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THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 033

Date of Decision: 2022-02-28

IN THE MATTER OF AN OPPOSITION

**Quiz Franchisor, LLC and
The Quizno's Master LLC**

Opponents

And

Quattro Hospitality Inc.

Applicant

1,721,152 for Q DESIGN

Application

INTRODUCTION

[1] Quiz Franchisor, LLC and The Quizno's Master LLC (collectively, the Opponents) oppose registration of the trademark Q DESIGN (the Mark) (depicted below), which is the subject of application No. 1,721,152 (the Application) by Quattro Hospitality Inc. (the Applicant):



[2] The Application is in association with the following services:

- (1) Restaurant services; provision of conference and meeting facilities (the Services (1)).
- (2) Hotel services; arranging for hotel and temporary accommodation reservation services (the Services (2)).

[3] The Application is based on use of the Mark in Canada since at least as early as October 2010 in association with Services (1), and proposed use of the Mark in Canada with Services (2).

[4] For the reasons that follow, the Application is refused in part.

THE RECORD

[5] The Application was filed on March 26, 2015, and was advertised for opposition purposes in the *Trademarks Journal* of April 25, 2018.

[6] On September 25, 2018, the Opponents filed a statement of opposition. The grounds of opposition pleaded are based on sections 30(a) and 30(i) (compliance), 12(1)(d) (registrability), 16(1)(a) and 16(3)(a) (entitlement), and 2 (distinctiveness) of the *Trademarks Act*, RSC 1985, c T-13 (the Act). All references in this decision are to the Act as amended on June 17, 2019, with the exception of references to the grounds of opposition which refer to the Act before it was amended.

[7] At the hearing, the Opponents withdrew the grounds of opposition based on sections 30(a) and 30(i) of the Act. The Opponents further limited the opposition to the Application's "restaurant services", thus removing the 16(3)(a) ground of opposition. The Opponents' 12(1)(d), 16(1)(a) and distinctiveness grounds of opposition are primarily based on an allegation of confusion between the Mark and the opponent Quiz Franchisor, LLC's use and registration of the trademark Q Design (depicted below) in association with goods and services including "restaurant services":



[8] Both parties filed evidence. Neither party filed written representations. A hearing was held at which both parties were represented.

OVERVIEW OF THE EVIDENCE

[9] The evidence of record is briefly summarized below. Pertinent portions of the evidence are discussed further in the analysis of the grounds of opposition.

Opponents' evidence

[10] The Opponents filed a certified copy of registration No. TMA644,321 for the trademark Q Design, depicted above at paragraph 7. The registration shows the original registrant as the opponent The Quizno's Master LLC, and the current owner of the registration as the opponent Quiz Franchisor, LLC (Quiz Franchisor). The registration indicates that an assignment of the registration from The Quizno's Master LLC to Quiz Franchisor occurred on June 8, 2018.

Applicant's evidence

[11] The Applicant filed the affidavit of Mike Braykovich (sworn August 16, 2019). Mr. Braykovich is the General Manager of the Applicant and has held this role since September 1, 2013. Mr. Braykovich states the following:

- The Applicant is the owner of the Mark in connection with its operation of the Quattro Hotel and Conference Centre and the Quattro restaurant in Sault Ste. Marie, Ontario (para 4). The Applicant has been providing hotel services and associated services in connection with the Mark since at least as early as May 2015 (para 5). Exhibit A consists of pages from the Applicant's website advertising the Services (including hotel and restaurant services) under the Mark, including screenshots of the Applicant's website dated June 13, 2018, March 23, 2016 and May 19, 2015 obtained from the Wayback Machine (para 6).
- The Mark is prominently displayed on signage at the Applicant's facility in Sault Ste. Marie, including at the Applicant's restaurant which is connected to its hotel and conference centre. The Applicant has been using the Mark in connection with its restaurant services since at least as early as October 2010 (para 7).

