



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADE-MARKS

**Citation: 2011 TMOB 57**  
**Date of Decision: 2011-03-28**

**IN THE MATTER OF AN OPPOSITION by  
Alpina Salami Inc. to application  
No. 1,226,045 for the trade-mark ALPINA &  
Design in the name of Alpina Productos  
Alimenticios S.A.**

[1] On August 5, 2004, Alpina Productos Alimenticios S.A. (the Applicant) filed an application to register the trade-mark ALPINA & Design shown below (the Mark). The application includes the following colour claim:



The word ALPINA and the underline is white. The mountain is white with light blue shade. The background is light blue, and the bottom on each side of the mountain is dark blue.

[2] The application is based upon use of the Mark in Canada since at least as early as January 20, 2004 in association with the following wares:

Preserved, dried and cooked fruits and vegetables, jellies, jams, fruit sauces; eggs, milk, milk goods, namely long life milk, long life milk with flavours, milk drinks based with yogurt, milk drinks with fruits, milk drinks with cereals, Chicha (milk drink made with rice flour), oat milk, milk drinks with oats, cheese; jellies (confectionary), soy based food, namely soy-based beverages used as a milk substitute, soy-based yogurt, baby food, jams,

juices, nectars, and refreshments, namely non-alcoholic fruits drinks, fruit juices for babies, non-alcoholic cool drinks with fruit flavour, light non-alcoholic cool drinks with fruit flavours, fruits in syrup; edible oil and fats; mineral and aerated waters and other non-alcoholic drinks, namely carbonated fruit juices, coffee-based drinks and soy-based drinks; non-alcoholic fruit drinks and fruit juices; syrups and other preparations for making beverages, namely powders, carbonation and fruit flavours.

[3] The application is also based upon use and registration of the Mark in Colombia under No. 141717 in association with:

Preserved, dried and cooked fruits and vegetables, jellies, jams, fruit sauces; eggs, milk, milk goods, namely long life milk, long life milk with flavours, milk drinks based with yogurt, milk drinks with fruits, milk drinks with cereals, Chicha (milk drink made with rice flour), oat milk, milk drinks with oats, cheese; jellies (confectionary), soy based food, namely soy-based beverages used as a milk substitute, soy-based yogurt; fruits in syrup; edible oil and fats.

[4] The application was advertised for opposition purposes in the *Trade-marks Journal* of October 19, 2005.

[5] On December 21, 2005, Alpina Salami Inc. (the Opponent) filed a statement of opposition claiming that the application does not conform to the requirements of s. 30(a), (b), (c), and (i) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act). The statement of opposition also claims that the Mark is non-distinctive of the Applicant pursuant to s. 2 and 38(2)(d) of the Act and that the Applicant is not the person entitled to registration of the Mark pursuant to s. 16(3)(a) of the Act, in view of the fact that the Mark is confusing with the Opponent's trade-marks ALPINA and ALPINA & Design shown below, which have been used in Canada since at least as early as 1960 in association with food products including "salamis, hams, sausages, ham hocks, bacon, pepperettes, liver paste, paté, jellied pork, pork, pork hocks, and cuts thereof". The statement of opposition further claims that the Mark is not registrable pursuant to s. 12(1)(d) of the Act in view of the fact that it is confusing with the said ALPINA & Design mark which in addition to having been used by the Opponent as mentioned above, has been registered in Canada under No. TMA357,659 in association with the same wares:



[6] The Applicant filed and served a counter statement in which it denies the Opponent's allegations.

[7] On March 23, 2009, the Opponent requested leave to amend its statement of opposition so as to more properly rely on s. 16(1)(a) and (2)(a) of the Act instead of s. 16(3)(a). Leave was granted by the Registrar on October 14, 2009 to so amend the statement of opposition.

[8] In support of its opposition, the Opponent filed the affidavits of Peter Piacek, the President of the Opponent, sworn June 8, 2007; Nicole Lefort, controller at the Opponent, sworn June 8, 2007; Vanessa Jodoin, a law student employed by the law firm representing the Opponent in this proceeding, sworn June 14, 2007; and Viktorya Aksoy, an articling student employed by the same law firm, sworn July 6, 2007, as well as a certified copy of registration No. TMA357,659. In support of its application, the Applicant filed the affidavits of Manon Goudreault, who describes herself as an employee of the law firm representing the Applicant in this proceeding, sworn February 11, 2008, and Thelma Thibodeau, a trade-mark agent in the employ of the same law firm, sworn February 20, 2008.

