

Federal Court



Cour fédérale

Date: 20250527

Docket: T-488-24

Citation: 2025 FC 946

Toronto, Ontario, May 27, 2025

**PRESENT:** The Honourable Mr. Justice Duchesne

**BETWEEN:**

**DERMASPARK PRODUCTS INC.  
PALLOGEN LTD.**

**Plaintiffs**

**and**

**DANIELLE IPINCE (DBA DREAMLOOK  
BEAUTY)**

**Defendant**

**JUDGMENT AND REASONS**

[1] The Plaintiffs have brought of a motion for default judgment against the Defendant pursuant to Rule 210 of the *Federal Courts Rules*, SOR/98-106 (the *Rules*).

[2] For the reasons that follow, the Plaintiffs' motion is granted in part and judgment is ordered accordingly.

**I. Procedural Background**

[3] A plaintiff may seek and obtain default judgment against a defendant pursuant to Rule 210 of the *Rules*. Rule 210 and the jurisprudence that has interpreted it establish that a plaintiff seeking default judgment must establish that: a) the defendant did not file a statement of defence within the time prescribed by Rule 204 of the *Rules* or by an order of the Court; and b) establish its claim(s) on a balance of probabilities by affidavit evidence. The requirement to establish the asserted claims on the basis of evidence exists because the allegations in a statement of claim are deemed denied unless they are admitted (Rule 184; *Trimble Solutions Corporation v Quantum Dynamics Inc*, 2021 FC 63 at para 35 [*Trimble*]; *Ragdoll Productions (UK) Ltd v Doe*, 2002 FCT 918 at paras 23-24).

[4] Default judgment is a discretionary order. The Court must scrutinize the evidence submitted by the plaintiff with care and the evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test applicable to each claim advanced (*Trimble*, at para 36 and the jurisprudence cited therein).

[5] The evidence in the record before the Court on this motion reflects that the Plaintiffs filed their Statement of Claim in this proceeding on March 6, 2024.

[6] The Plaintiffs have also filed a copy of the affidavit of service of Mahmood Thawer affirmed on March 20, 2024. The affidavit of service reflects that the Statement of Claim was served upon the Defendant personally on March 15, 2024. The affidavit of service filed on this motion reflects that service was effected upon the Defendant in accordance with Rules 127 and

128(a) of the *Rules*. The service effected constitutes good and sufficient service upon the Defendant.

[7] The Court file reflects that the Defendant did not thereafter serve or file a statement of defence within the time provided by Rule 204. The Court file does not reflect that the Defendant has sought any extension of time to serve and file her statement of defence. The Court file reflects that the Defendant has taken no steps whatsoever to defend herself in the proceeding before this Court.

[8] I am satisfied that the Plaintiffs have established that the Defendant is in default and that they may seek default judgment on *ex parte* basis and in writing pursuant to Rules 210 and 369 of the *Rules*.

## II. **The Statement of Claim**

[9] The Plaintiffs seek the following relief through their pleading:

- a) A declaration that the Plaintiff Pollogen Ltd. (Pollogen) is the owner of the common-law rights associated with the Geneo, Geneo+, Oxygeneo, OxyGeneo, Pollogen, Pollogen Design trademarks, 3-in-1 super facial, Oxygeneo 3-in-1, OxyPod and Tripollar RF trademark (the “Common Law Trademarks”), as well as any exclusive rights conferred to by the *Trademarks Act* (the “TA”) for Canadian trademark registrations TMA1032928 for GENEIO+, TMA1032944 for OXYGENEO, TMA1041360 for 3-in-1 super facial, TMA1032940 for geneo+ design, and TMA1184661 for OXYPOD (the “Registered Trademarks”), and that the same are valid (collectively, “Pollogen’s Trademarks”)
- b) A declaration that the Plaintiff Pollogen, and its permitted licensees, have the exclusive right to use the Pollogen’s Trademarks, or any confusingly similar variant thereof, throughout

Canada for use in association with the following goods and services:

- i. Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment;
- ii. Facial skin treatment service for humans for cosmetic purposes;
- iii. Esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment;
- iv. Cosmetic creams, face and body creams;
- v. Cosmetic gels, face and body gels;
- vi. Anti-aging facials and body contouring treatments;
- vii. Training and educational services with cosmetic apparatus;

(collectively, the Plaintiffs' Goods and Services)

- c) A declaration that the Defendant has infringed Pollogen's Trademarks, contrary to sections 19 and 20 of the TA;
- d) A declaration that the Defendant has, contrary to subsection 7(b) of the TA, directed public attention to their business, goods and services in such a way so as to cause confusion in Canada between their business, goods and services and those of the Plaintiffs;
- e) A declaration that the Defendant, by their misconduct and contrary to section 7(c) of the TA, have passed off their goods and services as and for the Plaintiffs' Goods and Services;
- f) A declaration that the Defendant, by their misconduct and contrary to section 22 of the TA, have damaged the goodwill and reputation attaching to the Plaintiff Pollogen's Trademarks and to the Plaintiffs' business and have caused damages to the Plaintiffs through foregone sales, lost profits and reduced market share by misappropriating sales the Plaintiffs would have otherwise made;
- g) A declaration that the Plaintiff Pollogen is the owner of the Copyrighted Works, as defined hereinbelow;

- h) Interim, interlocutory and permanent injunctions enjoining and restraining the Defendant, by themselves or by their shareholders, directors, officers, employees, representatives and agents or by any company, partnership, trust, entity or person under their authority or control, or with which they are associated or affiliated (the “Related Parties”), from any and all use of Geneo, Geneo+, Oxygeneo, OxyGeneo, Pollogen, Pollogen Design trademarks, 3-in-1 super facial, Oxygeneo 3-in-1, OxyPod and Tripollar RF or any other word or mark confusingly similar thereto, as a trade name, trademark, domain name, social media account name, curriculum courses name, or otherwise in association with their business, goods or services;
- i) An order requiring the Defendant to recall and deliver up to the Plaintiff DermaSpark all documents, records, articles, products, packaging, displays, advertisements, signs, whether in electronic form or otherwise, and any and all other items in the possession, custody or control of the Defendant which offend in any way against any order which may be made herein;
- j) An order requiring the Defendant to inform any affected third parties, by way of prescribed form of letter, of the subject matter of this proceeding and any interim, interlocutory or final orders made herein;
- k) Damages for, and arising from, the Defendant’s misconduct, amounting to direct infringement, estimated to exceed \$50,000.00 as of the date of filing the Statement of Claim or an accounting of the profits illegally made by the Defendant as the Plaintiffs may elect after proper inquiry, for acts that are contrary to the TA;
- l) Damages for, and arising from, the Defendant’s misconduct, amounting to direct reproduction of Copyrighted Works, estimated at \$1,000.00 per copyrighted work as of the date of filing the Statement of Claim, for acts that are contrary to the *Copyright Act*;
- m) Punitive and exemplary damages;
- n) Pre-judgment and post-judgment interest on any award or damages, profits and costs calculated on a semi-annual, compounded basis;
- o) Costs of this action on a solicitor and client basis, or such basis deemed appropriate by this Honourable Court, plus QST and GST, including expert’s fees, on the highest allowable scale.

[10] The claims advanced in the Statement of Claim are supported by pleaded material allegations of fact largely consistent with the relief sought although they lack many of the particulars one would normally expect when trademark violations are alleged and injunctive relief is sought. As the evidence to support their trademark claims will be discussed below it suffices at this juncture to summarize the alleged facts at a very high level.