- At all times during the operation of the Applicant's restaurant, the Mark has been displayed on the Applicant's website and on signage, menus and advertising materials located at the Applicant's facility (para 8). Exhibit B contains copies of pages from the Applicant's website displaying the Mark in association with its restaurant services, namely screenshots obtained from the Wayback Machine dated April 29, 2017 and August 1, 2015.
- Exhibit D consists of an online copy of the Applicant's dinner menu, which has remained substantially the same for at least the last five years. The Applicant's restaurant is a high end, sit down, steakhouse and Italian restaurant; it cannot be described as fast food or fast casual (para 10).
- Exhibit E consists of copies of advertising and marketing materials, including copies of postings from the Applicant's official Instagram page, showing the Applicant's use of the Mark in association with the Applicant's services (para 11).
- Exhibit C consists of reviews of the Applicant's restaurant on the website *yelp.com* (para 9). There are 13 reviews listed, with the earliest dated September 27, 2013.

LEGAL ONUS AND EVIDENTIAL BURDEN

[12] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the Application complies with the requirements of the Act. However, the Opponents must first adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 12(1)(d) ground of opposition

[13] The Opponents have pleaded that the Mark is not registrable in that, pursuant to section 12(1)(d), the Mark is confusing with the registered trademarks of the opponent Quiz

Franchisor, including registration No. TMA644,321 for Q Design, as well as a number of trademarks comprised of or containing the element QUIZNOS or QUIZ (identified by the Opponents as the “Quiznos Family of ‘Q’ marks”) set out in Schedule A of this decision (TMA644,321 for Q Design and the Quiznos Family of ‘Q’ marks are collectively referred to as the QUIZNOS Marks).

[14] I consider that the Opponents’ best case is registration No. TMA644,321 for the trademark Q Design and will focus on this trademark in my confusion analysis. At the hearing, counsel for the Opponents also focused on this registration in his submissions. The Q Design trademark is registered for use in association with the following goods and services:

Goods	Services
(1) Snack foods, namely: potato chips; soups, salads and vegetables. (2) Snack foods, namely: corn chips, taco chips, tortilla chips, grain-based chips, flour-based chips, cookies, cakes and brownies; products comprising and including bread, namely: breads, sandwiches, croutons, bread sticks, bread rolls; sauces, namely: dairy, fruit, vegetable, meat and seafood based sauces, and combinations thereof; coffee; tea; cocoa; artificial coffee; beverages having a coffee or tea or cocoa base. (3) Mineral and aerated waters; carbonated beverages, namely: carbonated soft drink beverages; fruit juices; other non-alcoholic drinks, namely: bottled water; fruit drinks, namely: lemonade.	(1) Restaurant services

[15] The material date for this ground of opposition is the date of this decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[16] As the registration is extant, the Opponents have met their initial evidential burden with respect to this ground of opposition [see *Quaker Oats Co of Canada Ltd v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB) regarding the Registrar’s discretion to check the register in the context of a section 12(1)(d) ground of opposition]. As a result, the Applicant must prove on a balance of probabilities that there is no reasonable likelihood of confusion between the Mark and registration No. TMA644,321 for Q Design.

Test for confusion

[17] The test for confusion is set out in section 6(2) of the Act which provides that the use of a trademark causes confusion with another trademark if the use of both trademarks in the same area would likely lead to the inference that the goods and services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods and services are of the same general class or appear in the same class of the Nice Classification. In making such an assessment, I must take into consideration all the relevant surrounding circumstances, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods and services or business; the nature of the trade; and the degree of resemblance between the trademarks in appearance, or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22; *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27; *Veuve Clicquot Ponsardin v Boutiques Clicquot Ltée*, 2006 SCC 23].

[18] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's mark, at a time when he or she has no more than an imperfect recollection of the opponent's trademark, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

Degree of resemblance

[19] In most instances, the degree of resemblance between the trademarks at issue is likely to have the greatest effect on the confusion analysis [*Masterpiece, supra* at para 49]. One must consider the degree of resemblance between the marks in appearance, sound and ideas suggested. However, it is not the proper approach to set the trademarks side by side and carefully examine them to find similarities and differences; each trademark must be considered as a whole [*Veuve Clicquot, supra*].

