

Federal Court



Cour fédérale

**Date: 20190402**

**Docket: T-199-18**

**Citation: 2019 FC 396**

**Ottawa, Ontario, April 2, 2019**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**BON APPETIT DANISH, INC. and  
BON APPETIT DISTRIBUTION, INC.**

**Applicants**

**and**

**2168587 ONTARIO LTD.**

**Respondent**

**JUDGMENT AND REASONS**

**I. INTRODUCTION**

[1] This is an application for the expungement of the Respondent's registered trademark brought under subsection 57(1) of the *Trade-marks Act*, RSC 1985, c T-13 [Act].

[2] In summary, both parties are manufacturers and distributors of packaged baked goods generally sold in convenience stores. The Applicants claim that the Respondent's registered

BON APPÉ GOURMET & Design mark is confusing with the unregistered BON APPETIT mark, which was in use in Canada prior to the Respondent's application for trademark registration.

[3] The Applicants further argue that the Respondent has "abandoned" its mark by using a variant of the mark that does not retain the dominant features of the registered mark.

[4] For the Reasons that follow, this application is dismissed.

## II. FACTUAL BACKGROUND

[5] The following are the competing marks as displayed on product packaging that are alleged to cause confusion:



[6] The Applicants use the BON APPETIT wordmark on their goods in association with the platter design (or variants of this design) displayed on the left. The Respondent's registered mark displayed on the right is marked on the Respondent's goods.

[7] The Applicants [collectively called "Bon Appetit"] are Bon Appetit Danish, Inc [Danish] and Bon Appetit Distribution, Inc [Distribution]. Danish is a California corporation engaged in the manufacture of packaged baked goods and is the owner of the BON APPETIT mark. Distribution, under common ownership and management with Danish, is a Nevada corporation in the business of selling packaged baked goods.

[8] The Respondent and registered owner of the mark BON APPÉ GOURMET, 2168587 Ontario Ltd [Upper Crust], is an Ontario company doing business as Upper Crust. Upper Crust makes and sells packaged baked goods to the same level of trade, generally convenience stores, as the Applicants.

[9] Firstly, the Applicants' central thrust is to emphasize the Respondent's proposed use of its mark as being confusing with the BON APPETIT mark. Secondly, the Applicants challenge the use of variants of the Respondent's mark as demonstrating that Upper Crust has abandoned use of the registered BON APPÉ GOURMET mark.

[10] The asserted grounds for expungement are that (i) Upper Crust was not the person entitled to secure registration; (ii) the registered mark is not distinctive of Upper Crust; and (iii) Upper Crust has abandoned the registered mark.

A. *Use of BON APPETIT Mark*

[11] Bon Appetit has used the BON APPETIT mark since the mid-1980s in the United States. It registered the BON APPETIT wordmark in the United States in the 1990s. Danish owns the BON APPETIT mark and Distribution is the sole licensee to use the mark.

[12] The Applicants have continuously used the BON APPETIT mark to sell baked goods in Canada since at least September 23, 2008. The wares associated with the mark include danishes, cakes, muffins, donuts and cookies. The Applicants' Canadian trademark registration application of the wordmark BON APPETIT was filed on April 11, 2016, is opposed by the Respondent, and remains pending.

[13] Bon Appetit owns the website domain: [www.bonappetitbakery.com](http://www.bonappetitbakery.com) and has advertised its goods on its website since at least 1999.

[14] In common with Upper Crust products, Bon Appetit products sell in convenience stores and other retail outlets in Canada and their respective goods are targeted at convenience store customers and other customers "on the go". Each item is priced at around \$3.00.

[15] This customer description is generally accepted by both sides and speaks to the "hurried consumer" profile referred to in the confusion analysis later.

[16] The Applicants advanced evidence of the sale of Bon Appetit products in Canada since 2008 with the BON APPETIT mark on the wrapping of the baked goods at the places of sale such as 7-Eleven, CO-OP and other similar stores. Prior to December 3, 2009, Bon Appetit had sold \$904,000 USD worth of goods in Canada. There is no real issue with these sales figures or the cost related thereto. There is no issue that Bon Appetit has advertised in Canada to distributors, retailers and end customers.

