

**IN THE MATTER OF AN OPPOSITION by  
Maple Leaf Foods Inc. to Application  
No. 1168313 for the trade-mark  
OLDENLÄNDER filed by Lidl Stiftung & Co.  
KG**

**I The Proceedings**

[1] On February 14, 2003 Lidl Stiftung & Co. KG (the “Applicant”) filed an application to register the trade-mark OLDENLÄNDER (the “Mark”) based on registration and use in Germany in association with:

Meat, poultry, game; meat products, sausage products and small sausage products, namely meat loaf, meat paste, meat balls, pastrami, meat juices, blood sausages, frankfurters (meat only, not sandwiches), hamburgers (meat only, not sandwiches), hot dogs (meat only, not sandwiches) meat-based mousse, meat-based spreads, ham, bacon, salami, mortadella, bacon rinds, roast beef, corned beef, beef patties, sausage patties; meat preserves, sausage preserves and small sausage preserves; meat jellies; ready-to-serve meals, semi-ready-to-serve meals and salads, essentially consisting of meat, meat products, sausage, small sausages and/or poultry, also with the addition of bread and/or cheese and/or farinaceous pastes and/or potatoes and/or rice and/or vegetables; preserved, dried and cooked fruits and vegetables; cheese, cheese preparations, namely cheese fondue, cheese spreads, cottage cheese, cream cheese, cheese sauce and processed cheese. Sauces namely salad sauces, soy sauce, spaghetti, fruit sauces, tartar sauce, tomato sauce, apple sauce, artichoke sauce, barbecue sauce, cheese sauce, chili sauce, cranberry sauce, hot sauce, pizza sauce, ketchup, mustard, mayonnaise; vinegar, spices; bread, pastries; cereal preparations for alimentary purposes. (the “Wares”)

[2] The application was advertised on September 29, 2004 in the Trade-marks Journal for opposition purposes. Maple Leaf Foods Inc. (the “Opponent”) filed a statement of opposition on February 28, 2005 that was forwarded by the Registrar on March 22, 2005 to the Applicant.

[3] The Applicant filed on April 1, 2005 a counter statement denying essentially all grounds of opposition pleaded.

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[4] The Opponent filed the affidavits of Adam J. Grogan and Rehana Naqvi while the Applicant filed three different affidavits of Karine Spénard. The Opponent filed as reply evidence the affidavit of Jeffrey Tracey. No cross-examinations were conducted.

[5] Only the Opponent filed a written argument and there was no oral hearing.

## **II The Grounds of Opposition**

[6] The grounds of opposition raised by the Opponent can be summarized as follow:

1. The application does not conform to the requirements of s. 30(d) of the *Trade-marks Act*, R.S.C. 1985, c. T-13, (the “Act”) in that the applicant has not used the Mark in Germany in association with the Wares and therefore could not have truthfully stated that it was entitled or so satisfied. Moreover at the time of filing of the application, the Applicant was aware of the Opponent’s trade-mark OVERLANDER, registration number TMA 215,406 which had been used previously in Canada in association with the wares covered by such registration. Therefore the Applicant was aware that its use of the Mark in association with food products would lead to a likelihood of confusion. Thereby the Applicant could not have been satisfied that it was entitled to use or register the Mark in Canada;
2. The Mark is not registrable in view of s. 12(1)(d) of the Act because it is confusing with the Opponent’s registered trade-mark OVERLANDER, certificate of registration TMA 215,406;
3. The Applicant is not entitled to registration of the Mark in view of s. 16(2)(a) of the Act because at the date of filing of the application the Mark was confusing with the Opponent’s trade-mark OVERLANDER that had been previously used in Canada by the Opponent;
4. The Applicant’s Mark is not distinctive because it is not adapted to distinguish the Wares from the wares of the Opponent, who has previously used its trade-mark OVERLANDER in Canada.

## **III General Principles Applicable to all Grounds of Opposition**

[7] The Applicant has the legal onus to show that its application complies with the provisions of the Act, but there is however an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts

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alleged to support each ground of opposition exist. Once this initial burden 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 *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

#### **IV Registrability of the Mark**

[8] All grounds of opposition are based on the allegation that the Mark is confusing with the Opponent's trade-mark OVERLANDER. The difference in the material dates may determine the admissibility of some of the evidence as it may relate to facts subsequent to the relevant date associated with a particular ground of opposition. With respect to the registrability of the Mark, the relevant date 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)].

