

**IN THE MATTER OF AN OPPOSITION
by Canbra Foods Ltd. to application No.
762,760 for the trade-mark CANADIAN
HARVEST filed by Saskatchewan Wheat
Pool doing business as CSP Foods**

On August 26, 1994, the applicant, Saskatchewan Wheat Pool doing business as CSP Foods, filed an application to register the trade-mark CANADIAN HARVEST based on proposed use in Canada. The application was amended to include a disclaimer to the word CANADIAN and was advertised for opposition purposes on April 5, 1995. The application was subsequently amended to delete certain of the wares. The application presently covers the following wares:

flour; mixes for breads, cakes, cookies, muffins, donuts and pies;
toppings and fillings, namely, fondants, icings, pie fillings, donut
fillings and glazes; meal and pellets for use as animal foodstuffs.

The opponent, Canbra Foods Ltd., filed a statement of opposition on September 5, 1995, a copy of which was forwarded to the applicant on October 23, 1995. 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 it was entitled to use the applied for mark in Canada.

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-marks CANOLA HARVEST and CANOLA HARVEST & Design (illustrated below) registered under Nos. 425,580 and 436,750, both for "salad oil, margarine and shortening."



The third ground of opposition 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 two registered trade-marks noted above 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 opponent's two trade-marks.

The applicant filed and served a counter statement. As its evidence, the opponent submitted the affidavits of Donna L. MacDonald and Keith L. Beerling. As its evidence, the applicant submitted the affidavits of Gerry Erickson and Lynda Palmer. Both parties filed a written argument but the applicant's written argument was mistakenly forwarded to the opponent before it had filed its written argument. Consequently, the applicant was given an opportunity to file a supplementary written argument in reply to the opponent's written argument. No oral hearing was conducted.

The first ground does not raise a proper ground of opposition since the opponent did not include any allegations of fact in support of its assertion that the applicant's application does not conform to the requirements of Section 30(i) of the Act. Thus, 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 the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Finally, 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 applicant's trade-mark CANADIAN HARVEST is inherently distinctive in relation to the applied for wares. However, the mark does suggest that the wares are made from products harvested in Canada. Thus, the applicant's mark is

not inherently strong. Since the filing of the application, the applicant has commenced sales of bread base, seed topping and bread bags in association with the mark CANADIAN HARVEST. However, those sales were minor and were only made to bakeries. Thus, the applicant's mark has only become known to a limited extent in Canada.

The opponent's two registered marks strongly suggest that the registered wares are made from oil obtained from canola seed. Thus, those two marks are inherently weak. The Beerling affidavit establishes that, since 1992, the opponent has made sales of canola oil, margarine and shortening in association with its two registered marks totalling in excess of \$15 million. Thus, the opponent's marks have become known to some extent in Canada.

The length of time the marks have been in use favors the opponent. As for the wares and trades of the parties, it is the applicant's statement of wares and the opponent's statement of wares in its two registrations that govern: see Mr. Submarine Ltd. v. Amandista Investments Ltd. (1987), 19 C.P.R.(3d) 3 at 10-11 (F.C.A.), Henkel Kommanditgesellschaft v. Super Dragon (1986), 12 C.P.R.(3d) 110 at 112 (F.C.A.) and Miss Universe, Inc. v. Dale Bohna (1994), 58 C.P.R.(3d) 381 at 390-392 (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. In this regard, evidence of the actual trades of the parties is useful: see the decision in McDonald's Corporation v. Coffee Hut Stores Ltd. (1996), 68 C.P.R.(3d) 168 at 169 (F.C.A.).

The opponent's wares are "salad oil, margarine and shortening" which the opponent sells through grocery stores and supermarkets. The applicant's wares comprise flour, bread mixes, pastry fillings and the like. Thus, the wares of the parties differ although there does appear to be a connection between the wares insofar as all of them could be used in baking.

The Erickson affidavit establishes that the applicant sells its CANADIAN HARVEST wares to bakeries including in-store bakeries. However, the applicant's statement of wares is not restricted to that particular trade and presumably those wares could also be sold through ordinary retail channels of trade such as grocery stores and supermarkets. If they were, however, they would likely be sold separate and apart from the opponent's wares.

As for Section 6(5)(e) of the Act, there is a fair degree of resemblance between the marks at issue due to the common use of the word HARVEST. However, that word is not the first word in either mark and is therefore secondary in importance.

As an additional surrounding circumstance, the applicant has relied on the state of the register evidence in the Palmer affidavit. State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace: see the opposition decision in Ports International Ltd. v. Dunlop Ltd. (1992), 41 C.P.R.(3d) 432 and the decision in Del Monte Corporation v. Welch Foods Inc. (1992), 44 C.P.R.(3d) 205 (F.C.T.D.). Also of note is the decision in Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd. (1992), 43 C.P.R.(3d) 349 (F.C.A.) which is support for the proposition that inferences about the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located.

The Palmer affidavit evidences about three dozen registrations for trade-marks including the word HARVEST for various food products. A number of those registrations cover bread or other baked goods or baking ingredients. Thus, I am able to conclude that HARVEST is a common component of trade-marks registered for food products and that consumers would likely center on the other elements of such marks to distinguish them.

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 differences in the wares, trades and marks of the parties and the common use by third parties of the word HARVEST as a component of trade-marks for various food products, I find that the applicant's mark is not confusing with either of the opponent's two registered marks. Thus, the second ground of opposition is unsuccessful.

As for the third ground of opposition, the opponent has evidenced use of its two registered trade-marks prior to the applicant's filing date and non-abandonment of those marks as of the applicant's advertisement date. The third ground therefore remains to be decided on the issue of confusion between the applicant's mark and the opponent's two marks as of the applicant's filing date. My conclusions respecting the second ground of opposition are, for the most part, equally applicable here. Although the applicant's mark had not become

known as of its filing date, the opponent's two marks had only acquired a limited reputation as of that date. Thus, I find that the marks at issue were not confusing as of the applicant's filing date and the third ground is therefore also unsuccessful.

In its written argument, the opponent sought to rely on prior use of several third party marks in support of its ground of prior entitlement. However, no such allegations were included in the statement of opposition and I am therefore precluded from considering them. Even if they had been pleaded, they would not have raised a proper ground of opposition pursuant to Section 16(3) of the Act in view of the provisions of Section 17(1).

The material time for considering the circumstances respecting the fourth ground of opposition is the filing of the opposition. The ground of non-distinctiveness turns on the issue of confusion between the marks of the parties as of that date and my conclusions respecting the second ground are, for the most part, also applicable here. Thus, I find that the marks at issue were not confusing as of the filing of the opposition and the fourth ground is therefore also unsuccessful.

In its written argument, the opponent sought to rely on the use of several third party marks in support of its ground of non-distinctiveness. However, no such allegations were contained in the statement of opposition. Even if they had been, they were not supported by the opponent's evidence.

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 1st DAY OF MARCH, 1999.

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