[11] The Plaintiffs plead that the Plaintiff Pollogen Ltd. (“Pollogen”) is a manufacturer of a full line of anti-aging facials and body contouring treatments that are popular and well known in Canada. These include the OxyGeneo cosmetic apparatus which uses OxyGeneo products.

[12] The Plaintiff DermaSpark Products Inc. (“DermaSpark”) is the exclusive authorized distributor of Pollogen’s products in Canada pursuant to an agreement between DermaSpark and Pollogen. The Plaintiffs allege that they are the sole and exclusive owners of the rights associated with Pollogen’s Trademarks.

[13] The Plaintiffs allege that the Defendant is the directing mind and operator of a sole proprietorship created pursuant to British Columbia law with a registered office in Maple Ridge, British Columbia. The Defendant is alleged to be a provider of esthetic services.

[14] The Plaintiffs allege that they discovered on or about December 14, 2023, that the Defendant had been violating the Plaintiffs’ exclusive rights to the Pollogen Trademarks since at least December 2, 2020. The offending conduct is alleged to consist of the Defendant’s offer to sell, to perform, and to advertise and promote her skincare treatments and related services

through an Instagram account, Facebook page, and dedicated website within which the skincare treatments are represented as being the Plaintiffs' OxyGeneo skincare treatments using the Plaintiffs' Goods and Services but with counterfeit OxyGeneo devices. By doing so, the Defendant is alleged to be conducting skincare treatments and offering skin care services while intentionally advertising and presenting the treatments and services as being offered and carried out with legitimate OxyGeneo devices and products. This, the Plaintiffs plead, constitutes the Defendant erroneously inducing consumers to believe that the goods she uses and the treatments she provides are those that are exclusively distributed by DermaSpark.

[15] The Plaintiffs allege that any transfer of any OxyGeneo device must be registered with Health Canada and is the subject of transfer fees because it is a class III medical device pursuant to the *Medical Devices Regulation*, SOR/98-282. They allege having no record of any of the Plaintiffs' Good and Services, including any OxyGeneo device, being supplied to the Defendant by DermaSpark.

[16] The Plaintiffs alleged that the full extent of the Defendant's infringing acts is unknown to them and will be the subject of the discovery process. Nothing in the materials filed on this motion or in the Court file suggest that any discovery has taken place at all.

[17] The Plaintiffs also allege that the Defendant has purposefully used Pollogen's Trademarks in a manner to create confusion as to the source of the goods offered by the Plaintiffs and by the Defendant.

[18] Turning to copyright issues, the Plaintiffs allege that the Defendant has violated Pollogen's copyright in 4 works that consist of advertising images depicting an individual receiving facial treatments and illustrations of nutrient absorption and related events. These 4 images (the "Images") were and are allegedly used by the Defendant through her advertising and marketing without authority and without Pollogen's consent. The Plaintiffs allege that all of the Defendant's acts are intentional and are in direct violation of their rights pursuant to the TA and the *Copyright Act*.

### III. **Issue**

[19] The only issues on this motion are: 1) whether the Plaintiffs have met the test for default judgment and have proven their claims on a balance of probabilities; and, if so, what relief they are entitled to receive.

### IV. **Analysis**

[20] As determined above, the Plaintiffs have properly served the Defendant, and the Defendant has failed to defend against the claims made against her within the time permitted by the *Rules*. The Plaintiffs may therefore proceed by default to seek judgment on their asserted claims as set out in their Statement of Claim.

[21] The Plaintiffs have filed affidavit evidence and documentary exhibits in support of their claims and motion.



[22] The Plaintiffs rely on the affidavit of Mr. Moshe Ben-Shlomo, a DermaSpark director. Mr. Ben-Shlomo produces 37 exhibits to his affidavit and his affidavit sets out the vast majority of the narrative affidavit evidence in support of the Plaintiffs' claims.

[23] The Plaintiffs also rely on the affidavit of Mr. Moshe Gurevitch, a Pollogen Vice President for International Sales and Professional Products. Mr. Gurevitch has not attached any exhibits to his affidavit. Mr. Gurevitch's affidavit is focused on the matter of Pollogen's authorized exclusive licensees throughout the world and that Pollogen has not sold any of its products to the Defendant within Canada, and that the Defendant has no right to use Pollogen's Trademarks or products for any purpose.

[24] Lastly, the Plaintiffs rely on the affidavit of Felix Breton, an employee of the Plaintiffs' solicitors. He deposes to the post-judgment interest rate applicable in British Columbia, as well as to the legal fees incurred by the Plaintiffs in this proceeding.

#### **A) Trademark Claims**

##### ***Claim 1: Declaratory Order of Ownership of the Common Law and Registered Trademarks***

[25] The Plaintiffs' action rests on the allegation that they both hold rights pursuant to the TA, and that those rights have been violated by the Defendant. Their first claim is for a declaration that they are the owners of Pollogen's Trademarks. These Pollogen Trademarks are alleged include Common Law Trademarks and Registered Trademarks.

[26] The alleged Common Law Trademarks are with respect to the following marks: “Geneo”, “Geneo+”, “Oxygeneo”, “OxyGeneo”, “Pollogen”, “Pollogen Design trademarks”, “3-in-1 super facial”, “Oxygeneo 3-in-1”, “OxyPod” and “Tripollar RF”. The alleged Registered Trademarks are with respect to the marks registered under the following registrations: a) TMA1032928 for “GENEO+”; b) TMA1032944 for “OXYGENEO”; c) TMA1041360 for “3-in-1 super facial”; d) TMA1032940 for “geneo+” design mark; and e) TMA1184661 for “OXYPOD”.

[27] The Plaintiffs have produced:

- a) a registered trademark under number TMA1032928 applicable to the word “GENEO+”, “GENEO +” and “PLUS” in connection with goods described as “Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment.” The registered mark was registered on June 27, 2019, and is in force for 10 years expiring on June 27, 2029. Pollogen claims that it used these marks in Canada prior to registration since as early as March 31, 2013. The registrant and owner described is the Plaintiff Pollogen Ltd.
- b) a registered trademark under number TMA1032944 applicable to the word “OXYGENEO” and “OXYGEN NEO” in connection with goods described as “Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment.” The registered mark was registered on June 27, 2019, and is in force for 10 years expiring on June 27, 2029. Pollogen claims that it used these marks in Canada prior to registration since as early as March 31, 2014. The registrant and owner described is the Plaintiff Pollogen Ltd.

c) a registered trademark under number TMA1041360 applicable to the word “3-IN-1 SUPER FACIAL” in connection with services described as “Facial skin treatment service for humans for cosmetic purposes; Esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment”. The registered mark was registered on July 15, 2019, and is in force for 10 years expiring on July 15, 2029. Pollogen claims that it used these marks in Canada prior to registration since as early as June 30, 2013. The registrant and owner described is the Plaintiff Pollogen Ltd.

d) a registered trademark under number TMA1032940 applicable to the design shown immediately below under the index heading “GENEO+ O”, “GENEO +” and “GENE O+”, with respect to goods described as a “Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment.



