

**IN THE MATTER OF AN OPPOSITION by  
Saputo Groupe Boulangerie Inc./Saputo  
Bakery Group Inc. to Application No. 1132412  
for the Trade-mark GOOD2GO & Design filed  
by Hollandia Bakeries Limited.**

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**I The Pleadings**

On February 27, 2002 Hollandia Bakeries Limited (the “Applicant”) filed an application to register the trade-mark GOOD2GO & Design as illustrated hereinafter:



(the “Mark”)

application number 1132412, on the basis of proposed use in Canada, in association with baked goods, namely, cookies (the “Wares”). The application was advertised on July 9, 2003 in the Trade-marks Journal for opposition purposes.

Saputo Groupe Boulangerie Inc./Saputo Bakery Group Inc. (the “Opponent”) filed on December 5, 2003 a statement of opposition forwarded on January 13, 2004 by the Registrar to the Applicant.

In a counter statement filed on April 22, 2004 the Applicant denied all grounds of opposition.

The Opponent’s evidence consists of the affidavit of Mr. Michel Lanctôt while the Applicant filed the affidavit of Joop de Voest Jr. None of the affiants were cross-examined and only the Opponent filed written arguments. Both parties were represented at an oral hearing.

## **II The statement of opposition**

The Opponent amended its statement of opposition such that the grounds of opposition presently pleaded can be summarized as follow:

- 1 The application does not conform to the requirements of s. 30(i) of the *Trade-marks Act* R.S.C. 1985, c. T-13, (the “Act”) in that it is falsely that the Applicant has claimed to be satisfied to use the Mark in Canada in association with the Wares in view of the facts alleged hereinafter;
- 2 The Mark is not registrable pursuant to the provisions of s. 38(2)(b) and 12(1)(d) of the Act in that the Mark is confusing with the following trade-marks:

HOP & GO! & Design, registration number TMA507197 for with food products;  
HOP! & Design registration number TMA507179 for food products;  
HOP & GO!, registration number TMA579492 for snack food and deserts.

- 3 The Applicant is not the person entitled to the registration of the Mark pursuant to the provisions of s. 38(2)(c) and 16(3)(a) of the Act as it is confusing with the abovementioned trade-marks previously used in Canada by the Opponent since at least January 8, 1999 in association with the wares identified above.
- 4 Pursuant to s. 38(2)(d) and s. 2 of the Act, the Applicant’s Mark is not distinctive, and is not capable of distinguishing or adapted to distinguish the Applicant’s Wares in view of the use of the trade-marks HOP & GO!, HOP & GO! & Design and HOP! & Design as well the registration of the trade-marks HOP & GO!, HOP & GO! & Design and HOP! & Design owned by the Opponent.

## **III Analysis of the various grounds of opposition**

The legal burden is upon the Applicant to show that its application comply with the provisions of the Act, but there is however an initial onus on the Opponent to establish the facts relied upon by it in support of each ground of opposition. Once this initial onus is met, the Applicant still has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [See *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

i) Conformity to the requirements of s. 30

The first ground of opposition, as drafted, is not a proper ground of opposition and is dismissed. Should I be wrong in reaching this conclusion, I would dismiss such ground of opposition as the Opponent failed to meet its initial onus. In any event, where an applicant has provided the statement required by s. 30(i), this ground should only succeed in exceptional cases such as where there is evidence of bad faith on the part of the Applicant. [*Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]

ii) Registrability

The material time for considering the issue of the registrability of the Mark is the date of the Registrar's decision. [See *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 at 424 (F.C.A)]

The Opponent has not filed a copy of the certificates of registration alleged in support of this ground of opposition. I am fully aware that the Federal Court in *Quaker Oats of Canada Ltd./La Compagnie Quaker Oats Ltée. v. Manu Foods Ltd.*, 11C.P.R. (3d) 410 confirmed that the Registrar has discretion to check the register to determine if the registrations cited in its statement of opposition are in good standing. I used such discretion and therefore limited my search to the Opponent's registered trade-marks HOP & GO! & Design, registration number TMA507197 as illustrated hereinafter:



registered in association with food products, namely: crackers, bread sticks, pretzels, croutons, biscuits, breadcrumbs, flours, melba toast, rusks, cakes, tarts, puff pastries, candies, dehydrated bases for soups and sauces, dehydrated soups and sauces; and

HOP & GO!, registration number TMA579492 registered in association with food products, namely: crackers, bread sticks, pretzels, croutons, biscuits, breadcrumbs, flours, melba toast, rusks, cakes, tarts, puff pastries, pastries, dehydrated bases for making soups and sauces, dehydrated soups and sauces.