[9] The Opponent filed a certified copy of registration TMA 215,406 for the trade-mark OVERLANDER through the affidavit of Rehana Naqvi, an employee at the Opponent's agent firm. I checked the register and confirm that this registration is still in good standing. The Opponent has therefore met its initial onus under this particular ground of opposition.

[10] I have to determine, on a balance of probabilities, if the Mark is likely to cause confusion with the Opponent's trade-mark OVERLANDER. The test to determine this issue is set out in s. 6(2) of the Act and I must take into consideration all the relevant surrounding circumstances, including those listed under s. 6(5): 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 in the 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*

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(1996), 66 C.P.R. (3d) 308 (F.C.T.D.)). I also refer to the decisions of the Supreme Court of Canada in *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 and *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée et al.* (2006), 49 C.P.R. (4th) 401 where Mr. Justice Binnie commented on the assessment of the criteria enumerated under s. 6(5) of the Act to determine if there exists a likelihood of confusion between two trade-marks.

[11] The Mark is a coined word. It is therefore inherently distinctive. The Opponent's trade-mark is also a coined word but consists of the combination of two English words: "over" and "lander". In fact extracts of the Canadian Oxford Dictionary were annexed to one of Karine Spénard's affidavits, a student employed by the Applicant's agent firm. However this combination is quite unique and has no suggestive meaning when used in association with food products. In any event the Applicant has not submitted any written argument. It is therefore difficult to speculate on the possible arguments that could have been raised by the Applicant with this portion of the evidence except for what has been mentioned previously.

[12] The degree of distinctiveness of a trade-mark may be enhanced through use in Canada. I shall now summarize the relevant portion of the evidence filed by the Opponent on this issue. Mr. Grogan is the Director of Marketing, Processes Meats for Maple Leaf Consumer Foods, a "member of the Maple Leaf Foods Inc." since 2003. However he failed to explain what he meant by such expression. Any ambiguity that may result from the use of that expression in his affidavit shall be interpreted against the Opponent.

[13] He has been employed by the Opponent since 1998. He filed samples of product labels presently used by the Opponent. He states that the Opponent's sales of products bearing the trade-mark OVERLANDER in Canada have been in excess of 14 million dollars for the years 2003, 2004 and up to November 2005. He filed samples of advertisements for the years 2003, 2004 and up to November 2005 published in flyers available in food chain stores such as CO-OP Stores, Manning Foods, The Marketplace, Overwaitea, Save on Foods, Safeway and AG Foods. I identified those names as they appear on the extracts filed. There is no reference in the samples filed to some other stores mentioned in Mr. Grogan's affidavit. What has been filed are colour copies of extracts of flyers. Some of them do not make

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reference to a particular food store chain. Finally there is no information on the extent of their distribution in Canada.

[14] He filed samples of invoices issued between February 2003 and September 2004 to support his allegation that the Opponent has been using in Canada the trade-mark OVERLANDER in association with various food products.

[15] I consider exhibit E to his affidavit, a listing entitled “Ad Reporting”, to be inadmissible hearsay evidence. There is no information on the origin of this document. It contains copies of web pages taken from a third party’s website.

[16] From this evidence I conclude that the Opponent’s trade-mark OVERLANDER is known to some extent in Canada and as such the factor described in s. 6(5)(a) of the Act favours the Opponent.

[17] The Applicant did not file any evidence of use of the Mark in Canada. In view of the summary of the Opponent’s evidence described above, the second factor listed under s. 6(5) of the Act also favours the Opponent.

[18] The Opponent’s certificate of registration TMA 215406 for the trade-mark OVERLANDER covers:

Cured meats, smoked meats cooked meats and fresh meats.

[19] There is definitively an overlap between those wares and the following wares listed in the present application:

meat, poultry, game; meat products, sausage products and small sausage products, namely meat loaf, meat paste, meat balls, pastrami, meat juices, blood sausages, frankfurters (meat only, not sandwiches), hamburgers (meat only, not sandwiches), hot dogs (meat only, not sandwiches) meat-based mousse, meat-based spreads, ham, bacon, salami, mortadella, bacon rinds, roast beef, corned beef, beef patties, sausage patties; meat preserves, sausage preserves and small sausage preserves; meat jellies; ready-to-serve meals, semi-ready-to-serve meals and salads, essentially consisting of meat, meat products, sausage, small sausages and/or poultry, also with

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the addition of bread and/or cheese and/or farinaceous pastes and/or potatoes and/or rice and/or vegetables (the “similar wares”).