The registered mark was registered on June 27, 2019, and is in force for 10 years expiring on June 27, 2029. Pollogen claims that it used this design mark in Canada prior to registration since as early as March 31, 2013. The registrant and owner described is the Plaintiff Pollogen Ltd.


e) a registered trademark under number TMA1184661 applicable to the word “OXYPOD”, in standard characters, in connection with goods described as “non-medicated exfoliating preparations for skin in exfoliating capsule for aesthetic

facial and body skin treatment for use with cosmetic medical apparatus, none of the above for the prevention or treatment of acne.” The registered mark was registered on June 14, 2023, and is in force for 10 years expiring on June 14, 2023, with a priority filing date of August 6, 2019, in the USA. The registrant and owner described is the Plaintiff Pollogen Ltd.

[28] The Court is satisfied that Pollogen has established that it is the owner of the Registered Trademarks claimed, and that it enjoys the exclusive rights regarding the Registered Trademarks that are set out in the TA.

[29] The Court is also satisfied that the Pollogen is the owner of the common law rights in Canada associated with the following Common Law Trademarks from the following dates:

- a) with respect to GENEIO+, GENEIO + and PLUS, with respect to cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment. since March 31, 2013;
- b) with respect to OXYGENEO and OXYGEN NEO, with respect to goods limited to “Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment”, since March 31, 2014;
- c) with respect to 3-IN-1 SUPER FACIAL, in connection with facial skin treatment service for humans for cosmetic purposes; esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment, since June 30, 2013;

- d) with respect to the design , with respect to goods described as cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment, since March 31, 2013; and,
- e) with respect to the mark OXYPOD in connection with non-medicated exfoliating preparations for skin in exfoliating capsule for aesthetic facial and body skin treatment for use with cosmetic medical apparatus, none of the above for the prevention or treatment of acne, since August 6, 2019.

[30] The Plaintiffs have not led evidence to establish that they have any Common Law Trademarks or Registered Trademarks with respect to the following alleged marks:

- a) “Geneo”
- b) “OxyGeneo”
- c) “Pollogen”
- d) “Oxygeneo 3-in-1”; and,
- e) “Tripollar RF”.

[31] Considering the foregoing and that these findings will be binding upon the parties to this action, there is no apparent reason for the Court to make any declaratory order with respect to Pollogen’s interest in its Common Law Trademarks and its Registered Trademarks. A declaratory order is neither necessary nor of any practical utility (*Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2020 FCA 100, at paras 105 and 106).

***Claim 2: Declaratory Order that Pollogen and its permitted licensees have the exclusive right to use the Pollogen Trademarks in connection with specific good and services***

[32] The Plaintiffs seek a declaratory order that Pollogen, and its permitted licensees, have the exclusive right to use Pollogen's Trademarks (consisting of its Common Law Trademarks and its Registered Trademarks), or any confusingly similar variant thereof, throughout Canada for use in association with the following goods and services:

- i. Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment;
- ii. Facial skin treatment service for humans for cosmetic purposes;
- iii. Esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment;
- iv. Cosmetic creams, face and body creams;
- v. Cosmetic gels, face and body gels;
- vi. Anti-aging facials and body contouring treatments; and,
- vii. Training and educational services with cosmetic apparatus.

[33] Pollogen has not identified who its permitted licensees may be with respect to any of these goods and services, nor the substance or text of any licencing agreement it may have entered into with any unidentified licensee.

[34] While Pollogen has produced Registered Trademarks that reflect that “Geneo”, “Geneo+”, “Oxygeneo” and “Oxygen Neo” are associated with the good or service described in subparagraph i) immediately above (“Cosmetic apparatus using micro-vibration, radio frequency, ultrasound for aesthetic facial and body skin treatment), and that “3-in-1 Super Facial” is associated with the goods or service described in subparagraphs ii) and iii) above (“Facial skin treatment service for humans for cosmetic purposes”, and “Esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment”) it has either not pleaded or not led evidence with respect to any of Pollogen’s Trademarks being associated with the goods and services described in subparagraphs iv), v), vi) and vii) immediately above.

[35] DermaSpark has produced a copy of its distribution agreement with Pollogen dated November 7, 2017. Its November 2017 distribution agreement was expanded by way of a specific January 17, 2021, “Authorization to Enforce Intellectual Property Rights” is also produced. The document reflects that it is a certification that DermaSpark is Pollogen’s exclusive distributor for certain Pollogen products in Canada and that DermaSpark has the exclusive right to use “TRIPOLLAR INTELLIGENT BIOLOGY + logo”, “TRIPOLLAR INTELLIGENT BIOLOGY (wordmark)”, “3-IN-1 SUPER FACIAL”, “NEOBRIGHT”, “TRIPOLLAR+logo”, “NEOREVIVE”, “GENEO+”, “OXYGENEO”, “OXYPOD (pending)”, and “POLLOGEN” in Canada. The January 17, 2021, authorization also authorizes and requires DermaSpark to defend, enforce and protect specifically identified marks and copyrights for the term of March 11, 2012, to December 2022. The produced authorization is not a document that purports to amend the November 2017 distribution agreement between Pollogen and DermaSpark.

[36] On January 23, 2023, Pollogen granted DermaSpark with an “Authorization for the use of registered designs and Power of Attorney” (the “Authorization and POA”). The Authorisation and POA provides DermaSpark with the power of attorney and legal authority for the purposes of representing Pollogen with regard to the enforcement of any of Pollogen’s intellectual property rights, including the Pollogen Trademarks described above, and to complete any steps and take any action DermaSpark deems necessary to enforce the Pollogen Trademarks against third parties.

[37] The first paragraph of the Authorization and POA stipulates that:

“[...] Dermaspark Products Inc. (hereinafter Dermaspark), with its registered office at 628 East Kent Ave S Unit 155, Vancouver, BC V5X 0B2, is an authorized agent and distributor of Pollogen, and is the sole and exclusive licensee, within Canada, of the following intellectual property rights owned by Pollogen (herein collectively referred to as “Pollogen Trademarks”):

Common Law Trademarks

1. Geneo
2. Geneo +
3. OxyGeneo
4. Pollogen
5. 3-in-1 super facial
6. Oxygeneo3-in 1
7. NeoRevive
8. NeoBright
9. Tripollar RF

Registered Trademarks (Canada)

1. TMA 1032928
2. TMA1032944
3. TMA1041360
4. TMA1037225
5. TMA1035066



[38] The language used in the Authorization and POA reflects that DermaSpark is the sole and exclusive licensee of Pollogen's Trademarks in Canada. This is confirmed by Mr. Gurevitch's affidavit evidence. This "sole and exclusive licensee" would preclude the finding of any other "permitted licensees" as identified baldly in the pleading. Although evidence was led on this motion that Pollogen has other exclusive licensees in geographic areas other than Canada, no licence agreement that would shed light of the terms of their licences were produced.

[39] The evidence tendered on this motion establishes that Pollogen's sole and exclusive licensee within Canada is DermaSpark and that DermaSpark may enforce Pollogen's intellectual property rights in Canada. There is nothing in the distribution agreement or in the Authorization and POA produced on this motion that suggests that DermaSpark is authorized to use any of Pollogen's Trademarks in connection with any of the goods or services identified in paragraph 1b) of the Statement of Claim, or in subparagraphs i) to vii), above.

[40] The Plaintiffs have not established the relief they seek in paragraph 1b) of the Statement of Claim. The Plaintiffs motion will be dismissed with respect to their paragraph 1b) claim.