I only considered those two registrations as they are the best-case scenarios for the Opponent. Both registrations are on the register.

The test for confusion is outlined in s. 6(2) of the Act. Some of the surrounding circumstances to be taken into consideration are described in s. 6(5) of the Act: the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; the length of time the trade-marks or trade-names have been in use; the nature of the wares, services, or business; the nature of the trade; and the degree of resemblance between the trade-marks or trade-names in appearance, or sound or any ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight [See *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 (F.C.T.D.) and *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)].

The Supreme Court of Canada through Mr. Justice Binnie in *Mattel, Inc. v. 3894207 Canada Inc.*, (2006) 49 C.P.R. (4th) 321 described the test of confusion as follow:

What, then, is the perspective from which the likelihood of a “mistaken inference” is to be measured? It is not that of the careful and diligent purchaser. Nor, on the other hand, is it the “moron in a hurry” so beloved by elements of the passing-off bar: *Morning Star Co-Operative Society Ltd. v. Express Newspapers Ltd.*, [1979] F.S.R. 113 (Ch. D.), at p. 117. It is rather a mythical consumer who stands somewhere in between, dubbed in a 1927 Ontario decision of Meredith C.J. as the “ordinary hurried purchasers”: *Klotz v. Corson* (1927), 33 O.W.N. 12 (Sup. Ct.), at p. 13. See also *Barsalou v. Darling* (1882), 9 S.C.R. 677, at p. 693. In *Delisle Foods Ltd. v. Anna Beth Holdings Ltd.* (1992), 45 C.P.R. (3d) 535 (T.M.O.B.), the Registrar stated at p. 538:

When assessing the issue of confusion, the trade marks at issue must be considered from the point of view of the average hurried consumer having an imperfect recollection of the opponent’s mark who might encounter the trade mark of the applicant in association with the applicant’s wares in the market-place.

(...)

In opposition proceedings, trade-mark law *will* afford protection that transcends the traditional product lines unless the applicant shows the likelihood that registration of its mark will *not* create confusion in the marketplace within the meaning of s. 6 of the *Trade-Marks Act*. Confusion is a defined term, and s. 6(2) requires the Trade-marks Opposition Board (and ultimately the court) to address the *likelihood* that in areas where both trade-marks are used, prospective purchasers will infer (incorrectly) that the wares and services - though not being of the same general class - are nevertheless supplied by the same person. Such a mistaken inference can only be drawn here, of course, if a link or association is likely to arise in the consumer's mind between the source of the well-known BARBIE products and the source of the respondent's less well-known restaurants. If there is no likelihood of a link, there can be no likelihood of a mistaken inference, and thus no confusion within the meaning of the Act.

It is with these general principles in mind that I shall review the pertinent evidence and assess each relevant factor identified above and others if deemed necessary.

In *Choice Hotels International Inc. v. Hotels Confortel Inc* (1996), 67 C.P.R. (3d) 340 Mr. Justice Rouleau made the following observations on the issue of inherent distinctiveness:

21 Now let us examine paragraph 6(5) (a) of the Act, which refers to the inherent distinctiveness of the trade-marks. The Registrar found, in relation to this paragraph, that neither of the disputed trade-marks has a strong inherent distinctiveness. Hughes has articulated the following principle concerning the inherent distinctiveness of a trade-mark, in his treatise on trade-marks:

A strong, inherently distinctive trade mark is one consisting of a striking inventive name or an original design, and as such, will be entitled to a wide scope of protection; on the other hand a trade mark lacking these qualities is inherently less distinctive and is considered to be a weaker mark; the ambit of protection afforded to a weak mark is much less than for a strong mark, and registration of other marks containing comparatively small differences may be permitted.[\[FN8\]](#)

22 In the case at bar, the Registrar did not err in arriving at such a decision. On the one hand, the COMFORT INN trade-mark is composed of two words that are common in the English language. Its intrinsic originality is therefore minimal. On the other hand, the CONFORTEL trade-mark is of course an invented word, although it is true that the suffix "TEL" is one that is frequently used in the hotel industry and the term *confort* ("comfort") is not in itself original. Accordingly, the trade-mark COMFORT INN should be given less extended protection, since it has little inherent distinctiveness.

