

**IN THE MATTER OF AN OPPOSITION
by Cadbury Confectionery Canada Inc.
(now Cadbury Trebor Allan Inc.) to application
No. 865,511 for the trade-mark CANNABIS
CRUNCH filed by Duncan Valliant-Saunders**

On January 2, 1998, the applicant, Duncan Valliant-Saunders, filed an application to register the trade-mark CANNABIS CRUNCH based on proposed use in Canada. The application was amended to include a disclaimer to the word CANNABIS and was subsequently advertised for opposition purposes on November 4, 1998. The application, as advertised, covers the wares “chocolate bars comprising [sic] mainly of cannabis seeds.”

The opponent, Cadbury Confectionery Canada Inc. (now Cadbury Trebor Allan Inc.), filed a statement of opposition on April 6, 1999, a copy of which was forwarded to the applicant on April 30, 1999. The opponent subsequently requested leave pursuant to Rule 40 of the Trade-marks Regulations to amend its statement of opposition and leave was granted on October 5, 2000.

The first ground of opposition is that the applicant’s application does not conform to the requirements of Section 30(i) of the Trade-marks Act because the applicant could not have been satisfied that he was entitled to use the applied for trade-mark in Canada. In this regard, the opponent alleges that the applicant was aware that his proposed wares could not be sold in Canada “....pursuant to various Canadian laws and regulations.....”

The second ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Act because it is confusing with the opponent’s trade-mark

CRISPY CRUNCH registered under No. 129,096 for “chocolates and chocolate bars” and “ice cream” and under No. 479,863 for “refrigerated milk shakes.”

The third ground is that the applicant is not the person entitled to registration pursuant to Section 16(3)(a) of the Act because, as of the applicant’s filing date, the applied for trade-mark was confusing with the trade-mark CRISPY CRUNCH previously used in Canada by the opponent. The fourth ground is that the applicant’s trade-mark is not distinctive because it is confusing with the mark CRISPY CRUNCH used by the opponent.

The applicant filed and served a counter statement in which he stated that sterilized cannabis seeds may be legally used in Canada. He also alleged that there were a number of registered trade-marks on the trade-marks register for candy and snack foods where the mark includes the word CRUNCH or a variation thereof. However, he failed to subsequently evidence any of those registrations.

As its evidence, the opponent submitted the affidavits of Ludmila Spaleny and Tannis Critelli. As his evidence, the applicant submitted his own affidavit. As evidence in reply, the opponent submitted the affidavits of Jennifer McKenzie and Nikita Nanos. Both parties filed a written argument and an oral hearing was conducted on January 7, 2002 at which both parties were represented. At the commencement of the hearing, I ruled that the three appendices to the applicant’s written argument were in the nature of evidence and were therefore inadmissible.

The Opponent's Evidence

In her affidavit, Ms. Critelli identifies herself as the Manager of Taxation and Legal Affairs of Cadbury Chocolate Canada Inc. (“Cadbury Chocolate”) and Cadbury Confectionery Canada Inc. (“Cadbury Confectionery”), the former being a wholly-owned subsidiary of the latter. Ms. Critelli details the history of the ownership and use of the trade-mark CRISPY CRUNCH and states that Cadbury Chocolate is licensed to use the mark by Cadbury Confectionery. Sales and advertising of the CRISPY CRUNCH mark in association with chocolate bars have been extensive with wholesale sales for the period 1995 to 1999 being in excess of \$83 million and advertising expenditures for the period 1995 to 1998 being greater than \$6 million.

Ms. Critelli describes the retail channels through which CRISPY CRUNCH chocolate bars are sold including grocery stores, convenience stores, vending machines, drug stores, department stores and movie theaters. Advertising has been effected through various media including nationwide television ad campaigns. Ms. Critelli also describes recent use of the trade-mark CRISPY CRUNCH for ice cream and milk shakes.

The Spaleny affidavit serves to introduce into evidence excerpts from a Health Canada publication entitled “The Industrial Hemp Guide” and copies of The Controlled Drugs and Substances Act and The Industrial Hemp Regulations which govern the use and sale of industrial hemp and cannabis products in Canada. Non-viable or sterilized cannabis seeds are not prohibited by The Controlled Drugs and Substances Act and are therefore excluded from

The Industrial Hemp Regulations. Viable seeds are prohibited unless they contain no more than 10 micrograms per gram of THC, in which case, someone manufacturing products from such seeds requires a license and must use appropriate labelling on his products.

