

Federal Court



Cour fédérale

**Date: 20190313**

**Docket: T-1195-18**

**Citation: 2019 FC 306**

**Ottawa, Ontario, March 13, 2019**

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

**BETWEEN:**

**CANADA BREAD COMPANY, LIMITED**

**Applicant**

**and**

**DR. SMOOD APS**

**Respondent**

**JUDGMENT AND REASONS**

[1] Canada Bread Company, Limited, the applicant, appealed pursuant to section 56 of the *Trade-marks Act* (R.S.C., 1985, c. T-13) [the “Act”] the decision of the Trade-marks Opposition Board (hereinafter the “Board” or “Registrar”) dated April 10, 2018. The Board rejected the oppositions to the registration of two trade-marks by the respondent, Dr. Smood ApS.

[2] The two applications for which registration is sought are:

- trade-mark application No. 1,707,012 for the word mark

SMART FOOD FOR A GOOD MOOD

- trade-mark application No. 1,707,009 for the design seen below:



These registrations are submitted in association with the following goods and services:

Goods

(1) Coffee; cocoa; tea; coffee-based beverages; tea-based beverages; cocoa-based beverages; instant coffee; instant tea; bakery goods, namely bread, buns, cakes, sugar confectionery, rolls, puddings, pies, petits fours; muffins; biscuits; pastries; bread; sandwiches; cereal preparations, namely breakfast cereal, processed cereals; edible ices; chocolate; sweetmeats; confectionery chips for baking; frozen confectioneries; sauces, namely fruit coulis, meat juice, ketchup, salad dressing, tomato sauce, hot sauce, soy sauce, pesto (2) Beers; mineral and aerated waters and other non-alcoholic drinks, namely, non-alcoholic beer, non-alcoholic cider, non-alcoholic wine; fruit drinks and fruit juices; syrups and scented waters for making beverages.

Services

Preparation and provision of food and drink for consumption on and off the premises; café, cafeteria and restaurant services; take-out restaurant services.

[3] Canada Bread Company, Limited, which opposed these two registration applications, has owned and uses the trade-mark SMART since at least 2006; the trade-mark is owned for use in association with a much narrower category of bakery products: bread, hot dog and hamburger buns, English muffins, bagels and tortillas. The trade-marks are presented as the SMART Family of trade-marks:

Registration No.	Trade-mark	Filing Date	Registration Date
TMA827,840	SMART	September 13, 2007	July 10, 2012
TMA708,753	SMART & Design	January 25, 2006	March 4, 2008
TMA761,257	DEMPSTER'S SMART	December 9, 2005	March 10, 2010
TMA812,868	POM'S SMART	December 9, 2005	November 28, 2011
TMA918,711	SMART 16 & Design	October 7, 2013	October 20, 2015

Counsel for the applicant insisted throughout that the mark to consider is SMART. He was not wrong. As in *Masterpiece Inc. v Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 SCR 387 [*Masterpiece*], where the Court compared the one trade-mark closest to the disputed trade-mark because, out of a family of trade-marks, if the one closest is not likely to cause confusion with the new proposed trade-mark, it will not be necessary to compare with other trade-marks in the family (para 78). Thus, the comparison will be between TMA827,840 SMART and the proposed “SMART FOR A GOOD MOOD”. As we shall see, the applicant chose not to prosecute its appeal concerning the design 009.

[4] It will suffice for our purposes to note that the applicant produces and distributes packaged fresh bread and bakery products, with a principal place of business in Etobicoke, Ontario. The respondent is an American entity involved in the food services industry. There is evidently an overlap over some of the products offered by Dr. Smood ApS, but not all.

I. The grounds of opposition

[5] The applicant raised before the registrar a number of opposition grounds. They were identical with respect to both applications. They invoke sections 30, 12, 16 and 2 of the Act. They are summarized in the decision under review at paragraph 12:

[12] In summary, Canada Bread raises the following grounds of opposition under section 38 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act):

- a) The application does not comply with section 30(e) of the Act because the Applicant did not intend to use the trade-mark in Canada.
- b) The application does not comply with section 30(i) of the Act because the Applicant could not have been satisfied that it was entitled to use the trade-mark in Canada. The Applicant was aware of Canada Bread's SMART Family of Trade-marks.
- c) The trade-mark is not registrable under section 12(1)(b) of the Act because it is either clearly descriptive or deceptively misdescriptive of the character or quality of the Applicant's goods or services or of the conditions of or the persons employed in their production or of their place of origin.
- d) The trade-mark is not registrable under section 12(1)(d) of the Act in view of confusion with the registered trade-marks forming the SMART Family of Trade-marks.
- e) The Applicant is not the person entitled to registration of the trade-mark under section 16(3)(a) of the Act in view of confusion with the trade-mark SMART or any or all of the SMART Family of Trade-marks previously used in Canada by Canada Bread.
- f) The Applicant is not the person entitled to registration of the trade-mark under section 16(3)(b) of the Act in view of confusion with the trade-mark SMART or any or all of the SMART Family of Trade-marks in respect of which applications for registration were previously filed in Canada by Canada Bread.
- g) The trade-mark is not distinctive under section 2 of the Act as it is neither adapted to distinguish nor capable of distinguishing the Applicant's goods from the goods of Canada Bread used in

association with the trade-mark SMART or any of the SMART Family of Trade-Marks.

The various grounds of appeal were all dismissed by the Board. The applicant takes issue in this appeal with the findings made concerning the alleged confusion which, argues the applicant, would ensue if the trade-mark applications are granted to Dr. Smood ApS.

[6] The respondent in this case chose not to participate in the appeal. It did not appear at the hearing and did not file a memorandum of fact and law. It did not concede the appeal either. It relied on its written representations before the Registrar (Dr. Smood ApS did not appear before the Board, but it filed evidence and a memorandum of fact and law), submitting that the decision of the Registrar of Trade-marks should stand. Accordingly, the Court did not have the benefit of the views of Dr. Smood ApS concerning the Board's decision.