[9] Only the Opponent filed a written argument. Both parties attended at an oral hearing.

## Onus

[10] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidentiary burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.); and *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)].

## Summary of the parties' evidence

### The Opponent's evidence

#### The Piacek affidavit

[11] Mr. Piacek states that the Opponent operates a business dealing in the processing of meats and the preparation of prepared meat products. He further briefly describes the history of the Opponent from its first incorporation under the name Marché Alpina Inc. in 1960, to its incorporation and adoption of the current name under the *Companies Act* on April 22, 1970.

[12] Mr. Piacek states that the Opponent is the owner of the registered trade-mark ALPINA & Design identified above.

[13] Mr. Piacek states that the Opponent has used the ALPINA & Design mark and trade-name "alpina" as part of its trade and corporate names since the beginning of its operations in 1960.

[14] Mr. Piacek states that the Opponent has distributed and still distributes its meat products under the ALPINA & Design mark in large chain supermarkets such as Metro, Provigo, Sobeys, Loblaws, Super C and IGA, and in speciality stores such as delis and bakeries, convenience

stores, hotels and restaurants throughout Canada. The Opponent also sells its meat products under the ALPINA & Design mark to several food product distributors, the majority of which are in the business of distributing a broad variety of food products concurrently, including meat and dairy products.

[15] Mr. Piacek attaches as Exhibits PP-2 to PP-5 a representative selection of packaging and labels featuring the Opponent's ALPINA & Design mark as used in association with meat products. The Opponent underlines that on one of the packaging displaying the ALPINA & Design mark, an element design featuring a mountain is also displayed. Upon review of this particular exhibit, which appears to consist of a plastic film wrapping paper, I note that the mountain is part of a landscape that also features the design of a Swiss chalet. The whole landscape is decorative and totally distinct from the ALPINA & Design mark. As such, I do not find this particular exhibit to be of significant interest in the present proceeding, not to mention that none of the Opponent's meat products depicted in the various exhibits filed by the Opponent is wrapped in such plastic film.

[16] The Opponent further underlines that one of the packaging attached as Exhibit PP-2 displays the word mark ALPINA in addition to the ALPINA & Design mark. Upon review of this particular exhibit, I note that it consists of a blank label that refers to "Alpina Salami". It is unclear whether the words "Alpina Salami" are meant to refer to the Opponent's trade-name or to salami to be marketed under the ALPINA word mark. In any event, I agree with the Opponent that use of the ALPINA & Design mark shown by the Opponent also qualifies as use of the word mark ALPINA since the word ALPINA clearly stands out from the additional design element [see *Nightingale Interloc Ltd. v. Prodesign Ltd.* (1984) 2 C.P.R. (3d) 535 (T.M.O.B.)]. In my view, despite the design element, the trade-mark ALPINA is clearly recognizable as a trade-mark *per se*. My finding is reinforced by Exhibits PP-8 and PP-9 discussed below.

[17] Mr. Piacek then provides sales figures for the meat products under the ALPINA & Design mark from 1997 to 2007 broken down by year in Canada, the total of which exceeds 60 million dollars. He attaches as Exhibit PP-6 representative invoices for sales of meat products under the ALPINA & Design mark for each of these years.

[18] Mr. Piacek also provides marketing and advertising expenditures for the meat products under the ALPINA & Design mark from 1997 to 2007 broken down by year in Canada, the total of which exceeds 3 million dollars. He attaches as Exhibit PP-7 a poster used by the Opponent featuring the products under the ALPINA & Design mark, which has been and is still distributed by the Opponent to its customers for use in their stores as displays. He also attaches as Exhibit PP-8 a representative selection of leaflets and circulars distributed by the Opponent as well as its customers, such as Provigo, IGA and Metro chain stores, as well as advertisements placed in newspapers by the Opponent's customers, all published between the years 1989 and 2007 and featuring the Opponent's products. These materials either feature the ALPINA & Design mark as displayed on the packaging for the Opponent's meat products or the APLINA word mark or both (see for example IGA's leaflet dated June 2003 advertising "ALPINA white ham" together with a picture of packaging for same displaying the ALPINA & Design mark).