The Applicant's Evidence

In his affidavit, Mr. Valliant-Saunders states that he is a sole proprietor who has been developing a chocolate bar made from sterilized hemp seeds. He details his investigations respecting the use of hemp seeds and states that sterilized hemp seeds are legal in Canada. Appended as exhibits to his affidavit are several excerpts from the materials appended as exhibits to the Spaleny affidavit. Appended as Exhibit 6 is a bag of sterilized hemp seeds purchased by Mr. Valliant-Saunders from an Ottawa retail store.

Exhibit 36 to Mr. Valliant-Saunders' affidavit is a copy of a prototype wrapper for his product bearing the proposed mark CANNABIS CRUNCH. Exhibits 39 and 40 comprise 111 completed questionnaires which resulted from an informal survey conducted by Mr. Valliant-Saunders on April 24, 2000 at Algonquin College in Ottawa. Respondents were asked to complete a one-page questionnaire which included black and white representations of a CRISPY CRUNCH wrapper and the applicant's prototype wrapper. They were asked if they would "....mistakenly and/or confusedly buy CANNABIS CRUNCH instead of CRISPY CRUNCH." All but six said no.

The Valliant-Saunders affidavit also serves to introduce into evidence examples of third party uses of the word CRUNCH or variations thereof by other traders. Exhibits 9 to 11 comprise wrappers of various types of chocolate bars sold under the trade-mark NESTLE CRUNCH. Mr. Valliant-Saunders states that such bars are available in convenience stores throughout Canada. Exhibit 14 is a wrapper bearing the trade-mark NESTLE BUNCHA CRUNCH. Exhibit 13 is a wrapper for what appears to be a so-called energy bar bearing the trade-mark CARBO-CRUNCH. Exhibit 15 is a wrapper bearing the trade-marks SECOND CUP and ALMOND BRITTLE CRUNCH for a confectionery bar that Mr. Valliant-Saunders says may be purchased in SECOND CUP coffee stores. Exhibit 16 is a wrapper for a chocolate bar bearing the trade-mark REESE CRUNCHY PEANUT BUTTER CUPS. Mr. Valliant-Saunders states that this product is available in convenience stores throughout Canada.

The Opponent's Reply Evidence

The McKenzie affidavit introduces into evidence a Health Canada publication entitled "Hemp: Interim Position" dated April 17, 2000 and a copy of regulations amending the Food and Drug Regulations regarding "novel foods." The publication states that the use of non-viable industrial hemp seeds in food is permitted in Canada but evidence that the seeds are non-viable must be provided. It also states that viable seeds can be used in food if the level of THC is less than 10 parts per million, a license is obtained and appropriate labelling is used.

In her affidavit, Ms. Nanos identifies herself as the President of SES Canada Research, a firm that designs and conducts market research surveys. Ms. Nanos details her background

and experience which establishes that she has expertise in the field of market research surveys. She was asked to review the informal survey conducted by Mr. Valliant-Saunders which she concluded was “methodologically flawed and seriously deficient.” Among the problems Ms. Nanos noted with the survey were the following:

- (1) Mr. Valliant-Saunders did not state how he designed his survey nor did he describe the methodology used.
- (2) The findings of the survey are not representative of any group or survey population.
- (3) Algonquin College students are not a complete or accurate sample to represent the target market.
- (4) No sample was generated. Potential respondents self-administered the completion of the questionnaire.
- (5) Self-administered questionnaires are not as good as telephone surveys because the order of the questions cannot be controlled.
- (6) The survey questions directed the respondent to graphic or design representations of the trade-marks at issue rather than the marks as applied for and registered.
- (7) The black and white reproductions of the two wrappers shown in the questionnaire make the two wrappers look different.
- (8) More than six out of ten of the respondents considered the trade-marks not confusing because the graphics were different.
- (9) There could have been researcher bias since Mr. Valliant-Saunders administered his own survey and had a vested interest in the results.
- (10) The survey was conducted on one day at one time only.