## II. The evidence before the Board

[7] The evidence before the Registrar was presented through affidavits on which none of the affiants were cross-examined. Canada Bread Company, Limited offered two affidavits:

- Jean-Luc Breton: he was at the time a senior officer of Canada Bread (we were advised that he has since retired). The family of trade-marks owned by the applicant is known collectively as the "SMART mark", thereby showing the emphasis on "smart". It has been in use since 2005. His evidence focused on the rather large amounts dedicated to the promotion of the SMART mark in Canada and the value of sales between 2009 and 2015. The evidence shows 129 million units sold for sales totalling approximately \$320 million. The Board noted that Mr. Breton filed a copy

of registration No. TMA711,521 for the trade-mark “SMART & HEALTHY” for “bakery products, namely bread” in the name of Bimbo Bakeries USA, Inc., a subsidiary of Grupo Bimbo, S.A.B. de C.V. which is the majority shareholder of the applicant.

- Stéphanie La: Ms. La is a legal assistant. She introduced certified copies of various registrations and copies of webpages found following Internet searches conducted in July 2016.

For its part Dr. Smood ApS presented its two affidavits:

- Hélène Deslauriers: a trade-mark analyst with Thomson Compu Mark, searched the Canadian Trade-marks Register to discover trade-marks with the term “SMART” in them. The search was conducted in August 2016.
- Hélène Parent, a trade-mark analyst in a law firm, filed a certified copy of the European Union Intellectual Property Office registration certificate for Dr. Smood ApS’ trade-mark.

### III. The Board’s decision

[8] Perhaps in an attempt to cut short the debate before the Board, Dr. Smood ApS argued that the matter before the Board constituted on the part of Canada Bread another unwarranted attempt to oppose the registration of trade-marks. In the case of *Canada Bread Company, Limited v La tortilla Factory*, (Nov. 24, 2014) [*La Tortilla Factory*], the Board rejected oppositions to the trade-marks “SMART & DELICIOUS WRAPS” and “SMART &

DELICIOUS TORTILLAS”. The Board did not base its decision in this case on the decision in *La Tortilla Factory*, but rather found that each case must be decided on its own merit. The applicant took issue with this affirmation, claiming that the Board, in fact, followed *La Tortilla Factory*, which would constitute a reviewable error (the appeal was ruled to be moot, 2016 FC 704).

[9] Dr. Smood ApS also sought to make hay out of some lack of precision in the evidence of Mr. Breton. The objections were quickly discarded in favour of Canada Bread.

[10] In its examination of the grounds of opposition, the Board indicated that its conclusions were to apply to the word mark as well as the design except where stipulated otherwise.

[11] The substance of the appeal before the Court is concerned with two issues:

- the applicant’s appeal is about confusion. The application of the factors listed at paragraph 6(5) of the Act as they relate to the confusion created between two marks is at the heart of this appeal. The appeal challenges the Board’s finding concerning confusion.
- the use made by the Board of the evidence of the state of the register for trade-marks presented by Dr. Smood ApS is an additional element to consider on the issue of confusion. The applicant contends that the use was inappropriate and could not support the Board’s conclusion.

It follows that the other grounds of opposition, which were dismissed by the Board, are not the subject of an appeal in this case. It will therefore suffice to note that the arguments concerning section 30(e) (not intending to use the trade-mark) and section 30(i) (statement that applicant is satisfied that he is entitled to use the trade-mark in Canada), which were disposed of expeditiously, and paragraph 12(1)(d) (non-registrability because clearly descriptive or deceptively misdescriptive of the character or quality of the goods or services) were not raised and are not the subject of the appeal.

[12] It is rather the portion of the decision addressing the allegation of confusion that is central to this appeal. Whether it is that the mark is not registrable under paragraph 12(1)(d), or that paragraphs 16(3)(a) and 16(3)(b) do not entitle a person to register a mark, the reason for the prohibition is confusion between the marks. The Board found that there is no such confusion.

[13] Considering the matter of confusion as of the date of the decision (April 10, 2018), the Board governs itself appropriately by recognizing that once the opposing party, Canada Bread, has met its evidentiary burden of putting confusion in issue, it is for Dr. Smood ApS to satisfy its burden, on a balance of probabilities, that the marks to be registered are not likely to cause confusion with any of the registered trade-marks pleaded by Canada Bread.

[14] The test for confusion is encapsulated by the Board as being “one of first impression and imperfect recollection” (para 100). That formula appears consistent with the more elaborate expression of the test in *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, [2006] 1 SCR 824, at paragraph 20:



20 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 name *Cliquot* on the respondents' storefront or invoice, at a time when he or she has no more than an imperfect recollection of the VEUVE CLICQUOT trade-marks, and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the marks. As stated by Pigeon J. in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.*, 1968 CanLII 1 (SCC), [1969] S.C.R. 192, at p. 202:

It is no doubt true that if one examines both marks carefully, he will readily distinguish them. However, this is not the basis on which one should decide whether there is any likelihood of confusion.

... the marks will not normally be seen side by side and [the Court must] guard against the danger that a person seeing the new mark may think that it is the same as one he has seen before, or even that it is a new or associated mark of the proprietor of the former mark.

(Citing in part *Halsbury's Laws of England*, 3rd ed., vol. 38, para. 989, at p. 590.)

The Supreme Court in *Masterpiece (supra)* reminds us that the test is in “contrast with what is not to be done – a careful examination of competing marks on a side by side comparison” (para 40). No one suggests that the Board applied the wrong test, although the applicant disagrees with the result.

[15] The Board then proceeds to examine the surrounding circumstances to determine whether there is confusion or not, as instructed by subsection 6(5) of the Act. The Act identifies five factors, as some surrounding circumstances to be considered. This list is not exhaustive. I reproduce in its entirety subsection 6(5) in view of its centrality in this case:

<b>What to be considered</b>	<b>Éléments d’appréciation</b>
<b>6 (5)</b> 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	<b>6 (5)</b> 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 :
<b>(a)</b> the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;	<b>a)</b> le caractère distinctif inhérent des marques de commerce ou noms commerciaux, et la mesure dans laquelle ils sont devenus connus;
<b>(b)</b> the length of time the trade-marks or trade-names have been in use;	<b>b)</b> la période pendant laquelle les marques de commerce ou noms commerciaux ont été en usage;
<b>(c)</b> the nature of the goods, services or business;	<b>c)</b> le genre de produits, services ou entreprises;
<b>(d)</b> the nature of the trade; and	<b>d)</b> la nature du commerce;
<b>(e)</b> the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them. R.S., 1985, c. T-13, s. 6; 2014, c. 32, s. 53.	<b>e)</b> 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. L.R. (1985), ch. T-13, art. 6; 2014, ch. 32, art. 53.