[17] Bon Appetit associated their mark with variable business names on their packaging and promotion materials such as “Bon Appetit Gourmet Pastry Company”; “Bon Appetit Bakery”; “Bon Appetit Pastry”, amongst others.

[18] Between December 3, 2009 and December 31, 2017, Bon Appetit earned approximately \$20 million in sales. Bon Appetit currently sells its goods in 4,000 to 5,000 retail locations in Canada.

*B. Use and Registration of BON APPÉ GOURMET & Design*

[19] On December 3, 2009, the Respondent filed Canadian trademark application No 1461500 for the mark BON APPÉ GOURMET & Design on the basis of proposed use. While the Design mark contains the letters “BA”, the descriptive reference does not, although the index heading says “BON APPÉ GOURMET BA”. The application was allowed on April 8, 2011. It was not opposed although the Applicants were in the market with their mark since at least September 2008 in Canada.

[20] In order to complete the registration of the mark, the Respondent was required to file a Declaration of Use showing the date of first use in Canada. The Respondent secured six (6) extensions of time (six months each) from the Registrar of Trademarks [Registrar] before it filed its Declaration of Use on October 21, 2015.

[21] For each of these extensions of time granted by the Registrar, the Respondent filed a statement that it had not used the mark. According to the Respondent's affidavit evidence, it had, in fact, used the mark on some of the products since 2013. Therefore the representation to the Registrar to secure the extension was misleading and admitted to be such by its counsel. The consequences will be discussed later.

[22] The actual registration of the design mark [the Registered Mark] was granted on November 4, 2015.

[23] The Respondent commenced using the mark or variations of it sometime in 2013 as it started selling some of its baked goods through its licensee, Fiera Foods. Over the period 2013 to 2017, Upper Crust and Fiera Foods sold approximately \$19 million of baked goods associated with the Registered Mark or its variants.

[24] The Respondent has continuously used the Registered Mark or variants thereof, and never has expressed an intention to abandon the Registered Mark. The variants of the mark retain the same general design and shape and the words "BA BON APPÉ" with changes to the font and font size. The current variant no longer includes the word "GOURMET".

C. *Similar Marks/Co-Existence*

[25] Interestingly, prior to 2017, neither party was aware of the other or their respective trademarks. There is no evidence of any complaints from consumers about the similarity of the marks nor any evidence of confusion with or between their respective marks. This absence of confusion evidence is striking given that the Applicants' private investigators found stores in several cities where both parties' products were being sold in close proximity within the stores.

[26] The phrase "Bon Appetit" is commonly understood as a toast or greeting expressing the hope that someone will enjoy that which they are to eat (see e.g. Katherine Barber, *Canadian Oxford Dictionary* (Toronto, ON: Oxford University Press Canada, 1998) sub verbo "bon appétit").

[27] Several third parties own trademark registrations for "BON APPETIT" in Canada in association with food-related products ranging from spices and seasonings to canned fish, to a food magazine. There has been no suggestion that any of these uses resulted in confusion with each other or the parties' products and several have co-existed in the market-place before 2009 and throughout the relevant time frame covered by this case.

[28] There is no real dispute over these facts and a recitation of the number of uses of BON APPETIT in association with food products as detailed in the Respondent's evidence and submissions is unnecessary.

### III. ISSUES

[29] The central issue is whether there is a reasonable likelihood of confusion between the BON APPETIT mark and the BON APPÉ Registered Mark under s 18(1)(b) or (d) of the Act.

Incidental to the central issue is:

- whether the BON APPETIT wordmark and/or design mark are distinctive;
- whether the Respondent has abandoned the Registered Mark; and
- what type of costs should be awarded.

[30] The Respondent did not, in final argument, challenge Bon Appetit's standing to bring this application as a "person interested" under subsection 57(1) of the Act.

[31] The Applicants argued that the Respondent was not entitled to register their mark under paragraph 18(1)(d) while the Respondent characterized this issue as being a question of whether the Registered Mark was not registrable under paragraph 18(1)(a) of the Act. Neither party made any particular argument regarding paragraph 18(1)(a), choosing to focus on the distinctiveness of the Applicants' mark, the likelihood of confusion and the matter of abandonment of the Registered Mark.

### IV. ANALYSIS

#### A. *Preliminary*

[32] The critical statutory provisions for this case are:

2 In this Act,

...