[20] In my view, there is a reasonably high degree of visual resemblance between the parties' trademarks insofar as both consist of an uppercase letter "Q", albeit in different stylized script. At the hearing, counsel for the Applicant suggested that without CIPO's index heading describing Quiz Franchisor's trademark as "Q Design", that the trademark would not definitively be seen as the letter "Q" as opposed to a speech bubble. While the letter Q is structurally similar to a speech bubble (as both feature a rounded component or "bubble" and a "tail"), in the absence of any text (conversational or otherwise) placed in the bubble, or any other cues identifying it as a graphic convention, I find it reasonable to conclude that the trademark would, as a matter of first impression, be perceived as a representation of an uppercase letter Q.

[21] Counsel for the Applicant further argued that even if Quiz Franchisor's mark was perceived as the letter "Q", there are key differences in the components making up the letter in the parties' trademarks. In particular, counsel noted that the tail component of the Applicant's Mark is angled to the left and then extends in a wavy line veering to the right, whereas the tail component of Quiz Franchisor's "Q" design extends directly to the right. Further, the rounded component of the Applicant's Mark is comprised of a single circular shape, while the rounded component of Quiz Franchisor's trademark consists of two curved lines with spacing between them. However, overall, I do not consider the visual differences to be significant as a matter of first impression to an individual with an imperfect recollection of Quiz Franchisor's Q Design trademark. From a phonetic standpoint, the trademarks are identical. With respect to the ideas suggested, neither of the parties' trademarks suggests any particular idea in the context of the parties' restaurant services.

[22] In view of the above, on balance, this factor favours the Opponents.

Inherent distinctiveness of the trademarks

[23] I find both of the parties' marks to possess a limited degree of inherent distinctiveness as each consists of a single letter, and trademarks consisting of initials (or single letters) are traditionally considered to be weak and to lack inherent distinctiveness [*GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD) at 162-164]. While both trademarks feature the letter Q in a stylized script or form, this does not significantly increase the inherent distinctiveness of either trademark.

Extent known and length of time in use

[24] The strength of a trademark may be increased by means of it becoming known through promotion or use. As discussed below, neither party has provided evidence that speaks persuasively to this point.

[25] With respect to the opponent Quiz Franchisor's Q Design trademark, the registration includes a claim of use in Canada since August 2002 with the listed goods and services. Absent any other evidence, I can only infer *de minimis* use of this trademark from the certificate of registration adduced [*Tokai of Canada v Kingsford Products Company, LLC*, 2018 FC 951 at para 37]. However, such an inference does not support the finding that Quiz Franchisor's trademark was known to any significant extent or that it has been continuously used since the date declared [*Krauss-Maffei Wegmann GmbH & Co KG v Rheinmetall Defence Electronics GmbH*, 2017 TMOB 50 at para 20].

[26] The Application claims a date of first use of the Mark in Canada in association with "restaurant services" since at least as early as October 2010, and the Applicant has submitted evidence (through the Braykovich affidavit) to show its use of the Mark. At the hearing, counsel for the Opponents submitted that if one looks closely at the exhibits to the Braykovich affidavit, the trademark that is being used in association with the restaurant services is not the Mark as applied for. Rather, it is the Mark in association with the word QUATTRO either laid over the Q Design or situated below it. In response, counsel for the Applicant submitted that there are multiple exhibits to the Braykovich affidavit prominently displaying the Mark, and that in many cases the Applicant's Q Design appears independently. I note that the Braykovich affidavit includes at least one example showing the display of the Mark *per se*, that is, without the word QUATTRO overlaid or below it, advertising restaurant services (see for example in Exhibit B, the printout from the Wayback Machine dated August 1, 2015 which prominently displays the Mark at the top left corner of the page). Moreover, with respect to the placement of the word QUATTRO below or in close proximity to the Mark, I also consider such use to constitute use of the Mark *per se* as it is well-established that nothing in the Act precludes a trademark owner from using more than one trademark at the same time in association with the same goods or services [*AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD)]. In my

view, a typical consumer viewing the Applicant's signage, menus, and advertising would perceive the Applicant's Q DESIGN as a separate trademark in its own right apart from the word QUATTRO.