[16] In its examination of the five listed factors, the Board starts with 6(5)(e). In *Masterpiece*, the Court speaks of the approach to testing resemblance. It indicates that starting with the fifth factor, that found at section 6(5)(e) which deals with the degree of resemblance between the marks, would be an appropriate starting point. While it is the last statutory factor, it “is often likely to have the greatest effect on the confusion analysis” (para 49). It refers specifically to professor Vaver’s influential *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2<sup>nd</sup>

ed., Irwin Law to explain the role played by section 6(5)(e) in the analysis and its importance compared to the other factors:

49. ...

As Professor Vaver points out, if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar (Vaver, at p. 532). As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start (*ibid.*).

[17] Thus, the Board dutifully began its review of confusion with the degree of resemblance. It found that the two Dr. Smood ApS marks are different from the SMART mark. Following again closely *Masterpiece*, the Board uses the preferable approach “to first consider whether there is an aspect of the trade-mark that is particularly striking or unique” (decision, para 106; *Masterpiece*, para 64).

[18] However, it appears from the analysis performed by the Board that its focus was on comparing the trade-mark Dr. Smood and design to the SMART mark. As a result, the Board found that the design “differs completely from Canada Bread’s trade-mark SMART in appearance, sound as well as in the ideas suggested” (para 108). It is only once the analysis of the design was completed that the Board addressed the word mark. Paragraph 111 appears to be the only paragraph dedicated to the word mark.

[19] The Board finds that the most striking aspect of the design is the words “Dr. Smood” that are featured prominently. The word “smart” which appears in the design may in fact “not even be referenced by a Canadian consumer pronouncing the trade-mark” (para 109). Section 6(5)(e)

speaks of appearance, sound and the ideas suggested by the trade-marks. For the Board, the design suggests to the consumer “thinking of a fanciful company name as the source of the goods and services” (para 110). That is not the case for the mark SMART which, in the view of the Board, “is suggestive of products that would be a healthier choice than other available products” (para 110) in the context of food products.

[20] The applicant has conceded during the hearing of the appeal that it was not so concerned with the 009 application for the trade-mark and design. That may very well be a wise concession, with the focus of the appeal being put on the other mark, Application No. 1,707,012, for SMART FOOD FOR A GOOD MOOD. With respect to this word mark, the analysis is rather succinct and rudimentary, more conclusory than perhaps is usually expected. Paragraph 111 constitutes the long and short of it:

[111] Turning to the Applicant’s trade-mark SMART FOOD FOR A GOOD MOOD, I acknowledge that its first component consists of Canada Bread’s entire trade-mark SMART. Still, when the trade-marks are considered in their totality, I find them to be more different than alike in terms of appearance and sound. Also, as I previously stated, I find the Applicant’s trade-mark suggestive of an intended result of the goods, i.e. to lift someone’s mood. This is not the idea suggested by Canada Bread’s trade-mark.

[21] The Board continued the analysis concerning the other four factors. Section 6(5)(a) is concerned with the inherent distinctiveness. Overall, it is that the trade-mark SMART has become known in Canada. Although, SMART has a low degree of inherent distinctiveness, its strength was increased through promotion. This factor favours Canada Bread.

[22] Obviously, the length of time the trade-marks have been in use (s. 6(5)(b)) favours Canada Bread. The nature of the services or business (s. 6(5)(c)) and the nature of the trade also favour Canada Bread in the eyes of the Board. There is a significant overlap between the Canada Bread products and many Dr. Smood ApS' products. But there are other goods and services listed in the application for its two trade-marks which are distinct from Canada Bread's registered goods. Despite that, the Board is "not prepared to conclude that all of the "other goods" are *very* distinct" (para 122). After all, the bakery products of Canada Bread are food products, as are Dr. Smood ApS' products. As for the nature of the trade, it appears that Dr. Smood ApS did not provide evidence concerning its channels of trade (the statement of goods did not indicate any restriction). That factor favours Canada Bread.

[23] As stated earlier, the five factors of section 6(5) receive a different weight, but the list is not exhaustive either. All the surrounding circumstances must be assessed and, in this case, there was evidence led of the state of the register which seemed to have impressed the Board.

[24] In view of the search conducted for "active trade-marks with the term SMART" in classes 29, 30, 31 and 32, Dr. Smood ApS sought to show how common is the use of the Canada Bread's mark. Obviously, the commonality will be a function of the use made of the word (*Maximum Nutrition Ltd. v Kellogg Salada Canada Inc.*, [1992] 3 F.C. 442, FCA) [*Kellogg*]. Thus, the search, the argument goes, showed that "smart" is common in the food and bakery industry.

[25] According to the evidence, 191 entries were found, 132 of which are associated with food, with 39 associated with bakery products. Canada Bread contended through a process of elimination that only 7 third-party trade-mark registrations for goods similar to bakery products are found. That, according to Canada Bread, is not sufficient to conclude to some common adoption of the word “smart” in the marketplace.

[26] The Board disagreed. It found that the registrations owned by subsidiaries of Canada Bread in its assessment were appropriate for consideration. The Board found 127 registered trade-marks, although many were not registered for relevant goods. Nevertheless, the Board concluded that the search disclosed “a significant number of third-party registered trade-marks for food products, including bakery products” (para 134); however, the Board was silent as to what constitutes a “significant number”. At paragraph 136, the Board lists eleven trade-marks which, it claims, are concerned with food products. Nothing is available on this record as to the products or the actual use of those trade-marks in the marketplace. Indeed, some of the marks at paragraph 136 are less than obvious (e.g. Smartforlife Design, BODY SMARTS, SALBA SMART, LIFE SMART MIEUX ETRE, SMART FIESTA). At any rate, the Board is satisfied that there is evidence to draw an inference favourable to Dr. Smood ApS, thus diluting the protection to which the mark SMART is entitled.