[19] Mr. Piacek further attaches as Exhibit PP-9 copies of articles published over the years in various newspapers and other publications concerning the Opponent and its products. Some of these materials refer to the Opponent's ALPINA word mark and design mark.

[20] Mr. Piacek states that the Opponent has also extensively used the trade-name Alpina Salami Inc. as demonstrated from a representative selection of letterhead, envelope and business card attached as Exhibit PP-10.

[21] Mr. Piacek states that the Opponent's trade-name and ALPINA & Design mark have become well-known and recognized in Canada due to the Opponent's extensive and continuous use of same. He attaches as Exhibits PP-11 copy of a leaflet distributed by the Opponent following the receipt of the "Merit of Charcuterie Award" in 1980. He also attaches as Exhibit PP-12 an excerpt from the "Millenium Edition" of the "National Register's Whose Who in Executives and Professionals" wherein Mr. Piacek's name appeared.

[22] Mr. Piacek concludes his affidavit by providing his opinion as to the likelihood of confusion between the Mark and the Opponent's trade-name and ALPINA & Design mark. He

states in this regard that the Applicant's application covers an extensive list of wares that contain a great number of diverse food products and that it is his experience that the Opponent's meat products under the ALPINA & Design mark are usually sold in the same sections of grocery stores and supermarkets that those wares would be. He further states that it is his experience that many trade shows are marketed as dairy/deli shows and the Opponent's products under the ALPINA & Design mark will most likely find themselves displayed in close proximity to the Applicant's wares. While I am not prepared to accord weight to Mr. Piacek's personal opinion as to the likelihood of confusion because such determination involves mixed questions of law and fact to be determined by the Registrar on the basis of the factual evidence of record, I am prepared to accord some weight to the above two statements of fact of his that are based on his professional experience with the Opponent. I further note that one of these statements is to some extent corroborated by the Jodoin affidavit discussed below.

#### The Lefort affidavit

[23] Ms. Lefort's affidavit essentially serves to introduce into evidence a selection of flyers distributed by some of the chains of grocery stores that sell the Opponent's meat products.

[24] More particularly, Ms. Lefort states that over the years, numerous flyers have advertised the Opponent's meat products in proximity to products similar to goods in association with which the Applicant has applied to register the Mark. Ms. Lefort attaches as Exhibits NL-1 to NL-5 a selection of flyers distributed by each of the Metro, IGA and Mourelatos chains of grocery stores for the years 2004, 2005 and 2007 advertising the Opponent's products under the ALPINA word mark and design mark in proximity to dairy products and milk goods, as well as beverages, preserved vegetables, etc.

#### The Jodoin affidavit

[25] Ms. Jodoin states that she attended in May 2007 various grocery stores located in the Montreal area (including Metro Plus, Super C, IGA, Loblaws, etc.) and provides pictures attached as Exhibits VJ-1 to VJ-16 which she took while at said locations of the dairy (including

cheese), deli and meat products, dried fruits and vegetable products and beverages sections of the grocery stores.

[26] More particularly, for each of Exhibits VJ-1, 2, 3, 4, 11, 14, 15 and 16, Ms. Jodoin states that it is clearly shown that the products in the pictures are situated close to each other in the respective grocery stores. As underlined by the Applicant, there is no mention that the Opponent's meat products were in those particular sections where she took her pictures. It is also not possible to identify precisely each of the food items displayed in the particular sections of the grocery stores pictured. However, the pictures do provide an overview of different sections of grocery stores, with an emphasis on adjacent refrigerated sections displaying meat products, dairy products, and beverages as well as non-refrigerated displays of dried fruits situated in proximity to those sections.

[27] As for Exhibits VJ-5 to VJ-8, VJ-9 and VJ-10, VJ-12 and VJ-13, they show different kinds of products such as delicatessen ("charcuterie") products, beverages, dairy products, etc. offered for sale at some of these grocery stores under the house marks "COMPLIMENTS", "PRESIDENT'S CHOICE PC LE CHOIX DU PRÉSIDENT" and "MERIT SELECTION MÉRITE" respectively.

#### The Aksoy affidavit

[28] Ms. Aksoy's affidavit serves to introduce into evidence excerpts printed in the months of May and July 2007, from various third parties' websites, namely *www.kraft.com*; *www.costco.com*; *http://magasin.iga.net*; *www.presidentchoice.ca*; *www.saralee.com*; and *www.kerrygroup.com*. These excerpts were filed to support the Opponent's contention that several famous food product manufacturers and distributors such as Kraft, Sara Lee and Kerry Group, have expanded their line of products to include beverages, meat products and dairy products.