[27] At the hearing, counsel for the Opponents further submitted that evidence relating to the extent of use of the Mark in association with restaurant services, such as sales figures, number of customers, or metrics showing customer exposure is noticeably absent from the Braykovich affidavit. I agree that the Applicant's evidence is limited in that no sales figures, information on the number of Canadian customers, or advertising expenditures are provided. While the Applicant provides examples of advertisements for its restaurant services on its website, there is no indication of the number of site visitors. Copies of various postings from the Applicant's Instagram page have been "liked" by viewers, however the number of "likes" (the highest being 30) is minimal. Finally, only 13 customer reviews of the Applicant's restaurant are posted on *yelp.com*, six of which are identified as reviews from customers from the United States.

[28] Based on the foregoing, I find that this factor favours the Applicant, though only slightly.

Nature of the goods, services or business; and the nature of the trade

[29] There is direct overlap in the restaurant services of the Applicant and the Opponent's restaurant services covered by registration No. TMA 644,321. While the Applicant has highlighted that its restaurant is "high-end" as opposed to "fast food or fast casual", no such restrictions (for instance, fine dining or casual) are included in the Application or in Quiz Franchisor's registration.

[30] With respect to the channels of trade, as the services at issue (restaurant services) are identical, it is reasonable to assume that their channels of trade would also overlap, particularly in the absence of evidence to the contrary.

[31] Accordingly, these factors favour the Opponents.

Additional surrounding circumstance – Family of trademarks

[32] The statement of opposition makes reference to a “Quiznos Family of ‘Q’ Marks” owned by Quiz Franchisor. However, there can be no presumption of the existence of a family of trademarks in opposition proceedings; the party seeking to establish a family of marks must show that it has used the trademarks comprising the series to a sufficient extent as to constitute a family of marks [*Industries Lassonde Inc v Olivia’s Oasis Inc*, 2010 TMOB 107]. In this case, the Opponents have not provided evidence establishing use of any of these trademarks. Accordingly, this is not a surrounding circumstance assisting the Opponents.

Conclusion

[33] The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the Mark when he or she has no more than an imperfect recollection of the opponent Quiz Franchisor’s Q Design trademark and does not pause to give the matter any detailed consideration or scrutiny.

[34] Having considered all of the surrounding circumstances, in particular, the degree of resemblance between the trademarks, and the direct overlap in the parties’ restaurant services, I find that at best for the Applicant, the probability of confusion is evenly balanced between a finding of confusion and no confusion. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the marks, I must therefore find against the Applicant. Accordingly, the 12(1)(d) ground of opposition is successful with respect to “restaurant services”.

Section 16(1)(a) ground of opposition

[35] The Opponents have pleaded that the Applicant is not the person entitled to registration of the Mark for “restaurant services; provision of conference and meeting facilities” in that the Mark was, at all material times, confusing with each of the Quiznos Marks, which had been previously used or made known in Canada by Quiz Franchisor, LLC and any predecessor-in-title, in association with the goods and/or services associated with the Quiznos Marks. At the hearing, this ground of opposition was limited to the “restaurant services” in the Application.

[36] The Opponents' evidence, which is limited to a certified copy of registration No. TMA644,321, is not sufficient for the Opponents to meet their burden for this ground of opposition [*Rooxs Inc v Edit-SRL* (2002), 23 CPR (4th) 265 (TMOB) at 268]. Accordingly, this ground is dismissed on the basis that the Opponents have not met their initial burden.