[27] As a result, the conclusion is that Dr. Smood ApS discharged the onus of establishing that there is no reasonable likelihood of confusion between its two trade-marks and SMART. The balancing of the various factors is limited. The Canada Bread mark benefits from its acquired distinctiveness, but the evidence of the state of the register dilutes the scope of the protection and

the differences in terms of appearance, sound and ideas suggested (s. 6(5)(e)) are sufficient to satisfy the balance of probabilities favouring Dr. Smood ApS.

IV. Additional evidence adduced by the applicant

[28] Canada Bread submitted additional evidence, pursuant to section 56(5) of the Act, which reads:

**Additional evidence**

**56 (5)** On an appeal under subsection (1), evidence in addition to that adduced before the Registrar may be adduced and the Federal Court may exercise any discretion vested in the Registrar.

R.S., c. T-10, s. 56; R.S., c. 10(2nd Supp.), s. 64.

**Preuve additionnelle**

**56 (5)** Lors de l'appel, il peut être apporté une preuve en plus de celle qui a été fournie devant le registraire, et le tribunal peut exercer toute discrétion dont le registraire est investi.

S.R., ch. T-10, art. 56; S.R., ch. 10(2e suppl.), art. 64.

[29] The affidavit of Tania Goecke, a senior officer of Canada Bread Company Ltd., confirms sales and advertising of products with the SMART trade-mark, thus stressing again the acquired distinctiveness in Canada. Furthermore, the witness provided fresh clear colored copies of some evidence filed with the oppositions. The Board commented during the hearing, we are told, that some of the documentary evidence was of poor quality, but found nevertheless in favour of Canada Bread on the issues where the documentary evidence was to be considered. As for the second affidavit of Stephanie La, the new evidence concerns the alleged overlapping ideas suggested by the two Dr. Smood ApS marks and the SMART trade-mark. These are extracts from Dr. Smood ApS' website where there are references to "healthy snacks" or "health & benefits", and more generally health.

V. The applicant's argument

[30] The applicant's argument, which was met unfortunately (*Bally Schuhfabriken AG v Big Blue Jeans*, (1992) 41 CPR (3<sup>rd</sup>) 205, at p. 214) with silence as the respondent did not participate in the appeal, boils down to a few simple propositions.

[31] First, there was an attempt to turn the new evidence into additional evidence sufficiently material for the Court to exercise the discretion vested in the Registrar, what some have characterized as a *de novo* decision, which in fact corresponds to a standard of correctness as the Court is invited to come to its own conclusion on the basis of the record enhanced by the new evidence.

[32] If unsuccessful with the initial argument, it was argued that questions of law ought to be decided on a standard of correctness (*Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283 [*Rogers*]). I note, however, that the standard of correctness would apply only to the Board's determinations of questions of law if it is possible to identify them in a discrete fashion (*Pfizer Products Inc. v Canadian Generic Pharmaceutical Association*, 2015 FC 493) as opposed to a mixed question of fact and law. To put it differently, the first task is to identify a discrete question of law to then consider the application of *Rogers*. Contrary to what is asserted by the applicant, *Rogers* does not lead to the Board's decision as a whole being reviewed on a standard of correctness (memorandum of fact and law, para 39). It is only the deference owed to administrative bodies when interpreting and applying their home statutes that is displaced. That is "(b)ecause of the



unusual statutory scheme under which the Board and the court may each have to consider the same legal question at first instance, it must be inferred that the legislative intent was not to recognize superior expertise of the Board relative to the court with respect to such legal questions” (*Rogers*, para 15). But this constitutes an exception to the presumptive deferential approach to the review of questions of law, not the standard of reasonableness for questions of fact or questions of mixed fact and law.

[33] Third, the applicant also took issue with the application made by the Board of the factors found at section 6(5)(a) (distinctiveness of the trade-marks) and section 6(5)(e) (degree of resemblance).

[34] Counsel for the applicant spent considerable time during the hearing taking issue with the view expressed by the Board that the word “smart”, the trade-mark to be considered in this case, is suggestive of food products that would be healthier than other available products. Reference to the connotation of the word is made twice, at paragraphs 90 and 110 of the Board’s decision. Both times the Board notes that this finding is consistent with its decision in a previous case involving Canada Bread (*Canada Bread Company, Limited v La Tortilla Factory*, 2014 TMOB265).

[35] For the applicant, the Board cannot refer to its earlier decision because it claimed that the Board based on facts from a different case its conclusion about the connotation of its mark, the idea it conveyed. Furthermore, the word “smart” conveys a meaning broader than that ascribed by the Board (healthier choice between food products), “notably the idea of products that are

more economic or environment-friendly and sustainable or capable of lifting one's mood" (memorandum of fact and law, para 46). The argument seems to be that a common word of the English language, "smart", does not have a "specific signification when associated with food products and bakery products" (memorandum of fact and law, para 47). The applicant is entitled to the widest protection for its trade-mark because it did not limit itself to a particular idea. The ideas conveyed by the trade-marks have therefore a degree of resemblance.

[36] In its effort to argue that there is no gap between "healthier choice", being the connotation of the word "smart" when in relation to food products, and lifting one's mood as suggested by the Dr. Smood ApS' marks, the applicant suggested that the "good mood" and the result of "lifting one's mood" ... is also related to products of a "healthier choice", as one's mental well-being is an intrinsic part of being healthy" (memorandum of fact and law, para 55).

[37] Fourth, as indicated earlier, Canada Bread prevailed in the examination made by the Board of the factor described at section 6(5)(a) of the Act. The applicant would have preferred a cleaner win because, it argues, the Board wrongly referred to the connotation of the word "smart" that was made in a prior case involving the same trade-mark. Having already been successful concerning this factor, it is unclear what the applicant sought to achieve with this argument concerning the factor described at section 6(5)(a).

[38] Finally, the applicant took issue with the use made by the Board of the state of the register of trade-marks. Two arguments are made. First, it is contended that, out of 197 results (there was also reference to 191 entries) of trade-marks revealed by the search, only 7 trade-

marks are registered with wares similar to those of the applicant, bakery products. This is a small number of marks. Second, in order to be of any value to a decision maker, there must be evidence of the use made in the marketplace of those trade-marks. The state of the register is a proxy for the state of the marketplace. The inference to be drawn from the state of the register evidence requires not only that there be a large number of registrations, but it must be shown that they were used, not merely registered. The applicant relies on *McDowell v Laverana GmbH & Co. KG*, 2017 FC 327 [*McDowell I*], which follows *Hawke & Company Outfitters LLC v Retail Royalty Company*, 2012 FC 1539 [*Hawke*], as well as *Compagnie Gervais Danone v Astro Dairy Products Ltd.*, (1999) 160 FTR 27. In the case at bar, the Board was simply “satisfied that the state of the register evidence shows sufficient relevant registration for me to draw an inference favourable to the Applicant” (decision, para 137).