## The Applicant's evidence

### The Goudreau affidavit

[29] Ms. Goudreau states in her affidavit that pursuant to instructions received from her employer, she obtained copies of information pertaining to registrations or applications contained on the Canadian Intellectual Property Office (CIPO) trade-marks database. She attaches as Exhibit MG-1 copies of all the trade-mark registrations and pending trade-mark applications resulting from her search.

[30] As pointed out by the Opponent, Ms. Goudreau simply attaches print-outs based on instructions received from her employer without any explanation of how the search was carried out or what the instructions were. Her affidavit is also silent as to the factual inferences which ought to be drawn from the results which are annexed to her affidavit. However, at the oral hearing, the Applicant's agent did specifically identify verbally some of the trade-marks listed in Exhibit MG-1 as supporting the Applicant's contention that identical or similar trade-marks in the names of different entities in respect of a variety of food products coexist on CIPO register of trade-marks. I will revert to this point later on in my decision when assessing the surrounding circumstances under the s. 12(1)(d) ground of opposition.

### The Thibodeau affidavit

[31] Ms. Thibodeau states in her affidavit that pursuant to instructions received from her employer, she conducted a search of CIPO trade-marks database so as to locate allowed or registered trade-marks containing the prefix "ALP" in association with food and/or beverage products and she attaches as Exhibits TTH-1 to TTH-4 the results of her searches. I will revert to this point later on in my decision when assessing the surrounding circumstances under the s. 12(1)(d) ground of opposition.

### Analysis of the grounds of opposition

[32] At the oral hearing the Opponent voluntarily withdrew three of the grounds of opposition, namely the ones based upon s. 30(a), (b) and (c) of the Act. The Opponent conceded that it had not met its evidentiary burden in respect of each of these grounds.

[33] I will now assess the remaining grounds of opposition in regard to the evidence of record, although not necessarily in the order they were raised in the statement of opposition.

### Section 30(i) ground of opposition

[34] The Opponent has pleaded that the application does not comply with the requirements of s. 30(i) of the Act “as the application does not contain a statement that the [A]pplicant is satisfied as to its entitlement to use the Mark in Canada as required, and as the [A]pplicant could not be and can still not be satisfied that it is entitled to use the Mark in Canada in association with the wares described in the application since at the date of filing of the application, the [A]pplicant was well aware of the [O]pponent’s trade-mark described herein and the [O]pponent’s continued use thereof.”

[35] The material date for considering the circumstances respecting the issue of non-compliance with s. 30(i) is the date of filing of the application [see *Tower Conference Management Co. v. Canadian Exhibition Management Inc.* (1990), 28 C.P.R. (3d) 428 (T.M.O.B.)].

[36] Contrary to the Opponent’s allegation, the Applicant has formally complied with s. 30(i) by providing the statement required. Furthermore, the mere fact that the Applicant may have been aware of the existence of the Opponent’s ALPINA & Design trade-mark does not preclude it from making the statement in its application required by s. 30(i) of the Act. Where an applicant has provided the statement required by s. 30(i), a s. 30(i) ground should only succeed in exceptional circumstances such as where there is evidence of bad faith on the part of the

applicant [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.)]. There is no such evidence in the present case.

[37] Accordingly, the s. 30(i) ground of opposition is dismissed.

Section 12(1)(d) ground of opposition

[38] The Opponent has pleaded that the Mark is not registrable having regard to the provisions of s. 12(1)(d) of the Act in that it is confusing with the Opponent's trade-mark ALPINA & Design registered under No. TMA357,659 as per particulars above.

[39] The material date to assess a ground of opposition based on s. 12(1)(d) is the date of my decision [see *Park Avenue Furniture Corp. v. Wickers/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.)].

[40] As indicated above, the Opponent has provided a certified copy of such registration. I have exercised the Registrar's discretion to confirm that it is in good standing as of today's date.

[41] As the Opponent's evidentiary burden has been satisfied, the Applicant must therefore establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's ALPINA & Design mark.