The Mark is composed of two common words in the English language. However it makes use of the number two as a phonetic equivalent to the word "to". Moreover the two main components of

the Mark suggest that the Wares are portable. It has a design feature. Overall I would not conclude that the Mark has a high degree of inherent distinctiveness. The Opponent's registered trade-marks are also composed of two common English words. The design feature of its design trade-mark has a higher degree of inherent distinctiveness than the Mark. However the combination of the two words "hop" and "go" suggests the idea that idea of movement. I do not believe that by itself the degree of inherent distinctiveness of the Opponent's trade-marks is such that it would justify an extended protection.

The degree of distinctiveness of a trade-mark can be enhanced through its use. Mr. Lanctôt described himself as the Opponent's vice-president marketing and has been working for the Opponent since February 25, 2002. He states that the Opponent is in the business of offering for sale food products such as pastries, cakes, muffin, muffin bars, granola bars, cookies, tarts, brownies and the like. Those products are sold at the retail level as well as to institutions such as restaurants and hotels. The Opponent has been selling in Canada since at least May 1998 muffin bars, galetttes bars and granola bars in association with the trade-mark HOP & GO!

He provides the sales figures of products bearing the trade-mark HOP & GO! We have no indication if those figures include the sales of products in association with the design trade-mark. Those sales vary from over \$5 millions in 1998 to close to \$13 millions in 2004. He filed sample invoices to illustrate the sale of products bearing the trade-mark HOP & GO!

He also provides the amounts spent by the Opponent in Canada to promote the sale of products bearing the trade-mark HOP & GO! which vary from over \$3 millions in 1998 to \$1,5 million in 2003. He filed as exhibit ML-2 sample flyers on which appears the trade-mark HOP & GO! & Design. He also produced videotapes containing samples of advertisements aired on various Canadian networks. However we have no information on the periods of time when these commercials were aired, on which stations, in which part of the country, how many people saw them, etc.

I consider the use of HOP & GO! & Design as use of HOP & GO! for the reason that the main feature of the design mark is the script “HOP & GO”. [See *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull, S.A.*, (1985) 4 C.P.R. (3d) 523 (FCA)]

Mr. De Voest Jr. is the Applicant's president. He describes the Applicant as a manufacturer of baked goods, namely cookies. He provides the sale figures of the Wares in association with the Mark without specifying the exact date when the Applicant started selling such wares. He simply states that the sales amount to \$50,000 for the period of 2003 to 2005. Those sales figures are much less than those provided by the Opponent. Moreover as pointed out by the Opponent, the Applicant failed to state if such sales were limited to Canada.

From such evidence I conclude that the Opponent's trade-mark HOP & GO! is more known in Canada than the Applicant's Mark. As such the first relevant factor favours the Opponent.

As for the length of time the trade-marks have been in use this factor also favours the Opponent. It has been using its trade-marks HOP & GO! and HOP & GO! and Design since at least 1998 while the Mark has been in use only since 2003 by the Applicant.

The Wares and those of the Opponent are in the same general class of wares. As for the channels of trade the Opponent's evidence, as mentioned above, shows that its wares are sold at retail level in supermarkets, grocery stores and coop stores. Mr. De Voest Jr states that the Wares are sold through retail grocery and convenience stores. Therefore there is an overlap in the nature of the wares and their channels of trade. Those two factors also favor the Opponent.

It has often been said that the degree of resemblance is the most important factor when assessing the likelihood of confusion between two trade-marks. Mr. Justice Cattanach in *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145 defined the issue in the following terms:

Realistically appraised it is the degree of resemblance between trade marks in appearance, sound or in ideas suggested by them that is the most crucial factor, in

most instances, and is the dominant factor and other factors play a subservient role in the over-all surrounding circumstances.