## VI. Analysis

### A. *The standard of review*

[39] Simply adducing new evidence does not carry that the Court will apply a correctness standard, what some have referred to as “*de novo*”. The Court must first assess the additional evidence adduced. Such evidence is considered to see if it would have materially affected the Board’s decision on the exercise of discretion (*Molson Breweries v John Labatt Ltd.*, [2000] 3 FC 145, FCA [*Molson Breweries*]). If the additional evidence does not have materiality sufficient to affect the decision of the Board, its decision is entitled to deference on a standard of reasonableness. In *Molson Breweries (supra)*, here is how the Court of Appeal (per Rothstein J.A.) put the issue:

[51] I think the approach in *Benson & Hedges and McDonald's Corp.* are consistent with the modern approach to standard of review. Even though there is an express appeal provision in the *Trade-marks Act* to the Federal Court, expertise on the part of the Registrar has been recognized as requiring some deference. Having regard to the Registrar's expertise, in the absence of additional evidence adduced in the Trial Division, I am of the opinion that decisions of the Registrar, whether of fact, law or discretion, within his area of expertise, are to be reviewed on a standard of reasonableness *simpliciter*. However, where additional evidence is adduced in the Trial Division that would have materially affected the Registrar's findings of fact or the exercise of his discretion, the Trial Division judge must come to his or her own conclusion as to the correctness of the Registrar's decision.

[40] I read the decision of the Supreme Court in *Mattel, Inc. v 3894207 Canada Inc.*, 2006 SCC 22, [2006] 1 SCR 772 [*Mattel*], as inviting caution in turning any new evidence into an opportunity for the Court to substitute its assessment of the evidence to that of the Registrar whose expertise is recognized:

35 The Act provides for a full right of appeal to a Federal Court judge who is authorized to receive and consider fresh evidence (ss. 56(1) and 56(5)). There is no privative clause. Where fresh evidence is admitted, it may, depending on its nature, put quite a different light on the record that was before the Board, and thus require the applications judge to proceed more by way of a fresh hearing on an extended record than a simple appeal (*Philip Morris Inc. v. Imperial Tobacco Ltd.* (No. 1) (1987), 17 C.P.R. (3d) 289 (F.C.A.)). Section 56 suggests a legislative intent that there be a full reconsideration not only of legal points but also of issues of fact and mixed fact and law, including the likelihood of confusion. See generally *Molson Breweries v. John Labatt Ltd.*, 2000 CanLII 17105 (FCA), [2000] 3 F.C. 145 (C.A.), at paras. 46-51; *Novopharm Ltd. v. Bayer Inc.* (2000), 2000 CanLII 16510 (FCA), 9 C.P.R. (4th) 304 (F.C.A.), at para. 4, and *Garbo Creations Inc. v. Harriet Brown & Co.* (1999), 1999 CanLII 8988 (FC), 3 C.P.R. (4th) 224 (F.C.T.D.).

(2) The Board's Expertise

36 The determination of the likelihood of confusion requires an expertise that is possessed by the Board (which performs such

assessments day in and day out) in greater measure than is typical of judges. This calls for some judicial deference to the Board's determination, as this Court stressed in *Benson & Hedges (Canada) Ltd. v. St. Regis Tobacco Corp.*, 1968 CanLII 1 (SCC), [1969] S.C.R. 192, at p. 200:

In my view the Registrar's decision on the question of whether or not a trade mark is confusing should be given great weight and the conclusion of an official whose daily task involves the reaching of conclusions on this and kindred matters under the Act should not be set aside lightly but, as was said by Mr. Justice Thorson, then President of the Exchequer Court, in *Freed and Freed Limited v. The Registrar of Trade Marks et al* [1950 CanLII 250 (FC), [1951] 2 D.L.R. 7, at p. 13]:

... reliance on the Registrar's decision that two marks are confusingly similar must not go to the extent of relieving the judge hearing an appeal from the Registrar's decision of the responsibility of determining the issue with due regard to the circumstances of the case.

37 What this means in practice is that the decision of the registrar or Board "should not be set aside lightly considering the expertise of those who regularly make such determinations": *McDonald's Corp. v. Silcorp Ltd.* (1989), 24 C.P.R. (3d) 207 (F.C.T.D.), at p. 210, aff'd (1992), 41 C.P.R. (3d) 67 (F.C.A.). Reception of new evidence, of course, might (depending on its content) undermine the factual substratum of the Board's decision and thus rob the decision of the value of the Board's expertise. However, the power of the applications judge to receive and consider fresh evidence does not, in and of itself, eliminate the Board's expertise as a relevant consideration: *Lamb v. Canadian Reserve Oil & Gas Ltd.*, 1976 CanLII 162 (SCC), [1977] 1 S.C.R. 517, at pp. 527-28.

[41] The issue is not so much the quantity of additional evidence but rather its quality. As noted by de Montigny J., then of this Court, in *Hawke (supra)*, "(e)vidence that merely supplements or confirms earlier findings, or which pertains to facts posterior to the relevant material date, will be insufficient to displace the deferential standard of reasonableness" (para 31). The test has also been helpfully articulated by Evans J., then of this Court, as "the extent to

which the additional evidence has a probative significance that extends beyond the material that was before the Registrar” (*Garbo Group Inc. v Harriet Brown & Co.*, (2000) 3 CPR (4<sup>th</sup>) 224 at para 37). The additional evidence that is repetitive of existing evidence without improving its cogency will not do (*Vivat Holdings Ltd. v Levi Strauss & Co.*, 2005 FC 707, 41 CPR (4th) 8, at para 27).

[42] In my view, the quality of the evidence offered in the new affidavits in this case does not offer additional evidence that would be substantive or probative in addressing an issue before the Court such that it would have likely affected materially the Board’s findings on the exercise of discretion.

