



EUROPEAN FLAVORS AND SAVEURS D'EUROPE ARE NOT CLEARLY DESCRIPTIVE TRADE-MARKS

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In a case addressing the issue of descriptive trademarks, the Canadian Trade-marks Opposition Board (TMOB) rejected oppositions to the applications for the marks EUROPEAN FLAVORS and SAVEURS D'EUROPE, for fresh produce and packaging thereof, on the basis that said trade-marks were not descriptive of the character or quality of the applicant's goods (*Loblaws Inc v. Agri-Mondo Inc*, 2014 TMOB 263, Cindy R. Folz, November 28, 2014).

On April 1, 2011, Agri-Mondo (hereafter the "applicant"), an importer, distributor and packer of fresh produce, based in Boucherville, Quebec, filed proposed use applications for the trade-marks EUROPEAN FLAVORS and SAVEURS D'EUROPE for "fruits and fresh vegetables and packaged fresh fruits and packaged fresh vegetables".

On August 16, 2012, Loblaws Inc. (hereafter the "opponent"), opposed the applications primarily on the grounds that these marks were clearly descriptive or deceptively misdescriptive of a characteristic or quality of the applicant's goods.

Opponent's evidence

In support of its oppositions, the opponent filed evidence of online dictionary definitions for the words "European" and "flavor" (and their French equivalents).

The opponent also filed Internet searches to locate information, products and services that contain or use the words "European flavors". For example, the following materials were produced:

- an article dated 1988 in the British Food Journal appearing on the website www.emeraldinsight.com which uses the phrase "European flavours" to describe the flavour industry in Western Europe;

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- an article dated October 9, 2003, appearing on the Food Navigator website (www.foodnavigator.com) where in the phrase European Flavours is used to describe the flavour business, market and industry in Europe;
- an article dated May 8, 2008, from the Food Reference website (www.foodreference.com) where the phrase “European Flavours” is used for the name of an initiative of the European Union to encourage the consumption of European fruits and vegetables in the U.S., Japan and Russia;
- a copy from a restaurant website in Cornwall, Ontario (<http://schnitzels.ca>) where the name Schnitzels European Flavours is used as the restaurant name;
- a copy of a search result from the BC Tourism Official website wherein an information guide describes where to find food and beverages in certain categories including the category of European Flavours; and
- a copy of the search result from the BC Foodie Blogger website wherein an article entitled “Street Meet Food Truck – European Flavors” describes the use of the “European Flavors” phrase by a food truck in Vancouver.

As part of its submissions, the opponent argued there is no other common or ordinary meaning, other than “of or in Europe” that may be attributed by the general public in Canada to the word “European” (or its French equivalent) in the context of the opposed applications. As for the word “flavors”, the common or ordinary meaning is “a distinctive mingled sensation of smell and taste” or “an indefinable characteristic or quality”. Taken together, the opponent argued these words represent that the applicant’s goods are either from Europe or contain flavors of traditionally European origin.

The opponent also alleged that its evidence illustrated that the phrase “European Flavors” has been extensively used for many years in the food, beverage, flavor and produce industries in Canada and that the term has been used to refer to food (in particular fruit and vegetable produce) and flavors originating from Europe or derived from traditionally European cuisine, to describe food categories as well as the food industry in general in Europe.

Noteworthy, the Opposition Board commented that the opponent had not pleaded that the marks EUROPEAN FLAVORS and SAVEURS D’EUROPE were clearly descriptive or deceptively misdescriptive of the place of origin of the goods. As a result, the issue of whether or not the average consumer would think upon seeing these marks that the goods originate in or come from Europe, did not constitute a ground of opposition considered by the Opposition Board.

Applicant’s evidence

The applicant filed evidence of various particulars of trade-mark applications and registrations in the Canadian Trade-marks Database, belonging to third parties, which

include the words EUROPEAN or FLAVOR (or their French equivalents) for various goods and services.

The applicant submitted that because it can be inferred from the number of registrations that marks with these elements are being used in the marketplace, it follows that consumers are used to seeing these words as parts of trade-marks as opposed to being simply descriptive terms.

Opposition Board's decision

The Opposition Board aptly reminded the parties the issue under section 12(1)(b) of the *Trade-marks Act* is whether, as a matter of immediate impression, the marks are clearly descriptive or deceptively misdescriptive of the goods from the point of view of an everyday user of the goods. If the marks contain elements that are used by other traders as part of their trade-marks, this in and of itself, is not determinative of the descriptiveness issue.

In addition, while the Court has recognized that the Registrar must consider prior registrations when assessing descriptiveness, the Board has previously found that it is not in a position to explain why some trade-marks were permitted to proceed to registration by the examination division of the Trade-marks Office.

While the Opposition Board agreed with the opponent that the term European (or "d'Europe") suggests that the goods have some European characteristic and that the word "flavors" (or "saveurs") connotes a certain smell and taste, the combination of these words (be it in English or in French) was not clearly descriptive or deceptively misdescriptive of the applied for goods.

In rejecting the descriptiveness ground of opposition, the Opposition Board held that the evidence did not illustrate that "European Flavors" had any specific meaning with respect to fruits or vegetables. More specifically, the opponent's own evidence showed that the flavors industry remains very country specific. Hence, the Opposition Board reasoned that if fruits and vegetables from specific countries have certain flavors and considering that the word "European" could mean one or more of many different countries in Europe, it followed that EUROPEAN FLAVORS and SAVEURS D'EUROPE could not clearly describe a characteristic or quality of the goods.

The Opposition Board's view was that the average Canadian consumer would not know what descriptive significance the word "flavors" has in association with the word "European" for fruits or vegetables in so far as they would not know what particular quality or characteristic a EUROPEAN FLAVORS fruit or vegetable would have. In other words, the marks were not easy to understand, self-evident or plain and therefore they did not fall under the purview of the descriptiveness bar to registration.

Moreover, the Opposition Board found that the trade-marks EUROPEAN FLAVORS and SAVEURS D'EUROPE were at most suggestive of food that tastes European. The meaning of the trade-mark EUROPEAN FLAVORS when used in association with the applicant's goods was not clearly descriptive because fresh fruits and vegetables cannot taste "European". In other words, the average consumer of such fresh produce would not be deceived in any way but would recognize the marks EUROPEAN FLAVORS and SAVEURS D'EUROPE as forms of puffery designed to attract attention.

Conclusion

This decision reminds us that the word "clearly" has been introduced in paragraph 12(1)(b) of the *Trade-marks Act* to preserve the registrability of suggestive marks. Such an analysis of descriptiveness under the statute may be particularly favourable in cases where two common dictionary words are combined to create a coined expression, irrespective of the inherently weak nature of said expression. More importantly, this decision illustrates that in choosing a trade-mark, a trader should consider the potential difficulties associated with obtaining monopolistic rights in trade-marks which may be viewed as straddling the descriptiveness divide.



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