**distinctive**, in relation to a trade-mark, means a trade-mark that actually distinguishes the goods or services in association with which it is used by its owner from the goods or services of others or is adapted so to distinguish them; (*distinctive*)

...

**6 (1)** For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

**(2)** The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the goods or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or

2 Les définitions qui suivent s'appliquent à la présente loi.

[...]

**distinctive** Relativement à une marque de commerce, celle qui distingue véritablement les produits ou services en liaison avec lesquels elle est employée par son propriétaire, des produits ou services d'autres propriétaires, ou qui est adaptée à les distinguer ainsi. (*distinctive*)

[...]

**6 (1)** Pour l'application de la présente loi, une marque de commerce ou un nom commercial crée de la confusion avec une autre marque de commerce ou un autre nom commercial si l'emploi de la marque de commerce ou du nom commercial en premier lieu mentionnés cause de la confusion avec la marque de commerce ou le nom commercial en dernier lieu mentionnés, de la manière et dans les circonstances décrites au présent article.

**(2)** L'emploi d'une marque de commerce crée de la confusion avec une autre marque de commerce lorsque l'emploi des deux marques de commerce dans la même région serait susceptible de faire conclure que les produits liés à ces marques de commerce sont fabriqués, vendus, donnés à bail ou loués, ou que les

services are of the same general class.

services liés à ces marques sont loués ou exécutés, par la même personne, que ces produits ou ces services soient ou non de la même catégorie générale.

...

[...]

**(5)** In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

**(5)** En décidant si des marques de commerce ou des noms commerciaux créent de la confusion, le tribunal ou le registraire, selon le cas, tient compte de toutes les circonstances de l'espèce, y compris :

**(a)** the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;

**a)** le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;

**(b)** the length of time the trade-marks or trade-names have been in use;

**b)** la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;

**(c)** the nature of the goods, services or business;

**c)** le genre de produits, services ou entreprises;

**(d)** the nature of the trade; and

**d)** la nature du commerce;

**(e)** the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

**e)** le degré de ressemblance entre les marques de commerce ou les noms commerciaux dans la présentation ou le son, ou dans les idées qu'ils suggèrent.

...

[...]

**18 (1)** The registration of a trade-mark is invalid if

- (a)** the trade-mark was not registrable at the date of registration;
- (b)** the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced;
- (c)** the trade-mark has been abandoned;
- (d)** subject to section 17, the applicant for registration was not the person entitled to secure the registration;

**18 (1)** L'enregistrement d'une marque de commerce est invalide dans les cas suivants :

- a)** la marque de commerce n'était pas enregistrable à la date de l'enregistrement;
- b)** la marque de commerce n'est pas distinctive à l'époque où sont entamées les procédures contestant la validité de l'enregistrement;
- c)** la marque de commerce a été abandonnée;
- d)** sous réserve de l'article 17, l'auteur de la demande n'était pas la personne ayant droit d'obtenir l'enregistrement;

[33] In written and oral argument the Applicants attacked the credibility of Mr. Gelbloom, general counsel and principal affiant for the Respondent. The attack was based on Gelbloom's use of hearsay without identifying his sources and belief and his response in cross-examination that a matter becomes his "personal knowledge" when he informs himself from other sources.

[34] The Court takes nothing from this debate. There may be some technical evidentiary glitches but the Applicants could have obtained the source information. Gelbloom was testifying much as a corporate officer would – as did the Applicants' key witness Mr. Lane. Gelbloom's understanding of "personal knowledge" must be taken in the light of his corporate role although it was a poorly worded explanation.

B. *BON APPETIT Distinctiveness*

[35] The general issue of distinctiveness, particularly regarding the BON APPETIT mark, is covered under the discussion of confusion. However, the Respondent made a separate argument that the BON APPETIT mark is non-distinctive and unenforceable because the Applicants have sold their products associated with slightly different trade names. This is not a viable position.

[36] In view of the Applicants' pending trademark application and the central issue in this case being the likelihood of confusion, it is not necessary for the Court to comment extensively on this issue.

[37] The Respondent's position is that the BON APPETIT mark is not distinctive because the Applicants have sold their products associated with different business names and therefore from different sources.