[43] The affidavit of Tania Goecke addressed comments made during the hearing before the Board about the quality of some documentary evidence and supplied information about the corporation, the use of marks and its sales. There is no significant evidence relevant to the issue being disputed in this case, whether there is confusion between the trade-marks such that Canada Bread should have prevailed in its oppositions to the two trade-marks of the respondent.

[44] As for the second affidavit of Ms. La, it is impossible to decipher what its legitimate purpose is (*Eclectic Edge Inc. v Victoria’s Secret Stores Brand Management Inc.*, (2015) 132 CPR (4<sup>th</sup>) 83). The affidavit of a paralegal (“adjoite juridique”) in the applicant’s counsel’s law firm consists of nothing more than pages apparently extracted from Dr. Smood’s website. I have reviewed each and every page of the four exhibits appended to the affidavit. The fourth exhibit appears to be about the various establishments operated by Dr. Smood in Miami and New York

City. The first two exhibits appear to be pages that refer to Dr. Smood; one is said to be the home page while the page under SL-2 appears to advertise a “New Matcha Latte”; one finds on the right hand side of the page what appears to be a reference to various products, the list including “healthy snacks”. Finally, there are 44 pages under SL-3 which appear to be products falling in the category of “health and benefits”. Various products are presented, from wild caught salmon to iced coffee and various juices.

[45] It is very much unclear what this information gleaned from a website shows. It is evidently an attempt at turning the appeal into something of a *de novo* exercise, the Court reviewing the matter anew without showing deference for the original Board decision. However, this new information never rises to the level required in that it could not have materially affected the Board’s finding. In fact, the pages taken from the website, without more, tell us very little other than the respondent appears to operate establishments and some of its products include food products of a considerable variety, largely exceeding the bakery products of the applicant.

[46] Accordingly, the standard of review will have to be reasonableness. As long as the outcome reached by the Board “falls within a range of possible, acceptable outcomes defensible in respect of the facts and the law”, no reviewing Court intervention is warranted (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47). Moreover, reasonableness requires also that the “process and the outcome fit comfortably with the principles of justification, transparency and intelligibility” (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59). Reasonableness excludes for the reviewing Court to substitute its view of the preferable outcome.

B. *Questions of law calling for a correctness standard*

[47] The applicant argues that questions of law require a standard of correctness. But there must be first a question of law. And then, it is only the question of law that is the subject of a correctness standard (*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para 50). I note that there has not been an extricable question of law identified by the applicant. It is only where there is such extricable question of law that would require the review on a standard of correctness, as per *Rogers (supra)*. In spite of numerous invitations to identify such question of law, none was identified. At best, the applicant sought to argue that the indication by the Board that it was consistent with its decision in *La Tortilla Factory (supra)* in finding that the connotation of the word “smart” in the context of food products is “healthier choice” constituted an error of law. One does not know why.

[48] As the Court reads the Board’s decision, there is no indication that it found such connotation because of the *La Tortilla Factory* decision. It merely indicated that the same connotation exists in this case, a finding the Board was entitled to make (as long as it is reasonable). It is for the trier of fact to make determinations of that type as she examines the likelihood of confusion (*General Electric Co. v The General Electric Co. Ltd.*, [1972] 2 ALL E.R. 507 (H.L.) [*General Electric*]). The view that the decision maker can decide by itself on confusion was endorsed by the Supreme Court of Canada in *Masterpiece (supra)*, which cited at some length Lord Diplock in *General Electric* at para 88:

[88] ...

... the question whether such buyers would be likely to be deceived or confused by the use of the trade mark is a ‘jury question’. By that I mean that if the issue had now, as formerly, to



be tried by a jury, who as members of the general public would themselves be potential buyers of the goods, they would be required not only to consider any evidence of other members of the public which had been adduced but also to use their own common sense and to consider whether they would themselves be likely to be deceived or confused.

[My emphasis.]

As the Court put it at paragraph 89:

[89] The question is not answered differently when the issue is determined by a judge. Lord Diplock wrote, continuing at p. 515:

The judge's approach to the question should be the same as that of a jury. He, too, would be a potential buyer of the goods. He should, of course, be alert to the danger of allowing his own idiosyncratic knowledge or temperament to influence his decision, but the whole of his training in the practice of the law should have accustomed him to this, and this should provide the safety which in the case of a jury is provided by their number. That in issues of this kind judges are entitled to give effect to their own opinions as to the likelihood of deception or confusion and, in doing so, are not confined to the evidence of witnesses called at the trial is well established by decisions of this House itself.

[Emphasis in original.]

[49] In effect, the *Masterpiece* Court accepts that the view of the decision maker as trier of fact is significant:

[91] In *Ultravite*, Spence J. was quite satisfied to express and apply his own view of the first impression of a trade-mark on the average consumer. At p. 738, he stated:

In expressing my view, I am putting myself in the position of the average person going into the market to purchase a dandruff remover and hair tonic.

The view is nicely summarized in a few lines at paragraph 92:

[92] I would endorse these comments about expert evidence and follow the approach of Spence J. in *Ultravite*, the House of Lords in *General Electric* and the English Court of Appeal in *esure*. In cases of wares or services being marketed to the general public, such as retirement residences, judges should consider the marks at issue, each as a whole, but having regard to the dominant or most striking or unique feature of the trade-mark. They should use their own common sense, excluding influences of their “own idiosyncratic knowledge or temperament” to determine whether the casual consumer would be likely to be confused.

[50] That of course does not exclude the use of surveys in trade-marks cases, although the Court stresses that “the use of survey evidence should still be applied with caution” (*Masterpiece*, para 93). However, this type of evidence is not required.

[51] The connotation found in the case at bar comes in part from an inference taken from the meaning of the word “smart”. The Oxford Canadian Dictionary (2001) gives the word the following first meaning in North America: “Intelligent, keen, bright”. I have not been persuaded that an error was committed in referring to the word “smart” as suggesting a healthier choice, even if the same conclusion was reached in a different case. One does not imply that the conclusion is based on the evidence in the case of *La Tortilla Factory*. There is no indication that such was the case and none was presented by Canada Bread. The Board was merely stating that it reached in this case the same conclusion about the idea suggested by the mark SMART as it did in another case.

[52] That does not make it a question of law. In the absence of anything that would help establish that “healthier choice” comes from the evidence in a different case, a suggestion made at the hearing by counsel without supporting evidence, I cannot find an error of law.

