IN THE MATTER OF AN OPPOSITION by Altro Limited to application no. 770,554 for the trade-mark AUTOGLO filed by Double B Automotive Warehousing Inc.

On December 7, 1994, the applicant, Double B Automotive Warehousing Inc., filed an application to register the trade-mark AUTOGLO, based on proposed use in Canada, in association with the wares

automotive waxes and polishes.

The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated April 26, 1995. The opponent, Altro Limited, filed a statement of opposition on June 6, 1995, a copy of which was forwarded to the applicant on July 26, 1995. The applicant responded by filing and serving a counter statement. The opponent was subsequently granted leave to amend its pleadings: see the Board ruling dated April 9, 1996.

The first ground of opposition is that the applied for mark is not registrable, pursuant to Section 12(1)(d) of the Trade-marks Act, because the mark AUTOGLO is confusing with the opponent's mark AUTO GLYM & Design, registration no. 401,833, illustrated below,

covering the wares

> paints, lacquers, varnishes, paint thinners, anti-corrosives, rust preservatives and tyre black; cleaning, polishing, rust removing and scouring preparations, abrasive preparations, shampoos, soaps and detergents.

The second ground of opposition alleges that the applicant is not entitled to register the applied for mark AUTOGLO because it is confusing with the opponent's marks AUTO GLYM (two words) and AUTOGLYM (one word) used and made known in Canada, in association with the above mentioned wares including automotive waxes and polishes,

prior to the applicant's filing date of the application. The third ground of opposition alleges that the applied for mark is not distinctive of the applicant's wares in view of "the Opponent's continuous use and advertising in Canada of the trade-marks AUTO GLYM and AUTOGLYM for many years prior to the filing date of the [subject] application . . . "

The opponent's evidence consists of the affidavits of Terry Bucknell, President of Autoglym Canada Ltd., the master distributor of AUTO GLYM products in Canada; Geoffrey Walker, President of a company that distributes AUTO GLYM products to automotive dealerships and automotive supply stores; and Michelle C. Guy, a trade-mark agent trainee. The applicant elected not to file any evidence. Both parties filed a written argument, however, neither party requested an oral hearing.

The opponent's evidence supports the allegations in the statement of opposition that the opponent has used its marks AUTO GLYM & Design and AUTOGLYM in the sale and advertising of automobile products as enumerated in the opponent's trade-mark registration, including waxes and polishes. In this regard, Mr. Bucknell's evidence is that AUTO GLYM products have been sold in Canada since 1991 and as of February 1996 were sold to over 430 businesses across Canada providing annual wholesale sales revenues of about $200,000. The evidence of sales, and the evidence of advertising attached as exhibits to Mr. Bucknell's and Mr. Walker's affidavits, leads me to conclude that the opponent's marks AUTOGLYM & Design and AUTOGLYM had acquired some reputation in Canada with automotive professionals and automobile enthusiasts, and to a lesser extent with the average consumer of automobile products, by the earliest material date December 7, 1994.

With respect to the first ground of opposition pursuant to Section 12(1)(d), the initial evidential burden on the opponent has been satisfied by the opponent evidencing its trade-mark registration. The material date to consider the issue of confusion arising pursuant to Section 12(1)(d) is the date of my decision: see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.);

Conde Nast Publications Inc. v. The Canadian Federation of Independent Grocers (1991), 37 C.P.R. (3d) 538 (TMOB). The legal onus is on the applicant to show that there would be no reasonable likelihood of confusion, within the meaning of Section 6(2), between the applied for mark AUTOGLO and the opponent's registered mark AUTO GLYM & Design. The presence of an 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: see *John Labatt Ltd. v. Molson Companies Ltd.* (1990) 30 C.P.R.(3d) 293 at 297-298 (F.C.T.D.). The test for confusion is one of first impression and imperfect recollection. Factors to be considered, in making an assessment as to whether two marks are confusing, are set out in Section 6(5) of the Act: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the wares, services or business; the nature of the trade; the degree of resemblance in appearance or sound of the marks or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered. All factors do not necessarily have equal weight. The weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 C.P.R.(3d) 308 (F.C.T.D).

The opponent's mark AUTO GLYM & Design possesses a relatively low degree of inherent distinctiveness. In this respect, the word AUTO is partially descriptive of the opponent's wares namely, automotive products; the design features add little to the mark's distinctiveness; and the word component GLYM is the phonetic equivalent of "glim" meaning "glimmer." Even if the purchaser of the opponent's products was unaware of the dictionary meaning of the word "glim", the component "glim" would still suggest that the opponent's products cause an automobile to "glimmer" or "shine" which in fact the opponent's products are intended to do. Similarly, the applied for mark AUTOGLO possesses relatively little inherent distinctiveness. As discussed earlier, the opponent's mark AUTO GLYM & Design has acquired some reputation in Canada through sales and advertising under the mark. There is no evidence that the applied for

mark has become known to any extent. The nature of the parties' wares are the same and in the absence of evidence to the contrary I assume that the parties' channels of trade would also be the same. Further, there is a fair degree of resemblance between the marks in issue aurally and in ideas suggested, although less so visually.

Keeping in mind that the test for confusion is one of first impression and imperfect recollection, I am satisfied that, on the balance of probabilities, the applied for mark AUTOGLO is confusing with the opponent's registered mark AUTOGLYM & Design. If I am wrong in so concluding, then I would at least be in a state of doubt regarding the issue of confusion and therefore the outcome must still favour the opponent.

For essentially the same reasons as discussed above, I find that the opponent is also successful on the second ground of opposition based on confusion between the applied for mark and the opponent's mark AUTOGLYM at the material time December 7, 1994. The third and final ground of opposition turns on the issue of confusion between the applied for mark AUTOGLO and the opponent's mark AUTOGLYM at the material date June 6, 1995. Again I find that the opponent succeeds on the third ground for essentially the same reasons as discussed in relation to the first ground of opposition.

Accordingly, the applicant's application is refused.

DATED AT HULL, QUEBEC, THIS 4th DAY OF DECEMBER, 1997.

Myer Herzig,
Member,
Trade-marks Opposition Board