[38] The Respondent does not advance cogent law on the point nor do the facts support it. The different sources all have similar names – much like the Respondent's reliance on its own right to use variants of its Registered Mark. The Respondent cannot succeed on this issue. The Respondent has provided no authority for the proposition that a trademark is unenforceable if the owner promotes its products in association with the trademark using names that are slightly different from its official corporate name.

[39] Moreover, there is no evidence that anyone other than the Applicants have been using the BON APPETIT mark. There is no evidence of a different source for the goods sold under such names as Bon Appetit Gourmet Pastry or Bakery or Pastry. The so-called “different sources” used by the Applicants are very similar in name; all but one example begins with “Bon Appetit”. The actual packaging of the baked goods consistently uses the name Bon Appetit Bakery. The end users would know the Applicants’ product through the packaging which consistently uses the business name “Bon Appetit Bakery” associated with the BON APPETIT mark.

C. *Reasonable Likelihood of Confusion*

[40] Likelihood of confusion is relevant to the analysis of invalidity under both paragraphs 18(1)(b) and 18(1)(d) of the Act and the parties combined their arguments on these two grounds of invalidity. However, there is a different temporal element in respect of each. Paragraph 18(1)(b) is directed at the distinctiveness of the Registered Mark as of the date proceedings commenced (February 1, 2018) while paragraph 18(1)(d) asks whether the Respondent was entitled to register the mark as of the filing date (December 3, 2009).

[41] The Respondent’s mark could be expunged if the Applicants could establish that there was a likelihood of confusion on December 3, 2009 or February 1, 2018.

[42] The Applicants focussed their evidence on the use of the BON APPETIT mark in Canada prior to December 3, 2009 (s 18(1)(d)) and likelihood of confusion will be considered in that context. The absence of evidence of actual confusion is more properly part of a paragraph 18(1)(b) consideration.

[43] In any event, the test for confusion is whether a casual consumer, somewhat in a hurry and seeing the Respondent's mark and with an imperfect recall of the BON APPETIT mark, would likely think that the Respondent's goods originated from the same source as the Bon Appetit goods (see *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 40, [2011] 2 SCR 387 [*Masterpiece*]; Act, s 6(2)).

[44] The Court should consider confusion in the relevant market, which includes the ordinary end consumer in stores like 7-Eleven as earlier described as well as distributors and retailers of the baked goods in question. The main perspective considered will be the individual end consumer of these baked goods, as they would be expected to have a greater likelihood of confusion because of their imperfect recollection of the marks, as considered in *Gemological Institute of America Inc v Gemology Headquarters International LLC*, 2014 FC 1153 at para 119, 247 ACWS (3d) 663.

[45] The Court should also consider confusion between the Registered Mark and each of the Applicants' marks, as held in *Masterpiece* at para 45. In this case, although not clearly articulated by the Applicants, there is the BON APPETIT wordmark and the associated design mark used on Bon Appetit packaging and the website.

[46] I would find that the Applicants have demonstrated their use of both marks in Canada since 2008. The BON APPETIT design mark or variants has been marked on the Bon Appetit's goods since 2008. To a lesser extent, they have shown use of the BON APPETIT wordmark

separate from their design mark, through their website and advertising. Therefore the Court will consider the likelihood of confusion between each mark with the Registered Mark.

[47] Subsection 6(5) of the Act sets out a non-exhaustive list of factors to be considered in assessing the likelihood of confusion:

- a) The inherent distinctiveness of the trademarks or trade names and the extent to which they had become known;
- b) The length of time the trademarks or trade names have been in use;
- c) The nature of the goods, services or business;
- d) The nature of the trade; and
- e) The degree of resemblance between the trademarks or trade names in appearance or sound or in the idea suggested by them.

[48] As held in *Masterpiece* at para 49, the degree of resemblance in section 6(5)(e) will usually have the greatest effect on the confusion analysis.

[49] Different factors may be given different weight when assessing likelihood of confusion.

(1) Degree of Resemblance

[50] The degree of resemblance must be assessed as a whole and not by breaking the mark into various elements (see *Battle Pharmaceuticals v British Drug Houses Ltd*, [1944] 4 DLR 577 at 586, [1944] Ex CR 239). It is an error to focus on just the most similar aspects of the respective marks.