[53] The reasonableness of an inference is a different matter. There was on this record ample evidence of the connection of the mark SMART with the applicant's bakery products being healthy bakery products. The affidavit of Mr. Breton is replete with various documents and advertisements where the trade-mark SMART prominently featured is associated with "Whole Grain" and "healthier choice" in the form of mentioning "13 essential nutrients", "190 calories", "3 grams of fibre" and what appears to be the endorsement of the Heart & Stroke Foundation. Elsewhere, is stressed "The good taste of white bread, the added goodness of whole grain", as well as a "source of fibre and calcium". Throughout, SMART is associated with whole grains, super grains and fibre. In one ad, a mother and her son are presented in the following fashion, with the word "smart" displayed in three locations on the page: "A Dynamic Duo ... Mom and Smart! With 16 Whole Grains, the goodness of 16 essential nutrients and 5 grams of fibre, Dempster's Smart<sup>®</sup> White with 16 Whole Grains is the perfect sidekick to ensure your kids Eat, Play and Be Smart<sup>™</sup>!".

[54] To say the least, the applicant is far from having discouraged the close relationship between its trade-mark and healthier choice. That relationship seems to be prevalent throughout the products offered by Canada Bread, as ads on packaging concerning English muffins, hot dog and hamburger buns, bagels, tortillas and of course bread all refer to the goodness (in French "bienfaits") of the product. Not only can one make a link between the connotation of the word "smart" (an intelligent, bright person will look for healthier products), but an argument can be made that the trade-mark was used to that effect. Whether the inference is strong or not is one thing. It is quite another to claim that the reference to "healthier choice" must have come solely

from a different file, without the benefit of evidence. There was evidence on this record to support that contention.

C. *Reasonableness of the decision*

[55] It would appear that the decision considered first the design of Dr. Smood ApS' trade-marks for which registration was sought. The decision mentions at paragraph 51 that given that the grounds of opposition are the same with respect to the two trade-marks, only when needed will there be distinctions made.

[56] However, it is clear from the examination of the degree of resemblance (s. 6(5)(e)) that the focus was on the trade-mark Dr. Smood et al Design where the Board noted how prominent Dr. Smood was in the design, making it the most striking aspect of the trade-mark. Counsel for the applicant, as I indicated earlier, conceded at the hearing of the case that the Board's decision to deny the opposition concerning the design was well founded. Accordingly, the appeal concerning the refusal to grant the opposition to the registration of the trade-mark THE HEALTH COMPANY DR. SMOOD SMART FOOD FOR A GOOD MOOD EST. 2014 (Application No. 1,707,009) is dismissed.

[57] That leaves the word mark SMART FOOD FOR A GOOD MOOD. The Board's whole analysis and conclusion concerning the degree of resemblance (s. 6(5)(e)) is found in paragraph 111 which I reproduce again in its entirety for ease of reference:

[111] Turning to the Applicant's trade-mark SMART FOOD FOR A GOOD MOOD, I acknowledge that its first component consists of Canada Bread's entire trade-mark SMART. Still, when

the trade-marks are considered in their totality, I find them to be more different than alike in terms of appearance and sound. Also, as I previously stated, I find the Applicant's trade-mark suggestive of an intended result of the goods, i.e. to lift someone's mood. This is not the idea suggested by Canada Bread's trade-mark.

[My emphasis.]

The other four factors of section 6(5) all went against the respondent. The Board did not conclude that the marks were so dissimilar that there was not weight to be given to the other factors that could counterbalance the weight to be given to the factor of "resemblance" (*Masterpiece, supra*, para 49). As a matter of fact, the Board relied on the state of the register evidence to reach its conclusion that there was no likelihood of confusion.

[58] There are issues with the analysis of the degree of resemblance and the state of the register evidence that make the Board's decision unreasonable in that it lacks justification, transparency and more particularly intelligibility. There are four factors favouring the applicant and one favouring the respondent. The Board saw fit to rely on one other factor to then conclude on the issue of confusion. That additional factor played a role: it diluted the scope of the protection to which the mark SMART is entitled, thus counterbalancing somehow the distinctiveness of the mark. However, the weight given to that factor was not warranted.

[59] The problem is the following. The evidence concerning the state of the register in this case falls significantly short of the mark as found by the jurisprudence of this Court. Evidently, the Board chose to reach to the state of the register in the balancing of the four factors favourable to Canada Bread, with the resemblance between Dr. Smood's word mark and Canada Bread's mark. As pointed out earlier in these reasons the *Masterpiece* Court agreed with Professor Vaver

that resemblance of the marks is the most important factor as “if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion” (*Masterpiece, supra*, para 49). The Board could have expressed itself clearly by declaring the word mark (012) was completely different from the applicant’s registered mark. Such lack of similarity was noted for the design (009), not the word mark. Instead, the Board sought to find solace in the state of the register evidence.

[60] That evidence presented in this case fails on two fronts such that its probative value is significantly diminished. The state of the register evidence seeks to lead the decision maker to infer what the state of the marketplace is. As Mactavish J. found recently in *McDowell I (supra)*, “such inferences may only be drawn when there are a large number of relevant registrations” (para 42). Citing *Kellogg (supra)* in support of the finding, my colleague goes on to explain that “(t)he theory is that the presence of a common element in marks causes purchasers to pay more attention to the other features of the marks, and to distinguish between them by those other features”.

[61] More importantly in my view, the evidence of the use of a common element becomes relevant only where the registered marks are commonly used in the market in question.

Mactavish J. agreed (para 46) with de Montigny J. when he wrote in *Hawke (supra)*:

I agree with the Respondents that a search of the Trade-marks Office Register is not the best way to establish the state of the marketplace or the actual use of a mark. The fact that a mark appears on the register does not show that it is currently in use, was in use as of the relevant material dates, is used in relation to wares or services similar to those of the parties, or the extent of any such use: see *Equinox Entertainment Ltd. v 54<sup>th</sup> Street Holdings Sarl*,

2011 TMOB 233 (CanLII), [2011] TMOB no 5233, 98 CPR (4<sup>th</sup>)  
14 [*Equinox Entertainment*] at para 35 (TMOB).

Our colleague Manson J. joined in the chorus in *McDowell v The Body Shop International PLC*, 2017 FC 581, at para 43 [*McDowell II*]. It remains very much unclear what inference may legitimately be drawn without evidence of the use made by third parties in the marketplace of a common element.

