, l'ordonnance qui fait l'objet de la demande ainsi que les motifs, y compris toute dissidence; **d)** les affidavits et les pièces documentaires à l'appui de la demande;

(e) the transcript of any cross-examination on affidavits that the applicant has conducted;	**e)** les transcriptions des contre-interrogatoires qu'il a fait subir aux auteurs d'affidavit;
(e.1) any material that has been certified by a tribunal and transmitted under Rule 318 that is to be used by the applicant at the hearing;	**e.1)** tout document ou élément matériel certifié par un office fédéral et transmis en application de la règle 318 qu'il entend utiliser à l'audition de la demande;
(f) the portions of any transcript of oral evidence before a tribunal that are to be used by the applicant at the hearing;	**f)** les extraits de toute transcription des témoignages oraux recueillis par l'office fédéral qu'il entend utiliser à l'audition de la demande;
(g) a description of any physical exhibits to be used by the applicant at the hearing; and	**g)** une description des objets déposés comme pièces qu'il entend utiliser à l'audition;
(h) the applicant's memorandum of fact and law.	**h)** un mémoire des faits et du droit.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-3685-24
STYLE OF CAUSE:	YAT SUN FOOD PRODUCTS LTD. v GRIFFITH FOODS INTERNATIONAL INC.
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 4, 2025
JUDGMENT AND REASONS:	FUHRER J.
DATED:	OCTOBER 10, 2025

APPEARANCES:

J. Cameron Prowse	FOR THE APPLICANT
Adam Bobker	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Smart & Biggar LLP Toronto, Ontario	FOR THE RESPONDENT