He also described the test of confusion in the following words in *Canadian Schenley Distilleries Ltd. v. Canada's Manitoba Distillery Ltd.* (1975), 25 C.P.R. (2d) 1:

«To determine whether two trade marks are confusing one with the other it is the persons who are likely to buy the wares who are to be considered, that is those persons who normally comprise the market, the ultimate consumer. That does not mean a rash, careless or unobservant purchaser on the one hand, nor on the other does it mean a person of higher education, one possessed of expert qualifications. It is the probability of the average person endowed with average intelligence acting with ordinary caution being deceived that is the criterion and to measure that probability of confusion the Registrar of Trade Marks or the Judge must assess the normal attitudes and reactions of such persons.

In considering the similarity of trade marks it has been held repeatedly that it is not the proper approach to set the marks side by side and to critically analyze them for points of similarities and differences, but rather to determine the matter in a general way as a question of first impression. I therefore propose to examine the two marks here in dispute not for the purpose of determining similarities and differences but rather to assess the attitude of the average reasonable purchaser of the wares as a matter of first impression.»

As stated by Mr. Justice Denault of the Federal Court in *Pernod Ricard v. Molson Breweries* (1992), 44 C.P.R. (3d) 359, the first portion of a trade-mark is the most relevant for purposes of distinction.

The Opponent argues that both HOP & GO! and the Mark emphasise on the word GO and that the prefixes of those marks comprise similar letters that visually present a striking resemblance.

Contrary to the Opponent's assertion, I do not think that the emphasis of its trade-marks is placed on the word portion "go". In fact if one looks at the Opponent's trade-mark HOP & GO! & Design, the emphasis is placed on the first word "hop" as the design illustrates a person jumping or hopping. The word "go" is written in much smaller letters. The first word of the marks in issue not only differs visually but in sound. Moreover when combined with the word "good" and the phonetic equivalent to the word "to" the Mark suggests the idea that the Wares are portable. On the other hand, the addition of the word "go" after the word "hop" emphasises the idea of



movement. The only resemblance is the word “go” that appears at the end of each trade-mark. Overall this factor favours the Applicant.

As an additional surrounding circumstance the Applicant has raised the lack of instances of confusion between the respective parties’ marks. The fact that nobody has communicated to Mr. De Voest Jr any instances of confusion does not mean that there has not been any. We do not know if he conducted any inquiries. Moreover the sales figures of the Applicant’s Wares seem to be modest and thus reduce the possibility of an instance of confusion being reported to the Applicant. Finally the test is likelihood of confusion and not actual confusion. The absence of the latter does not necessarily mean that there is no likelihood of confusion.

We are therefore left with a situation where four relevant factors favour the Opponent while only one favours the Applicant. If it was a pure arithmetic exercise the Opponent would succeed easily; but this is not the appropriate way to determine if there is a likelihood of confusion. As stated earlier the degree of resemblance is the most crucial factor especially when the wares in issue are similar. If there is no resemblance between two trade-marks it is difficult to conceive a scenario where a consumer would be deceived as to the origin of a product. There has to be a fair degree of resemblance in order to draw a conclusion that there is a likelihood of confusion.

I conclude, on a balance of probabilities, that a consumer with an imperfect recollection of the Opponent’s registered trade-marks HOP & GO! and HOP & GO! and Design would not think that the Wares sold in association with the Mark originate from the Opponent. The degree of resemblance is so tenuous that if I was to maintain the opposition it would be tantamount to give to the Opponent a monopoly over the common word “go” in association with the type of wares described in the application.

iii) Entitlement and distinctiveness

The third and fourth ground of opposition (entitlement and distinctiveness) can only succeed if there is a likelihood of confusion between the Mark and the Opponent’s trade-marks cited in the statement of opposition. The difference in the relevant dates would not alter my conclusion on

the absence of likelihood of confusion between the Mark and the Opponent's trade-marks HOP & GO! and HOP & GO! and design. As for the trade-mark HOP!, there is absolutely no resemblance whatsoever between the Mark and HOP!. Therefore those grounds of opposition are also dismissed.

#### **IV Conclusion**

Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the opposition, the whole pursuant to s. 38(8) of the Act.

DATED IN BOUCHERVILLE, QUEBEC, THIS 2nd DAY OF MAY 2007.

Jean Carrière,  
Member,  
Trade-marks Opposition Board