[62] The Board did not address in the 12 paragraphs dedicated to the state of the register the actual use that was made of the common element. The only evidence is the existence in the register of marks that use as one element the word “smart”. In other words, we are told of the existence of registrations, not whether they are in use, were in use or the extent of their use. In fact, the Board was concerned only with the existence of registration such that “the state of the register evidence effectively dilutes the scope of protection to which Canada Bread’s trade-mark SMART is entitled” (para 137). Without evidence of use, one is hard pressed to figure out if, and how much, dilution there can be.

[63] In *McDowell I (supra)*, there was not a large number of relevant registrations, a situation similar to the case at bar. Yet the Board declared itself satisfied to draw an inference that “Ms. McDowell does not have a monopoly over the use of “honey” in the personal care products sector” (para 45). In *McDowell II*, the Court found that the lack of evidence that the mark was used in relation to wares that are similar to those of the parties was enough to conclude that the Board had erred in drawing a negative inference merely from the state of the register. I reach the same conclusion in this case. It is less than clear that Canada Bread ought to have a monopoly

over a common word of the English language and what the scope of that monopoly ought to be. However, it is not for this Court to make that determination.

[64] For a decision to be reasonable, it must not only fall within a range of acceptable outcomes, but it must also fit comfortably with the principles of justification, transparency and intelligibility. In this case, if the state of the register evidence is not probative because the use of the common element has not been established as required in the two *McDowell* cases and *Hawke*, we are left with very little in support of the word mark other than the degree of resemblance. The resemblance between the two marks was said to be more different than alike, thus favouring the respondent, based on appearance and sound and the suggestion that Dr. Smood's products convey the idea that its product lift someone's mood. I note that it is not merely the word "smart" which conveys the idea that the products have the effect of lifting the mood, as counsel for Canada Bread suggested repeatedly. It is the word mark itself which says so in no equivocal fashion: smart food for a good mood. With such limited analysis, it is not possible to predict what the outcome would be without the state of the register evidence which took up 12 paragraphs against the sole paragraph to justify a lack of resemblance. It certainly seems that the Board itself did not see the degree of resemblance, or not, as sufficiently high to carry the day as it resorted to the state of the register evidence to bolster its conclusion.

[65] It follows that the limitation in resorting to the state of the register evidence by itself, coupled with a justification for the conclusion concerning the resemblance of the two marks, lead to the conclusion that the decision lacks intelligibility. We do not know what the result would



have been had the Board been more explicit about the resemblance of the two marks and concluded that the state of the register evidence was lacking.

[66] Recently, Stratas J.A., in *Bonnybrook Park industrial development co. Ltd. v Canada (National Revenue)*, 2018 FCA 136, reviewed the law on the ability of a reviewing court to supplement the reason of administrative decision makers. We are reminded that Parliament gave a decision maker with expertise the duty to decide matters for which that expertise exists. As Binnie J. said in *Mattel* “(t)he determination of the likelihood of confusion requires an expertise that is possessed by the Board (which performs such assessments day in and day out) in greater measure than is typical of judges” (para 36). Stratas J.A. considers that limits have been placed on the participation of reviewing courts in the decision-making that ought to take place at the administrative level:

[77] But there is a limit to our participation. *Delta* does not require us to figure out for ourselves the merits of the matter, decide the merits for the administrator, and then draft the administrator’s reasons. Instead, *Delta* underscores that administrators must still do their job. *Delta* declares (at para. 27) that “reasons [given by the administrator] still matter” and play a “vital role...in administrative law.” For good measure, *Delta* reiterates (at para. 24) the warning the Supreme Court sounded in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654: namely that reviewing courts do not have *carte blanche* to draft reasons for the administrative decision-maker.

[78] *Alberta Teachers* tells us that it is one thing for reviewing courts to interpret reasons in light of the record and conclude that—despite silence in the reasons on certain matters—the matters must have been considered and dealt with in a certain way. But it is quite another thing to draft the administrator’s reasons from scratch or to cross out portions of the administrator’s reasons and write our own.

[67] Surely a reviewing court would be entitled to supplement where the context would indicate that the matter has been addressed in a certain way.

[68] But this is not the situation here. The decision is not reasonable because it lacks in intelligibility. It is for the administrative tribunal to make the determination for which it has been created. The expertise resides at the Board and a reviewing court should avoid substituting its view for that of the Board. In fact, that may turn the reasonableness standard on its head with the reviewing court applying in effect a correctness standard.

[69] That is why the question of whether the word mark and the applicant's registered mark, without the benefit of the state of the register evidence found lacking, are confusing must be returned to a differently constituted Board for a new determination. The appropriate calibrating of the factors is the province of the Board and ought to be performed by it.

**JUDGMENT in T-1195-18**

**THIS COURT'S JUDGMENT is that:**

1. The appeal with respect to the rejection of the opposition to application 1,702,009 for registration of THE HEALTH COMPANY DR SMOOD SMART FOOD FOR A GOOD MOOD EST. 2014 (Dr Smood et al Design) is dismissed.
2. The appeal with respect to the rejection of the opposition to application 1,707,012 for registration of SMART FOOD FOR A GOOD MOOD (word mark) is granted. The matter of the alleged confusion between the applicant's mark, SMART, and that to be registered, SMART FOOD FOR A GOOD MOOD, is returned to a differently constituted Trade-marks Opposition Board for a new determination.
3. Given the split success of this appeal to which the respondent did not take part, there will be no costs awarded.

“Yvan Roy”

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Judge

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

**DOCKET:** T-1195-18

**STYLE OF CAUSE:** CANADA BREAD COMPANY, LIMITED  
v DR. SMOOD APS

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** JANUARY 14, 2019

**JUDGMENT AND REASONS:** ROY J.

**DATED:** MARCH 13, 2019

**APPEARANCES:**

Bruno Barrette  
Clara Chow

FOR THE APPLICANT

**SOLICITORS OF RECORD:**

Barrette Legal Inc.  
Barristers & Solicitors  
Montréal, Quebec

FOR THE APPLICANT