***Claim 3: A Declaration that the Defendant has infringed Pollogen's Trademarks contrary to sections 19 and 20 of the TA.***

[41] Section 19 of the TA provides that, subject to sections 21, 31 and 67 of the TA, the registration of a trademark in respect of any goods or services, unless shown to be invalid, gives to the owner of the trademark the exclusive right to the use throughout Canada of the trademark in respect of those goods or services.

[42] Paragraph 20(a) of the TA provides that the right of the owner of a registered trademark to its exclusive use is deemed to be infringed by any person who is not entitled to its use it, and who sells, distributes or advertises any goods or services in association with a confusing trademark or trade name.

[43] Subsection 6(1) of the TA prescribes that for the purposes of the TA, 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 section 6 of the TA. Subsection 6(2) of the TA prescribes 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. Subsection 6(3) of the TA prescribes that use of a trademark causes confusion with a trade name if the use of both the trademark and trade name in the same area would be likely to lead to the inference that the goods or services associated with the trademark and those associated with the business carried on under the trade name 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. Subsection 6(4) of the TA prescribes that confusion between two trademarks, and confusion between a trademark and a trade name, if the use of both in the same area would be likely to lead to the inference that the goods or services associated with the business carried on under the trademark, or the trade name as the case may be, and those associated with the trademark 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;

[44] Subsection 6(5) of the TMA prescribes that, in determining whether trademarks or trade names are confusing, the court shall have regard to all the surrounding circumstances including:

- a) the inherent distinctiveness of the trademarks or trade names and the extent to which they have become known;
- b) the length of time the trademarks or trade names have been in use;
- c) the nature of the goods, services or business;
- d) the nature of the trade; and
- e) the degree of resemblance between the trademarks or trade names, including in appearance or sound or in the ideas suggested by them.

[45] The purpose of trademarks is to function as a symbol of the source and quality of wares and services, to distinguish those of the merchant from those of another, and thereby to prevent “confusion” in the marketplace (*Mattel, Inc. v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22, at para 2).

[46] The test to be applied in assessing the factors identified above, on a balance of probabilities, is one of first impression in the mind of a casual consumer somewhat in a hurry who has no more than an imperfect recollection of the prior trademark and who does not stop to consider the differences and similarities between the marks or names in issue (*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23 [Veuve] at para 20 (*Veuve*). This test must be applied in a context specific manner (*Veuve* at para 21).

[47] As will become clear from the analysis below with respect to Pollogen's Registered Trademarks, and considering paragraph 6(5)(e) of the TA and the evidence led by the Plaintiffs, the Court is satisfied that the Plaintiffs have established on the balance of probabilities that the Defendant's use of the marks "Oxygeneo+", "Oxygenium", "3-in-1 Superior Facial Treatment", and "5-in-1 Superior Facial" in its advertising of its goods and services is unequivocally similar to Pollogen's Trademark to a very high degree due to the nearly identical words used, their sound, the idea suggested by each which, despite the change of a letter or number or the addition of the letters "ior" to "Super", gives rise to an immediate and high likelihood of confusion with the casual consumer who is somewhat in a hurry.

[48] Considering paragraphs 6(5)(c) and (d) of the TA and the evidence led by the Plaintiffs, the Court is satisfied that the Plaintiffs have established on the balance of probabilities that the Defendant operates and uses the Pollogen Trademarks in the same business or trade as the Plaintiff. Finally, considering paragraphs 6(5)(a) and 6(5)(b) of the TA and the evidence led by the Plaintiffs, the Court is satisfied that the Plaintiffs have established that the Pollogen Trademarks are inherently distinctive through their use in Canada since 2019 at the latest.

[49] I conclude that the Defendant's use of its marks "Oxygeneo+", "Oxygenium", "3-in-1 Superior Facial Treatment", and "5-in-1 Superior Facial" causes confusion in the market in British Columbia within the meaning of sections 6, 7(b), 7(c), 19 and 20 of the TA.

[50] The Plaintiffs plead that the Defendant has infringed Pollogen's Trademarks by her advertising and sale of counterfeit OxyGeneo skin treatment services while intentionally advertising and presenting those services to erroneously lead consumers to believe the goods she uses and services she offers are those manufactured by Pollogen and exclusively distributed by DermaSpark in Canada. The evidence led by the Plaintiffs in this regard consists in large part of screenshots taken of a website found at "www.dreamlook.ca", a Facebook page, and an Instagram page on December 14, 2023, January 15, 2024, and January 17, 2024.

[51] The Plaintiffs argue that the "www.dreamlook.ca" website is the Defendant's website but leave it to the Court to infer from the evidence led that "www.dreamlook.ca" is the Defendant's website. The Plaintiffs produced business profile information regarding the Defendant that is a collection of data field information collected from various public registry sources. The business profile information is similar to information ordinarily found in corporate registration databases maintained by provincial governments and by the federal government. The business profile information reflects that the Defendant is a sole proprietorship registered pursuant to the laws of British Columbia operating under the trade name "Dreamlook Beauty" with a mailing address and registered office address located in Maple Ridge, British Columbia. The sole proprietorship registrant appears to be named personal Defendant, Ms. Ipince.

[52] I have reviewed and considered the exhibits attached to Mr. Ben-Shlomo's affidavit that are stated to be a screenshot of the "www.dreamlook.ca" website. Considering that the Defendant's registered trade name is "Dreamlook Beauty", that the splash page on the website exhibits the name "Dreamlook Beauty", and that the domain name used for the website contains the operative key term "dreamlook" that is common to the Defendant's registered trade name, the website splash page header, and the domain name for the website at issue, the Court infers that it is more likely than not that the www.dreamlook.ca website is a website used by the Defendant in the course of her sole proprietorship and trade (the "Website").

[53] Exhibit MB-6 reflects that the words "OxyGeneO+ Treatment" is advised under the "skin" pull down menu on the Website. "OxyGeneO+" is not a Pollogen Trademark.

[54] Exhibit MB-7 reflects that the Website uses the words "OXYGENEO FACIAL", and "3-in-1 Super Facial Treatment". Much as is the case for "OxyGeneO+", while "Oxygeneo" is a registered mark, "OXYGENEO FACIAL" is not a Pollogen Trademark. "3-in-1 Super Facial" associated with a treatment is a Pollogen Trademark. The use of the word "3-in-1 Super Facial" in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen's rights pursuant to the TA.

[55] Exhibit MB-8 is another screenshot from the Website that contains an image of a person undergoing a skin treatment. Mr. Ben-Shlomo's affidavit evidence is that the image shows someone performing the Oxygeneo facial on a customer, but the image does not suggest, nor does Mr. Ben-Shlomo's evidence, which treatment is actually being administered in the image. I

find that Mr. Ben-Shlomo's evidence on this point is based on conjecture that is not borne out by the image produced and I give it no weight.

[56] Mr. Ben-Shlomo deposes that Exhibit MB-9 depicts a screenshot of Website with the same pictures from Exhibit MB-8 but also includes text summarizing what the Oxygeneo 3-in-1 facial is. No evidence is led by the Plaintiffs to describe "the Oxygeneo 3-in-1 facial" independently of any wording found on the Defendant's Website, or how it has been described by the Plaintiffs in any copyrighted work or trademark registration. In the absence of evidence as to what precisely the Plaintiffs' Oxygeneo 3-in-1 facial consists of or is described by the Plaintiffs, I must find that Mr. Ben-Shlomo's affidavit evidence with respect to Exhibit MB-9 is incomplete and unpersuasive as to what the Oxygeneo 3-in-1 facial consists of. The use of the word "Oxygeneo" in connection with facial treatments as depicted in the Exhibit nevertheless reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen's rights pursuant to the TA.