Paragraph 26 of Ms. Nanos' affidavit is a summary of her review of the applicant's survey:

26. Based on my review of the information presented in the Valliant-Saunders affidavit and the survey results, it is my opinion that the survey presented is seriously flawed and does not establish lack of confusion between the trade-marks Crispy Crunch™ and Cannabis Crunch™. A direct question as to whether the two names are confusing was not asked. The basis for confusion relies on a visual presentation of the wrappers using a biased questionnaire with leading questions. This is further compounded by an unrepresentative sample and researcher bias resulting from Valliant-Saunders' direct implementation of the fieldwork. As a result of a series of design flaws and implementation deficiencies, one cannot extrapolate the likelihood of confusion between the two trade marks based on the biased survey presented by Valliant-Saunders.

The Grounds of Opposition

As for the first ground of opposition, the legal burden is on the applicant to show his conformance with the provisions of Section 30 of the Act: see Joseph Seagram & Sons Ltd. v. Seagram Real Estate Ltd. (1984), 3 C.P.R. (3d) 325 (T.M.O.B.); Canadian National Railway Co. v. Schwauss (1991), 35 C.P.R. (3d) 90 (T.M.O.B.) and John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R. (3d) 293 (F.C.T.D.)). However, there is an initial evidential burden on the opponent respecting its allegations of fact in support of its ground of non-conformance with Section 30(i) of the Act.

In the present case, the applicant has formally complied with the provisions of Section 30(i) of the Act by including the required statement in his application. The issue then becomes whether or not the applicant has substantively complied with that subsection - i.e. - was the

statement true when the application was filed? Previous oppositions based on non-conformance with Section 30(i) of the Trade-marks Act have been successful where an opponent has made out a ‘prima facie’ case that the applicant’s proposed use of its mark was in potential violation of a federal statute: see, for example, the decisions in E. Remy Martin & Co. S.A. v. Magnet Trading Corp. (HK) Ltd. (1988), 23 C.P.R.(3d) 242 (T.M.O.B.) and Co-operative Union of Canada v. Tele-Direct (Publications) Inc. (1991), 38 C.P.R.(3d) 263 (T.M.O.B.).

In the present case, the opponent contends that the applicant’s statement that he was satisfied that he was entitled to use the applied for mark could not have been true because the applicant was aware that viable cannabis seeds cannot be used in food products in Canada pursuant to the Controlled Drugs and Substances Act and the Industrial Hemp Regulations. However, as conceded by the opponent, the relevant legislation indicates that the sale and use of non-viable cannabis seeds is legal in Canada. Furthermore, the documentation evidenced in this case suggests that even viable seeds having a THC content of less than 10 ppm may be used in food products if certain conditions are met.

In view of the above, it is apparent that the applicant can make legal use of certain types of cannabis seeds in his proposed chocolate bar. Nothing in the Valliant-Saunders affidavit suggests that the applicant intends to use illegal or prohibited cannabis seeds in his wares. In such a circumstance, I consider that it is reasonable to assume that the applicant will comply with relevant statutes, regulations and guidelines in manufacturing and selling his proposed product: see Ontario Lottery Corp. v. Arkay Marketing Associates Inc. (1993), 47

C.P.R.(3d) 398 at 402 (T.M.O.B.). In the absence of evidence to the contrary, I find that the opponent has failed to meet its evidential burden and the first ground is unsuccessful.

As for the second ground of opposition, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). The onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Furthermore, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

As for Section 6(5)(a) of the Act, the opponent's trade-mark CRISPY CRUNCH is comprised of two words that are descriptive or suggestive when used with chocolate bars or chocolate. Thus, the mark is inherently weak when used with such wares. It is less so when used with the other registered wares namely, ice cream and milk shakes. In view of the Critelli affidavit, I am able to conclude that the opponent's trade-mark has become very well known throughout Canada for chocolate bars. To a much lesser extent, it has acquired a reputation in association with milk shakes. The evidence establishes little recognition for the mark for ice cream.

The applicant's mark, too, is comprised of two words that are descriptive or suggestive when used with chocolate bars, the applicant having disclaimed the component CANNABIS.

Thus, his mark is also inherently weak. There is no evidence of any acquired reputation for the applicant's mark in Canada.

The length of time the marks have been in use clearly favors the opponent. As for Sections 6(5)(c) and 6(5)(d) of the Act, the wares of the parties are the same in relation to chocolate bars. To that extent, presumably the trades of the parties would also be the same or could overlap. The applicant's chocolate bar differs from the opponent's registered wares ice cream and milk shakes and the associated trades would likely be different.