[42] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[43] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those listed at s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; b) the length of time the

trade-marks have been in use; c) the nature of the wares, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered, and are not necessarily attributed equal weight [see *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.); and *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée* (2006), 49 C.P.R. (4th) 401 (S.C.C.) for a thorough discussion of the general principles that govern the test for confusion].

(a) The inherent distinctiveness of the trade-marks and the extent to which they have become known

[44] The parties' marks are inherently distinctive, not describing any particular feature of their respective goods.

[45] The strength of a trade-mark may be increased by means of it becoming known through promotion or use. However, the Applicant has produced no evidence that any of its products have been sold in association with the Mark in Canada (or anywhere else in the world). Thus, the Applicant has not established that the Mark has become known to any extent in Canada. In contrast, the Opponent's evidence establishes extensive use of the ALPINA & Design trade-mark by the Opponent in Canada in association with its delicatessen ("charcuterie") products for a considerable length of time.

[46] As per my review above of the Piacek affidavit, the Opponent has adduced evidence of use of the trade-mark ALPINA & Design in Canada supported by documentary evidence in the nature of invoices, sales and advertising data, as well as sample packages. While the Opponent's evidence does not establish continuous use of the ALPINA & Design trade-mark with the wares described in the Opponent's registration since the very first date of use claimed therein (namely 1960), the sales figures provided for the years 1997 to 2007, the total of which exceeds 60 million dollars, together with the advertising and promotion of the ALPINA & Design trade-mark by the Opponent in Canada in the same years, lead me to conclude that the ALPINA &

Design trade-mark has deeper roots and has become known significantly in Canada in association with delicatessen (“charcuterie”) products.

(b) The length of time the trade-marks have been in use

[47] For the reasons given above, this factor also favours the Opponent.

(c) The nature of the wares, services or business; and (d) the nature of the trade

[48] When considering the nature of the wares and services and the nature of the trade, I must compare the Applicant’s statement of wares with the statement of wares in the Opponent’s registration [see *Henkel Kommanditgesellschaft auf Aktien v. Super Dragon Import Export Inc.* (1986), 12 C.P.R. (3d) 110 (F.C.A.); and *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.)]. However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. The evidence of the parties’ actual trades is useful in this respect [see *McDonald’s Corp. v. Coffee Hut Stores Ltd.* (1996), 68 C.P.R. (3d) 168 (F.C.A.); *Procter & Gamble Inc. v. Hunter Packaging Ltd.* (1999), 2 C.P.R. (4th) 266 (T.M.O.B.); and *American Optional Corp. v. Alcon Pharmaceuticals Ltd.* (2000), 5 C.P.R. (4th) 110 (T.M.O.B.)].

[49] The Opponent’s registration covers “salamis, hams, sausages, ham hocks, bacon, pepperettes, liver paste, paté, jellied pork, pork, pork hocks, and cuts thereof” whereas the Applicant’s application covers a variety of food products that essentially fall within three main categories of wares, namely preserved, dried and cooked fruits and vegetables; dairy products; and non-alcoholic beverages.

[50] The Opponent submits that both the Applicant and the Opponent operate in the food industry. In this regard, the Opponent submits that it has led evidence of the convergence of the dairy product, beverage and meat product industries and that these products are often offered for sale in the same channels of trade, including grocery stores and in the same sections of such

stores. The Opponent further submits that it has led evidence that dairy products, beverages and meat products are often advertised in the same section of flyers or websites and thus a greater likelihood of confusion may be inferred.

[51] The Applicant submits for its part that the use of the ALPINA & Design trade-mark shown by the Opponent is with “charcuterie” only and that there is no evidence that the Opponent has expanded its line of products to other food products. The Applicant submits that the mere fact that the Applicant’s wares and the Opponent’s wares both fall within the broad general category of food products does not render the parties’ wares similar as thousands of different types of food products can be found in the marketplace.

[52] Concerning more particularly the Opponent’s argument that several food product manufacturers and distributors such as Kraft and Sara Lee have expanded their line of products to include beverages, meat products and dairy products, the Applicant submits that it is the very essence of their business. These are giant food conglomerates and global manufacturers of food products. The Opponent is not one of those.

[53] The Applicant further submits that the Opponent’s evidence does not establish that the products associated with the trade-marks at issue could be sold side by side.