I come to this conclusion from a simple reading of the description of those wares.

[20] As for the Applicant’s other wares namely:

preserved, dried and cooked fruits and vegetables; cheese, cheese preparations, namely cheese fondue, cheese spreads, cottage cheese, cream cheese, cheese sauce and processed cheese. Sauces namely salad sauces, soy sauce, spaghetti, fruit sauces, tartar sauce, tomato sauce, apple sauce, artichoke sauce, barbecue sauce, cheese sauce, chili sauce, cranberry sauce, hot sauce, pizza sauce, ketchup, mustard, mayonnaise; vinegar, spices; bread, pastries; cereal preparations for alimentary purposes; (“non-similar wares”)

even though they are food products, they do not fall within the general category of meat. There is enough of a distinction to be made between those products on one hand and meat products on the other hand.

[21] Ms. Spénard states in one of her affidavits that she visited various grocery stores in the Montreal area and describes the location in those stores of the various types of food products listed in the present application and the meat products mentioned in the Opponent’s certificate of registration for the trade-mark OVERLANDER. As reply evidence, Mr. Tracey, a student-at-law, visited various grocery stores in Toronto and filed pictures of either display cases or refrigerated display cases to illustrate how the various meat products are being offered for sale side-by-side. He describes one photograph as illustrating how meat, meat based spreads and allegedly cheese are placed side-by-side in the same display case. However the picture is not clear enough to illustrate the presence of cheese in this display case. In any event there exists enough of a difference between the non-similar wares and meat products.

[22] Therefore I conclude that the third factor listed under s. 6(5) of the Act favours the Opponent in so far as the similar wares are concerned.

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[23] As for the nature of the trade, the visits made by Ms. Spénard and Mr. Tracey confirm that the parties' respective wares would be sold through the same channels of trade. The fourth factor listed under s. 6(5) of the Act favours the Opponent for all of the Wares.

[24] The degree of resemblance is the most important factor when assessing the likelihood of confusion between two trade-marks. Mr. Justice Cattnach in *Beverley Bedding & Upholstery Co. v. Regal Bedding & Upholstering Ltd.* (1980), 47 C.P.R. (2d) 145 at par. 28 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.

[25] The parties' respective trade-marks are similar both in appearance and sound. They are almost identical in length. They both began with the letter "O" and end with the term "lander". The test is the vague recollection of an average consumer of the Opponent's trade-mark. When confronted with the Mark, will he be misled to believe that the Wares bearing the Mark originate from the Opponent? The similarity in both sound and appearance enables me to conclude that the last factor described in s. 6(5) of the Act also favours the Opponent.

[26] The last affidavit of Ms. Spénard contains over 1000 pages of evidence. She performed various searches on the Internet using different search tools. No analysis of these searches has been provided either in Ms. Spénard's affidavit or in a written argument. If a party wants to raise an argument on the basis of the state of the register or what is in the marketplace, it is the responsibility of that party not only to file the appropriate evidence but to develop this argument. In the absence of any argument relating to this voluminous portion of the evidence, I cannot substitute myself for the Applicant. As stated earlier it is the Applicant's burden to show that its trade-mark is registrable, that it is entitled to the registration of the Mark and that the Mark is distinctive. In any event none of this evidence is admissible or relevant for the following reasons.

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[27] Exhibits KS-2 and KS-3 are the results of searches on the Internet for the term “lander”. There are 609 pages containing only 3 lines for each result: a one-line extract of a particular website, a second line for the address of the website and a third line indicating the search engines used to locate such result. We have no information on the date wherein the term “lander” was used on each particular third party’s website; in what context the term was used, if the website was accessible to Canadians and if so how many Canadians visited the website. Some of the extracts are written in a foreign language and others do not even contain the term “lander”. These exhibits constitute inadmissible hearsay evidence.

[28] Exhibits KS-4, KS-5, KS-6 and KS-7 are similar searches on the Internet for the term “overlander”. For the same reasons described in the previous paragraph I conclude that these exhibits constitute inadmissible hearsay evidence.