As for Section 6(5)(e) of the Act, I consider there to be some resemblance in all respects between the marks at issue. However, that resemblance is due almost exclusively to the common use of the component CRUNCH which has been shown, on the evidence, to be commonly used by other traders in the confectionary industry for chocolate bars and the like. Thus, consumers would likely center on the other component of the marks to distinguish them. In this case, CANNABIS differs entirely from CRISPY. Furthermore, although marks are not to be dissected when determining matters of confusion, it has been held that the first portion of a trade-mark is the most relevant for the purposes of distinction: see Molson Companies Ltd. v. John Labatt Ltd. (1990), 28 C.P.R. (3d) 457 (F.C.T.D.).

The applicant submitted that an additional surrounding circumstance in the present case is the state of the trade-marks register respecting marks which include the component CRUNCH or the like registered for snack food products. As noted, although the applicant made reference to such marks in his counter statement, he did not evidence them. Thus, I

cannot have regard to the state of the register in the present case.

The applicant further submitted that the survey evidence contained in his affidavit supports a finding of no confusion. Survey evidence is admissible but care must be taken to ensure its reliability. As stated by Mr. Justice MacKay in Joseph Seagram & Sons v. Seagram Real Estate (1990), 33 C.P.R.(3d) 455 at 471 (F.C.T.D.):

The question of admissibility and reliability of surveys of public opinion polls has been the subject of debate in numerous trade mark cases. However, after considering the jurisprudence concerning the matter, I understand the general principle to be that the admissibility of such evidence and its probative value are dependant upon the relevance of the survey to the issues before the court and the manner in which the poll was conducted; for example, the time period over which the survey took place, the questions asked, where they were asked and the method of selecting the participants.

Mr. Justice Pinard also had occasion to consider survey evidence in Opus Building Corporation v. Opus Corporation (1995), 60 C.P.R.(3d) 100 at pages 105-106 as follows:

I find that the survey is admissible for the following reasons:

- (a) the survey was conducted by an expert in the field of public opinion research;
- (b) the sampling is from the appropriate "universe";
- (c) the survey was designed and conducted, and the resulting data was processed, in a professional manner, independent of both the applicant and its counsel;
- (d) the survey was not geographically restricted;
- (e) the survey was conducted in both national official languages and involved both male and female respondents; and
- (f) the survey evidence is put forward as the basis on which the expert assessed the recognizability of the word OPUS in the survey "universe".

In the present case, the survey evidence can be given little weight. For the reasons noted by Ms. Nanos in her affidavit, the applicant's survey was deficient in a number of

respects and fails to meet the standards set by Pinard, J. noted above. At best, I can infer from the survey that a limited number of people would not be confused by the two trade-marks at issue when they are presented with the marks in particular design configurations.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the common adoption of CRUNCH marks and descriptions by other traders in the field, the inherent weakness of the two marks and the relatively low degree of resemblance and notwithstanding the extensive reputation associated with the opponent's mark, I find that the applicant's trade-mark CANNABIS CRUNCH is not confusing with the opponent's registered trade-mark CRISPY CRUNCH. The second ground is therefore also unsuccessful.

As for the third ground of opposition, the opponent has evidenced use of its mark CRISPY CRUNCH prior to the applicant's filing date and non-abandonment of its mark as of the applicant's advertisement date. Thus, the third ground remains to be decided on the issue of confusion between the marks of the parties as of the applicant's filing date. For the most part, my conclusions respecting the issue of confusion for the second ground are applicable to this ground as well. Thus, I find that the applicant has satisfied the onus on him to show that his trade-mark was not confusing with the trade-mark CRISPY CRUNCH previously used in Canada by the opponent. The third ground is therefore also unsuccessful.

As for the fourth ground of opposition, the onus or legal burden is on the applicant to show that his mark is adapted to distinguish or actually distinguishes his wares from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Furthermore, the material time for considering the circumstances respecting this issue is as of the filing of the opposition (i.e. - April 6, 1999): see Re Andres Wines Ltd. and E. & J. Gallo Winery (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.) and Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.).

The fourth ground essentially turns on the issue of confusion between the marks of the parties. Given my conclusions respecting the second ground, I find that the two marks were not confusing as of the filing of the opposition. Thus, the fourth ground is also unsuccessful.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 28th DAY OF JANUARY, 2002.

David J. Martin,
Member,
Trade Marks Opposition Board.