[54] While it is true that the Applicant’s wares differ in nature from those of the Opponent, the fact remains that they are all food products. In the absence of any evidence to the contrary, I agree with the Opponent that there is a potential overlap in the trades of the parties. As per my review of the Piacek affidavit, the Opponent’s “charcuterie” products are sold through grocery stores and other retail food stores. Presumably, the Applicant’s wares will, or could, be sold through the same types of outlets.

[55] In addition, even if I acknowledge that typically, the parties’ wares would not be sold side by side, it is to be remembered that s. 6(2) of the Act does not require the parties’ wares to be sold side by side, nor does it require the wares to be of the same general class.

(e) The degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[56] As stressed by the Opponent, the parties' marks are identical when sounded as their word portion both consist of the word ALPINA.

[57] While the word ALPINA has no known meaning in French or English, it possesses an Italian connotation that evokes something which is "of or pertaining to the Alps" (re the French word "alpin"), especially when the marks are viewed. Indeed, the Mark prominently displays a white mountain surrounded by a dark blue mountain range. The inverted V shape depicted in the Opponent's ALPINA & Design mark also evokes a mountain, while at the same time evoking a bull's head forming the horizontal line of the letter "A", standing for "ALPINA".

[58] However, the parties' marks do differ in appearance owing to their quite dissimilar stylistic designs.

Additional surrounding circumstances

State of the register evidence

[59] As indicated above, the Applicant submitted evidence of the state of the register by way of the Thibodeau affidavit. State of the register evidence is introduced to show the commonality or distinctiveness of a mark or portion of a mark in relation to the register as a whole. Evidence of the state of the register is only relevant insofar as inferences may be made on it concerning the state of the marketplace, and inferences about the state of the marketplace can only be drawn when a significant number of pertinent registrations are located [see *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 (T.M.O.B.); *Welch Foods Inc. v. Del Monte Corp.* (1992), 44 C.P.R. (3d) 205 (F.C.T.D.); and *Maximum Nutrition Ltd. v. Kellogg Salada Canada Inc.* (1992), 43 C.P.R. (3d) 349 (F.C.A.)].

[60] More particularly, Ms. Thibodeau summarily reproduces in paragraph 7 of her affidavit

the details of the 43 trade-mark registrations located for the stem “ALP” as a component of a trade-mark associated with food and/or beverage products and she attaches as Exhibit TTH-3 the computerized details obtained from CIPO database for each one of these trade-marks. Among these 43 trade-mark registrations, Ms. Thibodeau further attaches as Exhibit TTH-4 a table summarizing the details of the trade-marks located for the word ALPEN alone or ALPEN as a component of a trade-mark associated with food and/or beverage products.

[61] The registrations located by Ms. Thidodeau include the Opponent’s registration No. TMA357,659 for the ALPINA & Design mark.

[62] A number of the registrations located are held by five distinct entities. These registrations (that I have grouped by owner for the ease of review) are:

- ALPENDORF (TMA633,650) and ALPENGUT (TMA631,960) for meat products, ready-to-serve meals, dairy products, etc.;
- ALPENHORN and ALPENHORN & Design (TMA183,164 and TMA180,765) for dairy products;
- ALPENWEISS (TMA235,777) and ALPENWEISS SPARKLING & DESIGN (TMA300,231) for wines;
- ALPINE (UCA10970); ALPINE & Design (TMA233,652); ALPINE & Design (TMA262,136); ALPINE & Design (TMA324,680); ALPINE & Design (TMA690,245); ALPINE & Design (TMA470,884); ALPINE GENUINE COLD FILTERED (TMA417,378); ALPINE GENUINE COLD FILTERED & Design (TMA414,046); ALPINE LAGER (TMA386,450); ALPINE LAGER BEER & Design (TMA146,228); ALPINE LIGHT (TMA387,125); and ALPINE LIGHT & Design (TMA696,935) for beer or alcoholic beverages; and
- ALPINE ASTER (TMA657,645); ALPINE BELL Design (TMA695,952); and ALPINE ROSE (TMA661,539) for dairy products.