[57] Mr. Ben-Shlomo deposes that Exhibit MB-10 depicts a screenshot of the Website with images showing how the Oxygeneo facial works. No evidence is led by the Plaintiffs independently of any wording found on the Defendant's Website that describes "how the Oxygeneo facial works" or how it has been described by the Plaintiffs in any copyrighted work or trademark that is infringed by the Defendant's conduct as reflected on Exhibit MB-10. In the absence of evidence as to what precisely how Plaintiffs' Oxygeneo 3-in-1 works or is described by the Plaintiffs, I must find that Mr. Ben-Shlomo's affidavit evidence with respect to Exhibit MB-10 is incomplete and unpersuasive.

[58] Mr. Ben-Shlomo deposes that Exhibit MB-11 depicts a website screenshot with images and text showing how the 5-in-1 Superior Facial Treatment works. No evidence is led by the Plaintiffs that describes “how the 5-in-1 Superior Facial Treatment works”. The Plaintiffs’ evidence also does not suggest that the “5-in-1 Superior Facial Treatment” is a trademark under their control. That said, the Website content reflects that the “5-in-1 Superior Treatment” is referred to as “Oxygeneo” treatment. The use of the word “Oxygeneo” in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen’s rights pursuant to the TA.

[59] Exhibit MB-12 and Mr. Ben-Shlomo’s evidence in its regard suffers from the same deficiencies, despite that it does establish that the word “Oxygeneo” is used on the Defendant’s website with respect to a facial treatment and the price offered for it. The use of the word “Oxygeneo” in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen’s rights pursuant to the TA.

[60] Mr. Ben-Shlomo’s deposes in his affidavit that Exhibits MB-13 to MB-21 depict the Defendant’s Facebook page as it appeared on December 14, 2023. As with the Plaintiffs’ allegations regarding the Website, the Plaintiffs leave it to the Court to infer from the evidence led and the circumstances that the Facebook pages exhibited are more likely than not the Defendant’s Facebook pages. Considering that the Defendant’s corporate profile information reflects that the Defendant is located in Maple Ridge, British Columbia, and uses the trade name “Dreamlook Beauty”, and that the Website is referred to and hyperlinked in the Facebook pages,



the Court can infer that the Facebook page “Dream Look is in Maple Ridge” is the Defendant’s Facebook page (the “Facebook”).

[61] Mr. Ben-Shlomo deposes that Exhibit MB-13 depicts a screenshot of the Facebook page advertising the Oxygeneo and TriPollar RF treatments. It is apparent that the word “Oxygeneo” is used on the Facebook page in connection with “specialized skincare treatments” without the Plaintiffs’ permission. The Plaintiffs have not established that “TriPollar RF” is one of their marks, either registered or otherwise. The use of the word “Oxygeneo” in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen’s rights pursuant to the TA.

[62] Mr. Ben-Shlomo deposes that Exhibit MB-14 depicts a screenshot of a Facebook page advertising for the “5-in-1 Oxygeneo Super Facial treatment”. The exhibit does not use the “super facial” wording as deposed to by Mr. Ben-Shlomo. Rather, the exhibit uses the words “5-in-1 Oxygeneo Superior Facial”. Neither “5-in-1” nor “Superior Facial” are demonstrated by the Plaintiffs as being marks to which they a registered trademark right pursuant to the TA. The use of the word “Oxygeneo” in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen’s rights pursuant to the TA.

[63] In apparent repetition of the content of Exhibit MB-13, Exhibits MB-15, MB-17, MB-19, MB-21 depicts a screenshot of the Facebook page that includes a footer that uses the words Oxygeneo and TriPollar RF. It is apparent that the word “Oxygeneo” is used on these Facebook

pages in connection with “specialized skincare treatments” without the Plaintiffs’ permission.

The Plaintiffs have not established that “TriPollar RF” is one of their marks, either registered or otherwise. The use of the word “Oxygeneo” in connection with facial treatments as depicted in the Exhibit reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen’s rights pursuant to the TA.

[64] Mr. Ben-Shlomo deposes that Exhibit MB-16 depicts a screenshot of the Defendant’s Facebook page advertising for the Oxygeneo and TriPollar RF treatments. The exhibit does not depict any such advertising. It does, however, use the “#Oxygeneo” hashtag as a link on the Facebook page to allow the Facebook users to easily find and engage with content relating to the hashtag and, more precisely, to Oxygeneo. I do not consider the use of a hashtag with “Oxygeneo” in this context to be a violation of the Pollogen’s Trademarks as it directs a Facebook reader to the Oxygeneo content available on the internet. To some degree best appreciated after full argument by parties adverse in interest, the use of a hashtag as a link on a Facebook page constitutes marketing to the Plaintiffs’ benefit.

[65] Mr. Ben-Shlomo deposes that Exhibit MB-18 depicts a screenshot of the Facebook page advertising for the 5-in-1 Oxygeneo Super Facial treatment. The exhibit does not depict any such advertising, although it does advertise a “5-in-1 Superior Facial” that is not one of the Plaintiffs’ trademarks and offers a coupon code “20OFFOXY”. Considered in its context and the use of the diminutive “OXY”, I consider that the coupon code suggests to the reader that the treatment on offer is an Oxygeneo treatment.

[66] Mr. Ben-Shlomo deposes that Exhibit MB-20 depicts a screenshot of the Facebook page advertising for the “3-in-1 Oxygeneo Super Facial treatment”. This exhibit establishes the Defendant’s use of the “Oxygeneo” and “3-in-1 super facial” without the Plaintiffs’ consent. The use of the word “Oxygeneo” and “3-in-1 super facial” in connection with facial treatments as depicted in the Exhibit reflects the use of Pollogen Trademarks without authorization and in violation of Pollogen’s rights pursuant to the TA.

[67] Exhibit MB-22 to Mr. Ben-Shlomo’s affidavit repeats the content of Exhibit MB-9, and his narrative evidence with respect to Exhibit MB-22 is the same as for Exhibit MB-9 and suffers from the same limitations. The difference between the two exhibits is the image capture date and that the Website refers to the super facial as “Oxygenium” rather than “Oxygeneo+” as it had in Exhibit MB-9.

[68] Mr. Ben-Shlomo deposes that Exhibit MB-23 is a screenshot of the Website advertising the Tripollar RF & Ultrasound Facial, the 5-in-1 Superior Facial, and the 3-in-1 Oxygeneo Super Facial. The screenshot depicts the Defendant’s use of “Oxygeneo” without authorisation, as well as her use of the “3-in-1 super facial” in combination without the Plaintiffs’ consent. The Exhibit reflects the use of Pollogen Trademarks without authorization and in violation of Pollogen’s rights pursuant to the TA.

[69] Mr. Ben-Shlomo deposes that Exhibit MB-24 depicts a screenshot of the Website advertising an “Oxygenium & Tripolar RF” treatment. Neither of these marks have been

established on this motion as being Pollogen's Trademarks despite their very high degree of similarity to the words used in Pollogen's Trademarks.