[29] Exhibit KS-8 consists of extracts of websites wherein the term “lander” appears. Aside from the remarks made in paragraph 27 above, I note that none of the extracts relates to food products. Therefore I cannot draw any conclusion that would be favourable to the Applicant.

[30] Exhibit KS-9 is the results of a search using Canada 411.ca and WhitePages.com to locate any reference containing the term “Lander”. The pages filed are irrelevant. The fact that “Lander” is a common surname in Canada would not have an impact on the registration of the Mark. Finally, exhibit KS-10 is the result of a search on Wikipedia. Without discussing the admissibility of the content of the page filed, it contains a definition of the word “lander” in terms of people, space or places. Again there is no reference to meat or food products. Therefore without any arguments developed around this portion of the Applicant’s evidence, I fail to see how it could be relevant in this case.

[31] From this analysis, I conclude that the Applicant has not discharged its burden to prove that the Mark would be registrable in association with the similar wares. For those wares, all criteria under s. 6(5) of the Act favour the Opponent. With respect to the non-similar wares, I consider the difference in the nature of those wares to be sufficient to avoid any likelihood of confusion with the Opponent’s meat products.



## **V The Other Grounds of Opposition**

[32] The commonly accepted material date with respect to distinctiveness is the date of filing of the opposition [see *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4<sup>th</sup>) 317 (F.C.T.D.) at 324]. The Opponent has an evidential burden to show that, as of February 28, 2005, its trade-mark OVERLANDER had become sufficiently known to negate the distinctiveness of the Mark [*Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.) at 58]. Once this burden is met, the Applicant has a legal onus to show that the Mark is adapted to distinguish or actually distinguishes the Wares from the wares of the Opponent throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)].

[33] The Opponent has met its evidential burden through the evidence of actual use of its trade-mark OVERLANDER in association with various meat products as discussed in paragraphs 13 and 14 above. The issue therefore is one of likelihood of confusion. The same criteria mentioned previously would be used to determine if the Mark is apt to distinguish the Wares from the wares of the Opponent. I come to the same conclusion reached under the registrability of the Mark, namely that the Mark is not adapted to distinguish or would not distinguish the similar wares from the Opponent's meat products. However the Mark would be distinctive in so far as the non-similar wares are concerned as there would be no likelihood of confusion between the parties' respective marks for those wares.

[34] Without going into an in depth analysis of the grounds of opposition described in subparagraphs 1 and 3 of paragraph 6 above, the issue is still one of likelihood of confusion between the Mark and the Opponent's trade-mark OVERLANDER. The same conclusions as those reached under registrability and distinctiveness would apply.

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## **VI Conclusion**

[35] Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, and applying the principles enunciated in the case of *Produits Ménagers Coronet Inc. v. Coronet Werke Heinrich Scherf GmbH* 10 C.P.R. (3d) 482, I refuse, pursuant to s. 38(8) of the Act, the Applicant's application for the registration of the Mark, in association with the following wares:

meat, poultry, game; meat products, sausage products and small sausage products, namely meat loaf, meat paste, meat balls, pastrami, meat juices, blood sausages, frankfurters (meat only, not sandwiches), hamburgers (meat only, not sandwiches), hot dogs (meat only, not sandwiches) meat-based mousse, meat-based spreads, ham, bacon, salami, mortadella, bacon rinds, roast beef, corned beef, beef patties, sausage patties; meat preserves, sausage preserves and small sausage preserves; meat jellies; ready-to-serve meals, semi-ready-to-serve meals and salads, essentially consisting of meat, meat products, sausage, small sausages and/or poultry, also with the addition of bread and/or cheese and/or farinaceous pastes and/or potatoes and/or rice and/or vegetables; preserved, dried and cooked fruits and vegetables

and reject the opposition in so far as:

cheese, cheese preparations, namely cheese fondue, cheese spreads, cottage cheese, cream cheese, cheese sauce and processed cheese; sauces namely salad sauces, soy sauce, spaghetti, fruit sauces, tartar sauce, tomato sauce, apple sauce, artichoke sauce, barbecue sauce, cheese sauce, chili sauce, cranberry sauce, hot sauce, pizza sauce, ketchup, mustard, mayonnaise; vinegar, spices; bread, pastries; cereal preparations for alimentary purposes

are concerned.

DATED, IN BOUCHERVILLE, QUEBEC, THIS 4th DAY OF FEBRUARY 2010.

Jean Carrière,  
Member, Trade-marks Opposition Board