[63] The following registrations (that I have grouped by category of wares for the ease of review) are each owned by distinct entities:

- ALPEN SPRINGS (TMA446,319); ALPIAN (TMA382,353); ALPINE (TMA435,451); ALPENROCK HOUSE (TMA526,769); and ALPINE-SUBTERRANEAN INTERNATIONAL GUIDING SERVICES INC. (TMA537,394) for water or other beverages and preparations for making beverages;



- ALPENBERGER (TMA696,591); ALPENFRESH (TMA339,530); ALPENJOY (TMA245,521); and ALPI (TMA337,617) for various dairy products;
- ALPINE LACE (TMA530,010) for cheeses and meat;
- ALPENKRAFT (TMA406,520) for herbal remedies and herbal candies;
- ALPINE (TMA565,425) for medicated and non-medicated lozenges, throat drops, candy and chewing gum;
- ALPENICE (TMA425,631) for candies;
- ALPINE (TMA139,149) for frozen bakery products;
- ALPIA (TMA534,480); and ALPROSE (TMA519,837) for chocolates and confectionary;
- ALPREZ (TMA511,791) for vegetables; and
- TRANS ALPINE & Design (TMA323,331) for snail, capers; canned and marinated vegetables; (...) pâté de foie, oil, soya sauce, vinegar, table syrup.

[64] The Opponent underlines that none of these registrations comprise the word ALPINA either alone or combined with other words or design elements. Thus, the Opponent submits that there is no evidence that the word ALPINA is commonly used as part of a trade-mark in the food industry. The Opponent further submits that two of the above registrations cover both dairy products and meat products, which fact supports the Opponent's argument made above as to the convergence of the dairy product, beverage and meat product industries.

[65] I consider the number of registered marks located by Ms. Thibodeau sufficient to conclude that it is common in the food industry to adopt trade-marks made up of the words "ALPEN" or "ALPINE" in association with a variety of food products, especially dairy products and beverages. However, it is true that there is no evidence that the word ALPINA *per se* is commonly used as part of a trade-mark in the food industry.

[66] This brings me to comment on the Goudreau affidavit. As indicated above, the Goudreau affidavit was introduced to support the Applicant's contention that identical or similar trade-marks in the names of different entities in respect of a variety of food products coexist on CIPO register of trade-marks, like for instance:

- BARON BRAND (TMA685,805) for "ham"; BARON BURGER and BURGER BARON (TMA488,523 and TMA495,236) for "hamburgers"; LE BARON (TMA665,228) for "pain de jambon cuit); BARON (TMA491,460) for "beurre de sucre, choucroute, compote de pommes, fèves au lard, fruits frais, fruits en conserve, [etc.]"; BARON DE

LUZE (TMA287,064) for “vins, à l’exclusion des vins mousseux”; LE BARON (TMA247,789) for “tomates, jus de tomates, maïs en grains et en crème, petits pois, fèves jaunes et vertes, carottes, macédoine de légumes”; LE BARON (TMA301,646) for “fromages”; LE GRAND BARON (TMA297,043) for “wine”; RED BARON (TMA320,125) for “pizza”; and RED BARON (TMA351,199) for “beer”;

- THE BEEFEATER (TMA376,046) for “meat, poultry, fish, frozen meats” and BEEFEATER (TMA250,814) for “hydrolyzed vegetable protein”; BEEFEATER (TMA271,275 and TMA667,125) for “frozen French fries potatoes” and “appetizers and snack foods, namely frozen potato snacks, battered vegetables, onion rings, [etc.]” respectively; and BEEFEATER (TMA120,981) for “gin”;
- BIG RED (TMA224,704) for “meat products, namely wieners”; WRIGLEY’S BIG RED CHEWING GUM (TMA202,538) for “chewing gum”; BIG RED (TMA403,953) for “beer, ale and porter; mineral and aerated waters”; and BIG RED’S (TMA255,606) for “sandwiches and pizzas”; and
- BLUE RIBBON (TMA373,191) for “prepared meats, namely bologna”; BLUE RIBBON & Design (TMA339,911) for “food products, namely spices, dessert decorations and flavour extracts; coffee; tea; baking powder”; and BLUE RIBBON GOLDEN (TMA391,445) for “rice”.

[67] Even if I agree with the Applicant that the Goudreau affidavit supports to some extent the Applicant’s contention that identical or similar marks may well coexist on the register of trade-marks in respect of a variety of food products, it remains that each case must be decided on its own merits. Thus, the mere fact that various trade-marks coexist on the register in respect of a variety of food products is not binding upon the Registrar.

#### Conclusion regarding the likelihood of confusion

[68] As indicated above, the Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. The presence of a legal onus on the Applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the Applicant.