[51] Visually the Respondent's mark does not significantly resemble the BON APPETIT design mark (see para 5 for the two seen together). The Respondent's mark is a design with a ribbon over an oval with a scalloped edge containing the words "BA BON APPÉ GOURMET". The Respondent's mark is a registered design mark and cannot be assessed for its words only. Any assessment must be based on its "look" overall.

[52] The BON APPETIT mark features the words "Bon Appetit" written on a 45° angle (more or less) on the lid of a usually red serving platter.

[53] The design of the Respondent's mark does not visually resemble the BON APPETIT design mark as it appears on the packaging.

[54] As a whole, the Respondent's mark also does not significantly visually resemble the BON APPETIT wordmark. The Respondent's mark has several other visual features than just the words "BA BON APPÉ GOURMET". As described below, the phrase "Bon Appetit" is weakly distinctive. Even if the phrase "Bon Appetit" is the dominant component of the Applicant's mark, it should only be afforded a narrow ambit of protection (*Venngo Inc v Concierge Connection Inc (Perkopolis)*, 2017 FCA 96 at paras 45-46, 279 ACWS (3d) 156 [*Venngo*]). The Court puts little weight on the similarities between "BON APPETIT" and "BA BON APPÉ GOURMET" given the lack of distinctiveness in the phrase "Bon Appetit".

[55] In terms of sound, the words of the two marks start to sound similar but finish quite differently. Bon Appé is a made-up word without any other use, whereas Bon Appetit is a greeting in French, often used in English, and for which similar toasts exist in most languages.

[56] The Respondent's argument that the sound "BA" also differentiates the marks is misplaced. The Respondent's application for registration did not include "BA" in its description.

[57] The ideas suggested by the marks are only vaguely similar in that they suggest the service of food. Given the suggestive nature and weak distinctiveness of the phrase "Bon Appetit", described below, the ideas suggested by the marks do not contribute to any significant resemblance between the marks likely to lead to confusion.

[58] While there are some similarities in the two marks, the resemblance is low. Any similarities do not distract sufficiently from the overall view of the two marks as distinct. The degree of resemblance does not support a finding of likelihood of confusion, which is a significant factor in the overall confusion assessment.

## (2) Inherent Distinctiveness

[59] The BON APPETIT wordmark is weak in terms of distinctiveness. The phrase "Bon Appetit" is suggestive of the Applicants' goods and is commonly used in trade names and trademarks by other traders in food related goods and services. The Respondent has established that there are several food-related trademarks in Canada for "Bon Appetit" for such a range of goods as canned fish to packaged perogies.

[60] Bon Appetit is a suggestive phrase associated with enjoying food and thus narrows the protection to be given to the words “Bon Appetit” associated with food products. I note the dictionary definition of “bon appétit” in an English dictionary, referenced above, further supports the suggestive and generic nature of the phrase in English.

[61] In *Venngo* at paras 45-46, the Federal Court of Appeal confirmed that the use of a generic and suggestive term – in that case “perks” - erodes distinctiveness. The same applies here to the erosion of distinctiveness in BON APPETIT by the generic nature of the phrase, which leads to a narrow ambit of protection for the mark.

[62] The BON APPETIT wordmark did not acquire distinctiveness between 2008 and December 3, 2009. The evidence of sales and advertising were not sufficient to show that the BON APPETIT wordmark acquired significant distinctiveness for what otherwise is a generic phrase. There was little evidence to show that the advertising was effective in distinguishing the goods in the minds of consumers.

[63] I note that the BON APPETIT platter design mark used on its packaging and promotion likely has some inherent distinctiveness. However, given that none of the design elements in the mark resemble the Respondent’s mark, it is less important to analyze the distinctiveness of the design mark as the only similarities alleged were between the words “Bon Appetit” and the Respondent’s Mark.

(3) Length of Time of Use

[64] This factor favours the Applicants both because the Applicants used their mark well before the Respondent's filing in 2009 and because of the Respondent's questionable evidence of first use as evidenced by communication with the Registrar.

(4) Nature of Goods and Services

[65] There is no question that the overlap in the parties' goods and channels of trade makes confusion more likely. There is little evidence as to the type of consumer and their thought process in buying the relevant goods, but as recognized in *Masterpiece* at para 67, the greater the expense the more care a consumer will likely exhibit in examining trademarks. These goods are inexpensive, which suggests less care and attention in purchasing. There has been no evidence of qualitative differences (perceived or otherwise) such that one party's goods would have a band of loyal followers.