[70] Mr. Ben-Shlomo deposes that Exhibit MB-25 is a screenshot of the Website with pictures advertising for the 3-in-1 Super Facial treatment. The Defendant's use of the Plaintiffs' "3-in-1 super facial" trademark is made without the Plaintiffs' consent and reflects the use of a Pollogen Trademark without authorization and in violation of Pollogen's rights pursuant to the TA.

[71] Mr. Ben-Shlomo deposes that Exhibit MB-26 is a screenshot of the Website with pictures showing how the 5-in-1 Superior Facial Treatment works as well as three pictures that are copyrighted and owned by Pollogen. Exhibit MB-26 is the first exhibit led to substantiate a violation of the Plaintiffs' copyright in any images. The copyright issues raised will be dealt with below. Except for the date of the screenshot, Exhibit MB-26 is identical to Exhibit MB-10; it will be considered in the same manner as Exhibit MB-10.

[72] Except for the date of the screenshot, Exhibit MB-27 is substantively identical to Exhibit MB-1 and is considered in the same manner as Exhibit MB-10.

[73] Mr. Ben-Shlomo deposes that Exhibit MB-28 depicts multiple images of the Defendant's Instagram page advertising for the Oxygenium, Oxygeneo and Tri-Polar RF treatments. As was the case with the Website and Facebook pages, the Plaintiffs leave it to the Court to infer that the exhibited Instagram page screenshot is the Defendant's Instagram page. Considering that the Instagram page contains the same language and features that permitted the Court to infer that the

Website at issue and the Facebook were the Defendant's website and Facebook page, the Court infers from the evidence that the Instagram is the Defendant's Instagram (the "Instagram").

[74] Exhibit MB-28 reflects that the Defendant has used the Oxygeneo trademark without the Plaintiffs' consent. I cannot find the same with respect to the alleged "Tri-Polar RF" trademark violation as the Plaintiffs have not established that "Tripollar RF" is a trademark, or that it is under their control. At best, the Plaintiffs have established that Pollogen believes that it is in light of the power of attorney document produced. Pollogen's representation in the power of attorney document does not establish any common law trademark in Canada for "Tripollar RF". I cannot find that the Defendant has violated any alleged trademark with respect to "Tripollar RF".

[75] In light of the evidence led by the Plaintiffs as discussed above, I find that the Plaintiffs have established that the Defendant has used Pollogen's "Oxygeneo" and "3-in-1 Super Facial" trademarks without the Plaintiffs' consent and in violation of Pollogen's rights pursuant to the TA. The Defendant has therefore clearly infringed Pollogen's Trademarks "Oxygeneo" and "3-in-1 Super Facial" and is deemed to have done so pursuant to section 20 of the TA.

[76] The Court appreciates that the Plaintiffs argue in their written representations that they have established that the Defendant is using counterfeit OxyGeneo devices and counterfeit Pollogen products to conduct skincare treatments. While it may be attractive to infer this result as the Plaintiffs have based on their absence of records of any distribution of any Pollogen products to the Defendant, I cannot come to the same conclusion.

[77] The Plaintiffs have led evidence of advertising of skincare treatments in violation of their trademark rights pursuant to the TA. They have not led evidence of what the Defendant has actually used in the conduct of the treatments advertised. The Court is not disposed to make the inference the Plaintiffs suggest in their written representations in order to alleviate the impacts of a want of evidence.

***Claims 4 and 5: A declaratory Order that the Defendant directed public attention to their business, goods and services in such a way so as to cause confusion in Canada between their business, goods and services and those of the Plaintiffs, and has passed off her goods and services as the Plaintiffs' goods and services contrary to paragraphs 7(b) and (c) of the TA.***

[78] Paragraph 7(b) of the TA is the statutory codification of the tort of passing off. It prohibits a person from directing and/or continuing to direct public attention to their goods, services, or business in such a way as to cause or be likely to cause confusion in Canada.

[79] Pursuant to *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd.*, 2016 FCA 69 at paras 20-21 (*Sadhu Singh*), a claim under s. 7(b) is made out if a plaintiff can establish three elements: first, that it possesses goodwill in the trademark; second, that the defendant deceived the public by misrepresentation; and, third, that the plaintiff suffered actual or potential damage through the defendant's actions (*Kirkbi AG v. Ritvik Holdings Inc.*, 2005 SCC 65, [2005] 3 S.C.R. 302 at paragraph 66 (*Kikby*); *Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 at 132, 1992 CanLII 33 (S.C.C.)).

[80] The use of a trademark in Canada is not a necessary pre-condition for the existence of goodwill in Canadian law. Rather, the requisite goodwill within a defendant's market may be

shown to exist by virtue of the reputation of the plaintiff's trademark in the defendant's market, even where the plaintiff does not use the trade-mark in that market (*Sadhu Singh*, at para 25; *Orkin Exterminating Co. Inc. v. Pestco Co. of Canada Ltd. et al.*, 1985 CanLII 157 (ON CA), [1985] O.J. No. 2536, 1985 CarswellOnt 144; *Enterprise Rent-A-Car Co. v. Singer*, [1996] 2 F.C.R. 694, 1996 CarswellNat 2506 at paragraph 52 aff'd 1998 CanLII 7405 (F.C.A.). If the plaintiff establishes that its trade name has a reputation within the jurisdiction such that the public associates it with goods or services provided by the plaintiff, then the defendant's use of it means that the plaintiff has lost control over the impact of its trade name in the defendant's jurisdiction (*Sadhu Singh*, at para 26).

[81] Mr. Ben-Shlomo adduces a number of distributor awards in support of the Plaintiffs' allegation that they have goodwill associated to their trademarks in Canada. The number of awards led into evidence do not speak to Pollogen's trademarks or to its or their reputation in Canada. Rather, they speak to DermaSparks' efforts and successes as a distributor. DermaSpark's success as a distributor of Pollogen's products does not establish any goodwill associated with Pollogen's trademarks in Canada, nor does it reflect any loss of Pollogen's control over its trademarks in Canada.

[82] The Plaintiffs also lead a number of links to advertisements and marketing efforts by DermaSpark in Canada. Many of the links included in the affidavit material do not link to the identified webpage or other electronic media. I do not consider online training videos as referred in the materials to be indicative of goods of service goodwill. Of the links that do lead to the electronic evidence, the Court notes that the material produced consists of advertisements,

promotion, and what appears to be online influencer recommendations which are no different than advertising through social media platforms (*Loblaws Inc. v. Columbia Insurance Company*, 2019 FC 961, at para 104: aff'd 2021 FCA 29. There are a few online reviews of the Oxygeneo facial treatment, but these “reviews” are made in the context of online influencer postings and must, in my view, be considered as advertisement and marketing rather than an indication of created goodwill associated with Pollogen’s Trademarks.

[83] The remaining affidavit evidence led by the Plaintiff consists of vague hearsay evidence contained at paragraphs 32, 35 of Mr. Ben-Shlomo’s affidavit on the one hand, and evidence pertaining to the alleged use of counterfeit devices on the other. Neither substantiate goodwill associated with Pollogen’s Trademarks.

[84] I must conclude that that the Plaintiffs have not led evidence of goodwill in respect of Pollogen’s Trademarks or the goods or services they are associate with them within the Canadian market that is necessary to satisfy the first element to be successful in connection with its claim of passing off within the meaning of paragraph 7(b) of the TA despite their evidence of marketing and promotion (*Kirkbi*, at paras 62, 66 and 67). I come to the same conclusion with respect to the claim under paragraph 7(c) of the TA for the same reasons.