[69] As per my review of the Opponent’s evidence above, the Opponent has established extensive use of the ALPINA & Design mark in Canada in association with its “charcuterie” products for a considerable length of time. The documentary evidence in the nature of invoices, sales and advertising data, promotional materials, as well as sample packages support the Opponent’s contention that its ALPINA & Design mark has become known significantly in

Canada in association with “charcuterie” products.

[70] The distinctiveness acquired by the Opponent’s ALPINA & Design mark is not significantly undermined by the state of the register evidence in the present case as none of the registrations located by Ms. Thibodeau comprise the word ALPINA *per se*.

[71] As indicated above, the parties’ wares are likely to travel through the same type of grocery stores, and other food retail stores. The Opponent’s evidence further tends to support to some extent the possible convergence of the dairy product, beverage and meat product industries, although such convergence cannot be generalized.

[72] In view of the above, I find that the balance of probabilities is evenly balanced between finding that (i) there is no reasonable likelihood of confusion as to the source of the parties’ wares in view of the fact that there is little similarity in the exact nature of the parties’ wares and in the parties’ marks in appearance owing to their quite dissimilar stylistic designs and (ii) there is a reasonable likelihood of confusion as to the source of the parties’ wares particularly in view of the extensive use and promotion of the Opponent’s ALPINA & Design mark, the similarities existing between the marks owing to the fact that their word portions both consist of the word “ALPINA”, and the possible overlap in the parties’ channels of trade and industries. As the onus is on the Applicant to show, on a balance of probabilities, that there is no reasonable likelihood of confusion, I must find against the Applicant.

[73] Accordingly, the s. 12(1)(d) ground of opposition succeeds.

[74] I wish to add that that to the extent that my conclusion on the registrability ground of opposition is based on the evidence of record, the present proceeding is distinguishable from my decision of even date in the co-pending opposition proceeding by Weetabix Limited.

### Section 16 grounds of opposition

[75] The Opponent has pleaded that the Applicant is not the person entitled to registration of the Mark having regard to the provisions of s. 16(1)(a) and (2)(a) of the Act in that at the claimed date of first use of the Mark and the date of filing of the Applicant's application respectively, the Mark was confusing with the Opponent's trade-marks ALPINA and ALPINA & Design, which have been used in Canada since at least as early as 1960 in association with food products including "salamis, hams, sausages, ham hocks, bacon, pepperettes, liver paste, paté, jellied pork, pork hocks, and cuts thereof".

[76] An opponent meets its evidentiary burden with respect to a s. 16(1)(a) or (2)(a) ground if it shows that as of the date of first use claimed in the applicant's application or the date of filing of the applicant's application respectively, its trade-mark had been previously used in Canada and had not been abandoned as of the date of advertisement of the applicant's application [s. 16(4) of the Act]. As per my review of the Opponent's evidence, the Opponent has met its evidentiary burden.

[77] As I came to the conclusion that, based on the evidence of record, the balance of probabilities is evenly balanced between finding that (i) there is no reasonable likelihood of confusion between the marks in issue and (ii) there is a reasonable likelihood of confusion between the marks in issue, and because the difference in relevant dates does not substantially affect my analysis, I must find against the Applicant. Accordingly, the s. 16(1)(a) and (2)(a) grounds of opposition also succeed.

### Non-distinctiveness ground of opposition

[78] The Opponent has pleaded that the Mark does not distinguish the Applicant's wares from the wares of others and more particularly from the wares of the Opponent in association with which the latter has used and is still using its trade-marks ALPINA and ALPINA & Design in

Canada.

[79] An opponent meets its evidentiary burden with respect to a non-distinctiveness ground if it shows that as of the filing of the opposition its trade-mark had become known to some extent at least to negate the distinctiveness of the applied-for mark [see *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D)]. As per my review of the Opponent's evidence, the Opponent has met its evidentiary burden.

[80] As I came to the conclusion that, based on the evidence of record, the balance of probabilities is evenly balanced between finding that (i) there is no reasonable likelihood of confusion between the marks in issue and (ii) there is a reasonable likelihood of confusion between the marks in issue, and because the difference in relevant dates does not substantially affect my analysis, I must find against the Applicant. Accordingly, the non-distinctiveness ground of opposition also succeeds.

#### Disposition

[81] In view of the foregoing and pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

---

Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office