(5) Surrounding Circumstances

[66] There is no evidence of wilful infringement or actual confusion. In fact, the parties only became aware of each other's marks in 2017.

(6) Likelihood of Confusion

[67] I have concluded that there is no reasonable likelihood of confusion between the marks in 2009 in accordance with paragraph 18(1)(d). The BON APPETIT mark in 2009 had weak

distinctiveness. Given the presumption of the validity of a registered mark articulated in *Kirkbi AG v Ritvik Holdings Inc*, 2003 FCA 297 at para 80, [2004] 2 FCR 241, aff'd 2005 SCC 65, the Applicants failed to rebut that presumption and failed to establish such acquired distinctiveness as to justify a conclusion of reasonable likelihood of confusion.

(7) Paragraph 18(1)(b) – Distinctiveness at the Time of Proceedings

[68] When the proceedings were commenced on February 1, 2018, the only significant changes in circumstance since 2009 were a) approximately nine more years for the Applicants' mark to acquire distinctiveness and five years for the Respondent's mark to acquire distinctiveness; and b) about five years for evidence of actual confusion to arise (when both parties were in the market between 2013 and 2018).

[69] Except for more sales and advertising (sales alone are not sufficient), the Applicants provided no additional evidence of acquired distinctiveness. Likewise, the Respondent did not show that its mark acquired distinctiveness between 2013 and 2018.

[70] Between 2013 and 2018, there was no evidence of actual confusion despite the parties sharing the same market space.

[71] The Court concludes from the failure to show actual confusion, as suggested in *Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22 at paras 55, 89, [2006] 1 SCR 772, that there is also no reasonable likelihood of confusion. The parties shared the same market space, advertising continued, market surveys were conducted and yet no actual confusion was established.

(8) Abandonment

[72] Given the absence of evidence of non-use or intention to abandon, this argument must be dismissed. As stated by the Federal Court of Appeal in *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 at 64, 34 ACWS (3d) 833 (FCA), abandonment under paragraph 18(1)(c) requires that the Respondent: 1) no longer uses its Registered Mark in Canada and 2) intended to abandon its Registered Mark. The Respondent's use of modified marks, which are substantially the same as the Registered Mark and retain the Registered Mark's dominant features, is sufficient to dispel any notion that the Respondent was tending toward abandonment. There is no evidence of intention to abandon.

[73] Abandonment under paragraph 18(1)(c) by which the Court can declare a mark abandoned is different from non-use which may permit the Registrar to expunge a mark under section 45 of the Act.

V. COSTS

[74] In the normal course the Respondent would be entitled to party and party costs.

[75] The Respondent's conduct with the Registrar's office in filing false statements to obtain an extension of time must be discouraged. Whether it is a common practice of the trademark prosecution practice of professional firms is not a good reason to endorse misstatements. While that issue did not dominate these proceedings, it did play a role in the time frame for analysis of distinctiveness and use.

[76] Therefore, the Respondent will be entitled to costs at the usual level less 50% of the total party and party costs calculated under Column III of the Tariff.

VI. CONCLUSION

[77] This application will be dismissed with costs as specified in the reasons.

**JUDGMENT in T-199-18**

**THIS COURT'S JUDGMENT is that** the application is dismissed with costs as specified in these reasons.

"Michael L. Phelan"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-199-18

**STYLE OF CAUSE:** BON APPETIT DANISH, INC. and BON APPETIT  
DISTRIBUTION, INC. v 2168587 ONTARIO LTD.

**PLACE OF HEARING:** WINNIPEG, MANITOBA

**DATE OF HEARING:** FEBRUARY 26, 2019

**JUDGMENT AND REASONS:** PHELAN J.

**DATED:** APRIL 2, 2019

**APPEARANCES:**

Steven Raber FOR THE APPLICANTS  
Dean Giles

Mark Biernacki FOR THE RESPONDENT  
Jennifer Ponton

**SOLICITORS OF RECORD:**

Fillmore Riley LLP FOR THE APPLICANTS  
Barristers and Solicitors  
Winnipeg, Manitoba

Smart & Biggar FOR THE RESPONDENT  
Barristers and Solicitors  
Toronto, Ontario