[85] The Defendant’s claims 3 and 4 shall therefore be dismissed.

***Claim 6: A declaration pursuant to section 22 TA, that the Defendant has damaged the Plaintiffs’ goodwill and reputation attaching to the Plaintiff Pollogen’s Trademarks, and to the Plaintiffs’ business and have caused damages to the Plaintiffs through foregone sales, lost profits and reduced market share by misappropriating sales the Plaintiffs would have otherwise made***



[86] A claim pursuant to section 22 TA has four elements. First, it must be shown that a registered trademark was used by a defendant in connection with goods or services -- whether or not such goods or services are competitive. Second, it must be shown that the registered trademark is sufficiently well known to have significant goodwill attached to it. Third, it must be shown that the trademark was used in a manner likely to have an effect on that goodwill (there must be a connection or “linkage”), and fourth it must be shown that the likely effect would be to depreciate the value of its goodwill (i.e. damage): *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltee*, 2006 SCC 23 at para 46, BOA Tab 12.

[87] The Plaintiffs have led sufficient evidence to meet the requirements of the first element of the applicable test for a section 22 TA claim. They have failed to meet the requirements of the other three elements.

[88] The evidence led by the Plaintiffs with respect to the goodwill of their trademarks is limited to the evidence referred to above with respect to their claims pursuant to paragraph 7(b) of the TA. The Plaintiffs have not led any additional or different evidence with respect to goodwill in Canada to establish their section 22 TA claim and have not led evidence that suggests that the Defendant’s use of Pollogen Trademarks will have an effect on the trademarks’ goodwill or is likely to depreciate the value of that goodwill.

[89] The Plaintiffs’ section 22 TA claim must be dismissed for the same reasons as their paragraph 7(b) and (c) TA claim must be dismissed, specifically, that there is an absence of evidence of goodwill associated with Pollogen’s Trademarks in Canada.

***Claims 8 and 9: Injunctive Relief against the Defendant regarding her use of the Plaintiffs' Trademarks, and an order for the delivery up of electronic material***

[90] Section 53.2 of the TA provides the Court with the jurisdiction, if it is satisfied that any act has been made contrary to the TA, to make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits, for punitive damages and for the destruction or other disposition of any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material.

[91] The Plaintiffs seek a very broad injunction against the Defendant in connection with the use of Pollogen's Trademarks. As found above, the Plaintiffs have established that the trademarks "Oxygeneo" and "3-in-1 super facial" have been used on the Website, the Facebook page and Instagram page without the Plaintiffs' consent or authorization, and that the Defendant's use of the marks "Oxygeneo+", "Oxygenium", "3-in-1 Superior Facial" and "5-in-1 Superior Facial" cause confusion in the market.

[92] Nevertheless, they have led no evidence as to the Defendant's actual involvement in, design of, or determination of the content or images contained or appearing in her website, Facebook page and Instagram pages. The evidence they did lead is not sufficient for the Court to infer that the Defendant was actually involved in the design of, or determination of the content or images contained or appearing in her website, Facebook page and Instagram pages.

[93] The Plaintiffs will therefore be granted an injunction to ensure that their trademarks and the Defendant's confusing marks are not used on the Website, Facebook page and Instagram pages, but the scope of the injunction granted will be narrower than that which they had sought.

***Claim 10: An order requiring the Defendant to inform any affected third parties, by way of prescribed form of letter, of the subject matter of this proceeding and any interim, interlocutory or final orders made herein.***

[94] The Plaintiffs had led no evidence of any third parties affected by this proceeding. They also have advanced no argument to support their claim for an order requiring the Defendant to inform any affected third parties, by way of prescribed form of letter, of the subject matter of this proceeding and any interim, interlocutory or final orders made within it.

[95] These reasons, Order and Judgment will be published as a final order and will be available to be public as a result. No evidence or argument was advanced to suggest that additional targeted dissemination of these reasons, Order and Judgment is necessary.

[96] The Plaintiffs' claim 10 is rejected.

***Claim 11: Damages for, and arising from, the Defendant's infringement of the Plaintiffs' Trademarks***

[97] The Plaintiffs have not led any evidence with respect to actual monetary damages, or, for that matter, any actually suffered damage at all, connected to the Defendant's use of Pollogen's Trademarks.

[98] The absence of evidence of actual damages or of goodwill is not fatal to a claim for damages based on the violation of Pollogen's exclusive trademark rights. The jurisprudence has presumed damages upon proof of passing off. Even then, the Court may award damages for loss of goodwill without proof of actual damage in a case of infringement without an allegation of passing off (*Teavana Corporation v. Teayama Inc*, 2014 FC 372, at para 39 (*Teavana*); *Toys "R" Us (Canada) Ltd. v. Herbs "R" Us Wellness Society*, 2020 FC 682, at 67).

[99] Madam Justice Bédard's (then of this Court) comments in *Teavana* at para 41 are apposite:

[41] The Court notes that, in the present case, there is no proof of damages and that there is no evidence with respect to the plaintiff's sales and profits. However, the Court also recognizes that the defendant has not participated in the present proceeding and that it leaves the plaintiff in a position where it cannot adequately assess the extent of its damages. The assessment of the true damages encountered by the plaintiff will therefore remain speculative. Furthermore, there is no evidence of loss of goodwill. Having said that, the Court clearly noted in *Oakley* that damages can nonetheless be awarded. Considering that there was no evidence of damages or loss of goodwill, and as noted in *Oakley* the Court can simply fix an amount for compensatory damages as reflecting the infringement of the plaintiff's legal rights without any need for proof of the actual quantum of damages. I find that, in the present case, it is reasonable to award an amount for damages equivalent to \$10 000.

[100] In the circumstances, and on the evidence and the facts of this action, I find it reasonable to award the Plaintiffs the amount of \$ 10,000 for the violation of its trademark rights and the confusion caused by the Defendant.

## **B) Copyright Claims**

***Claim 7: A Declaratory Order than Pollogen is the owner of Copyrighted Works.***

[101] The Plaintiffs claim that the works it described as Images 1, 2, 3 and 4 in its Statement of Claim were authored by a Pollogen employee and that the copyright in those Images is owned by Pollogen. The evidence led on this motion is limited to a verbatim recitation of the exact words used in the Statement of Claim with respect to the copyright claims advanced.

[102] The baldness of the allegations of copyright ownership made in the Statement of Claim and their verbatim recitation in the affidavit evidence filed do not establish the Plaintiffs' claims. There is no evidence as to when the Images were created. There is no produced registration of copyright, no evidence of the date of first publication of the Images, and no evidence of any publication of the Images by either of the Plaintiffs at any time. More significantly, there is no evidence of the Images predating the Website, Facebook page and Instagram page screenshot dates.

[103] In these circumstances and given the absence of any evidence other than bald and insufficiently precise evidence regarding the Images, I must dismiss the Plaintiffs' claims of copyright ownership and copyright violation by the Defendant.

***Claim 13: Damages for Copyright Infringement***

[104] There is no basis for an award of damages for copyright infringement because the Plaintiffs have not proven their rights in the Images or how those rights were infringed.

[105] This claim will also be dismissed.

**C) Other Claims**

***Claim 13: Punitive and Exemplary Damages***

[106] The Plaintiffs have claimed punitive and exemplary damages in the prayer for relief of their Statement of Claim but have not otherwise alleged any conduct by the Defendant that would support the claim advanced for either punitive or exemplary damages.