Section 2 ground of opposition

[37] The Opponents have pleaded that the Mark is not distinctive in that the Mark does not actually distinguish the Applicant's services (subsequently limited to "restaurant services") from the goods or services of others, including those of Quiz Franchisor in association with the Quiznos Marks, nor is it adapted to so distinguish them.

[38] To meet its initial evidential burden under this ground of opposition, an opponent must show that its trademarks had a substantial, significant or sufficient reputation in Canada in association with the relevant goods and/or services so as to negate the distinctiveness of the applied for trademark [*Motel 6, Inc v No 6 Motel Ltd*, (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International, LLC and Bojangles Restaurants, Inc v Bojangles Café Ltd*, 2006 FC 657, 48 CPR (4th) 427 (FCTD)].

[39] In this case, the Opponents have provided no evidence of the use of their trademarks in Canada. In this regard, I note that any reference to use claimed in the Opponents' registrations is not sufficient to satisfy the Opponents' evidential burden under section 2 of the Act [*Roox, supra*]. Therefore, the Opponents have not met their initial evidential burden and this ground of opposition is rejected.

DISPOSITION

[40] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the Application with respect to “restaurant services”. Therefore, the Application may proceed in association with the remaining services, which are set out in Schedule B to this decision.

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE A – OPPONENT’S “FAMILY OF Q MARKS”

Trademark	Reg. No.	Goods/Services
Quiznos	TMA639,238	(1)Snack foods, namely: potato chips; soups, salads and vegetables (2)Snack foods, namely: corn chips, taco chips, tortilla chips, grain-based chips, flour-based chips, cookies, cakes and brownies; products comprising and including bread, namely: breads, sandwiches, croutons, bread sticks, bread rolls; sauces, namely: dairy, fruit, vegetable, meat and seafood based sauces, and combinations thereof; coffee; tea; cocoa; artificial coffee; beverages having a coffee, tea or cocoa base (3)Mineral and aerated waters; carbonated beverages, namely: carbonated soft drink beverages; fruit juices; other non-alcoholic drinks, namely: bottled water; fruit drinks, namely: lemonade Services: restaurant services
QUIZNOS	TMA638,787	(1)Snack foods, namely: potato chips; soups, salads and vegetables (2)Snack foods, namely: corn chips, taco chips, tortilla chips, grain-based chips, flour-based chips, cookies, cakes and brownies; products comprising and including bread, namely: breads, sandwiches, croutons, bread sticks, bread rolls; sauces, namely: dairy, fruit, vegetable, meat and seafood based sauces, and combinations thereof; coffee; tea; cocoa; artificial coffee; beverages having a coffee, tea or cocoa base (3)Mineral and aerated waters; carbonated beverages, namely: carbonated soft drink beverages; fruit juices; other non-alcoholic drinks, namely: bottled water; fruit drinks, namely: lemonade Services: restaurant services
QUIZNOS SUB	TMA701,371	Sandwiches including submarine sandwiches and tortilla wrap sandwiches; soups; salads; pizza; snack foods, namely, chips, crackers, cookies; pastry; bread; non-alcoholic beverages, namely, coffee, tea, cocoa, carbonated colas, drinking water, non-alcoholic fruit drinks, fruit juices, milk. Services: restaurant services
QUIZNOS TO GO	TMA721,995	Sandwiches including submarine sandwiches and tortilla wrap sandwiches; soups; salads; pizza; snack foods, namely, chips, crackers, cookies; pastry; bread; non-alcoholic beverages, namely, coffee, tea, cocoa, carbonated colas, drinking water, non-alcoholic fruit drinks, fruit juices, milk. Services: retail sale of food and beverages.
QUIZ KIDZ	TMA588,247	Restaurant services.

SCHEDULE B

The Application may proceed in association with the following services:

- (1) ~~Restaurant services~~; Provision of conference and meeting facilities.
- (2) Hotel services; arranging for hotel and temporary accommodation reservation services.

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2021-12-07

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