[107] The Plaintiffs argue in their written representations that the Defendant has engaged in “reprehensible and high-handed conduct”, but no allegation of material fact was ever made in this regard in their pleading. No evidence of such reprehensible or high-handed conduct has been filed either.

[108] The Plaintiffs ask the Court to consider the factors set out in *Whitten v. Pilot Insurance*, 2002 SCC 18, at para 36, and to award punitive damages. The Plaintiffs then argue that the Defendant had knowledge of various facts, looked for and obtained a counterfeit device, concealed their actions and, as a result, were acting intentionally throughout. There is no evidence led to support these arguments.

[109] There is no basis to make any punitive or exemplary damage award in this case. The claim for punitive and exemplary damages against the Defendant is dismissed.

***Claim 14: Pre-judgment and post-judgment interest calculated on a semi-annual, compound basis.***

[110] The Plaintiffs has led the affidavit of Felix Breton in support of their claim for pre and post judgment interest calculated on a semi-annual, compound basis. Mr. Breton produced a copy of the Court of British Columbia webpage titled “Court Order Interest Rates” from 1991 to the present Interest in support of his evidence that the post-judgment interest rate applicable here is 6.95%.

[111] Section 36(1) of the *Federal Courts Act*, RSC 1985, c F-7, provides that the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court in respect of any cause of action arising in that province. Section 37(1) is worded in similarly and makes the laws relating to interest on judgments in causes of action between subject and subject that are in force in a province apply to judgments of the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

[112] The causes of action at issue in this proceeding arose in British Columbia. Applying subsection 36(1) of the *Federal Courts Act* requires the Court to consider and apply the *Court Order Interest Act*, RSBC 1996, c 79. Subsection 1(1) of the *Court Order Interest Act* provides that “Subject to section 2, a court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order.” This

Judgment constitutes a “pecuniary judgment” in the sense that money is awarded as damages and is to be paid to the Plaintiffs. Section 2 of the *Court Order Interest Act* does not apply here.

[113] The Plaintiff has led no particular evidence as to when its cause of action arose in British Columbia or than that DermaSpark learned on or around December 14, 2023, that the Defendant “had been violating the Plaintiffs’ exclusive rights to Pollagen’s Trademarks”. Subject to any statutory language which may qualify the matter otherwise, the general rule applicable to determining when a cause of action may be said to have arisen remains the Supreme Court of Canada’s formulation of the rule in *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, at para 77, that a cause of action arises when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

[114] I find that in case, the Plaintiffs’ cause of action for the damages awarded, trademark infringement, arose on December 14, 2023, pursuant to the Plaintiffs’ evidence that it learned of the trademark violations on or about December 14, 2023. The Plaintiffs shall therefore be granted an order for pre-judgment interest from December 14, 2023.

[115] Judgment interest pursuant to section 7 of the *Court Order Interest Act* is determined from the date of judgment and is an annual simple interest rate. The Order and Judgment herein will be made accordingly.



[116] There is no basis on the evidence or in law for the Plaintiffs to be awarded pre-judgment and post-judgment interest calculated on a semi-annual, compound basis.

***Claim 15: Costs on a solicitor and client basis on the highest allowable scale.***

[117] The Plaintiffs seek their costs of this proceeding and of this motion on a solicitor and client basis. There is no evidence led that would justify such an exceptional award (*Moosomin First Nation v. Canada*, 2024 FC 1081, at paras 9 to 11; *aff'd* 2025 FC 518; *Hutton v. Sayat*, 2024 FC 784 at para 6; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3 at 134; *Wewayakum Indian Band v. Wewayakai Indian Band*, 1999 CanLII 8839 (FCA); *Merck & Co v Apotex Inc*, 2002 FCT 1210 at para 11).

[118] Costs before this Court are determined in accordance with column III of Tariff B to the *Rules*, subject to the Court's discretion to award costs as appropriate in the circumstances in consideration of the factors identified at Rule 400(3) (Rule 400(1) and (3), 407). The Plaintiffs seek costs based on the costs they have incurred in other, separate proceedings. That is not a basis upon which to award costs in this proceeding.

[119] Considering the absence of evidence of costs filed by the Plaintiffs but considering their claim for costs, I fix their costs at the mid-point of column III of Tariff B of the *Rules* for assessable Tariff B Items 1 and 4, being 5 units and 3 units respectively, at the unit value of \$ 180 each, for a total costs award of \$ 1,440.00.

**JUDGMENT in T-488-24**

**THIS COURTS JUDGMENT is that:**

1. The Plaintiffs' motion for default judgment is granted in part.
2. The Defendant has infringed the Plaintiffs' exclusive trademark rights with respect to the words and marks "Oxygeneo" and "3-in-1 super facial".
3. The Defendant as well as all others over whom she may exercise authority or control are hereby enjoined from using the word and mark "Oxygeneo" as set out in the registered trademark bearing registration number TMA1032944 in connection with any cosmetic apparatus using micro-vibration, radio frequency ultrasound for aesthetic facial and body skin treatment, and from using the expression and mark "3-in-1 super facial" as set out in the registered trademark bearing the registration number TMA10410360, and from using the words "Oxygeneo+", "Oxygenium", "3-in-1 Superior Facial", "5-n-1 Superior Facial" and any other similar words in connection with any facial skin treatment service for humans for cosmetic purposes, esthetic skin care treatment, namely, facial exfoliation, oxygenation massages and skin treatment, in connection with her or their business, goods or services.
4. The Defendant as well as all others over whom she may exercise authority or control, shall immediately remove, delete, deliver up to the Plaintiffs or destroy under oath any goods, packages, labels and advertising material in its possession, power or control, including electronic materials, that use the "Oxygeneo" or "3-in-1 super facial" trademark, in accordance with section 53.2 of the *Trademarks Act*.
5. Danielle Ipince (DBA Dreamlook Beauty) shall pay to DermaSpark Products Inc. or Pollogen Ltd., forthwith damages in the amount of \$10,000 arising from her violations of the *Trademarks Act*.

6. DermaSpark Products Inc. or Pollogen Ltd. are jointly awarded costs of this action and of this motion which are hereby fixed in the total amount of \$ 1,440.00 and are payable forthwith by Danielle Ipince (DBA Dreamlook Beauty).

7. DermaSpark Products Inc. or Pollogen Ltd. are awarded pre-judgment interest at the rate of 4.95% per annum from December 14, 2023, and are awarded post-judgment interest from the date of this Judgment at the rate of 5.45% per annum.

8. All of the Plaintiffs' other claims against the Defendant pleaded in its Statement of Claim in this proceeding are dismissed.

"Benoit M. Duchesne"

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-488-24

**STYLE OF CAUSE:** DERMASPARK PRODUCTS INC. et Al. v.  
DANIELLE IPINCE

**ORDER AND REASONS:** DUCHESNE, J.

**DATED:** MAY 27, 2025

**MOTION IN WRITING CONSIDERED IN OTTAWA, ONTARIO PURSUANT TO  
RULES 210 AND 369 OF THE *FEDERAL COURTS RULES*.**

**WRITTEN SUBMISSIONS BY:**

Gabriel Cohen

FOR THE PLAINTIFFS

**SOLICITORS OF RECORD:**

Pinto Legal  
Montréal, Québec

FOR THE PLAINTIFFS