

Federal Court



Cour fédérale

Date: 20170111

Docket: T-226-16

Citation: 2017 FC 38

Ottawa, Ontario, January 11, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

SCHWAN'S IP, LLC

Applicant

and

SOBEYS WEST INC.

Respondent

JUDGMENT AND REASONS

[1] This is an appeal pursuant to section 56 of the *Trade-marks Act*, RSC, 1985, c T-13 [the Act] which is brought by way of application pursuant to rule 300(d) of the *Federal Courts Rules*, SOR/98-106.

[2] The appeal is from a decision of a Member of the Trade-marks Opposition Board [the Registrar] dated October 29, 2015 [the Decision], in which she refused Trade-mark Application

No. 1, 448, 719 [the Application] made by Schwan's IP, LLC for the trade-mark EDWARDS & Design [the Schwan's Mark].

I. The Parties

[3] The Applicant Schwan's IP, LLC [Schwan's IP] is the company which owns the Schwan's Mark. Schwan's Consumer Brands [SCB] currently markets the Schwan's products in the United States [US]. Both Schwan's IP and SCB are subsidiaries of a private company based in Minnesota called The Schwan Food Company. All three companies are incorporated in the US.

[4] The Respondent, Sobeys West Inc., [Sobeys] opposed the registration of the Schwan's Mark. Sobeys is a national retail grocery store operator with 215 stores across Canada. It is the owner of the trade-mark for the word EDWARDS [the Sobeys' Mark]. Canada Safeway Ltd. [Safeway] was the original opponent and owner of the Sobeys' Mark. After Safeway was purchased by Sobeys, it took an assignment of the Sobeys' Mark and replaced Safeway as the opponent in this application.

II. The Trade-marks & the Wares

[5] The Schwan's Mark is:



[6] Schwan's IP seeks registration for the following:

1. Baked foods – namely pies based on registration and use in the US; and
2. Dessert Products – namely pies, apple crisp, cream pies, cheesecakes, brownies, cakes and cobblers based on proposed use in Canada.

[7] The Trade-mark Application does not indicate whether these goods are fresh or frozen. In my view, both categories are therefore included in the Application.

[8] Sobeys' Mark is:



EDWARDS

[9] Sobeys' Mark is for coffee and coffee filters. EDWARDS coffee is sold in all Sobeys' stores but not in any other locations.

III. The Material Dates

[10] The Material Dates before the Registrar were:

- With regard to sections 30 and 16(2)(a) and 16(3)(a) of the Act, the filing date of the Application was August 19, 2009;
- With regard to section 12(1)(d) of the Act, the date of the Registrar's Decision was October 29, 2015;

- With regard to section 2 of the Act, the date of filing the Opposition was June 27, 2011.

IV. The Evidence Before the Registrar

[11] Safeway filed affidavits in opposition made by:

- Generosa Castiglione – Trade-marks Searcher – exhibited registration for and assignment of the Sobeys’ Mark;
- Julie Léger – Professional Researcher –exhibited internet websites showing coffee and baked goods served together. Her affidavit was found inadmissible for the truth of its contents;
- David Pullar – Director of Consumer Brands at Safeway – provided evidence regarding the use and promotion of the Sobeys’ Mark.

[12] Schwan’s IP filed the following affidavits:

- Hallee Eileen Lauriola – legal assistant – provided print outs of LCBO, Google, 411 and other search results;
- Sandro Romeo – Trade-marks Research Analyst – state of the Register;
- Caroline D’Amours – Trade-marks Research Analyst – “how common” search.

[13] Safeway filed the following affidavits in Reply:

- Jamie-Lynn Kraft – articling student – 411 search;
- Nick Todorovic and Jane Buckingham – the Registrar found these affidavits inadmissible as improper reply.

V. Sobeys' Opposition

[14] In its Opposition, Sobeys alleged that the Schwan's Mark is confusing with the Sobeys' Mark under sections 12(1)(d), 16(2)(a) and 16(3)(a) of the Act and that, contrary to section 2 of the Act, the Schwan's Mark is not distinctive. There were other grounds of opposition under section 30 of the Act but the Registrar's rejection of those grounds was not appealed.

VI. The Registrar's Decision

[15] The Registrar allowed Sobeys' opposition on the issues of confusion and distinctiveness and refused the Application to register the Schwan's Mark.

[16] It is noteworthy that Schwan's IP did not provide an affidavit which described its use or promotion of the Schwan's Mark. This allowed the Registrar to conclude at paragraph 31 of the Decision that "there is no evidence of use of the Mark by the Applicant in Canada or that it has acquired any distinctiveness in Canada [...]."

[17] In contrast, the Registrar found that David Pullar's affidavit showed a history of use of the Sobeys' Mark since at least 1988.

[18] Dealing with the other factors listed in subsection 6(5) of the Act, the Registrar concluded that:

Re: subsection 6(5)(a) Inherent Distinctiveness and Extent Known

[19] Neither mark is inherently strong as both are common surnames. However, the design element (the pie server) in the Schwan's Mark gives it slightly more inherent distinctiveness than the Sobeys' Mark.

[20] As noted above, there was substantial evidence to show that the Sobeys' Mark had become known and no such evidence for the Schwan's Mark.

Re: subsection 6(5)(b) Length of Time in Use

[21] The Sobeys mark had a long history of use. There was no evidence of use of the Schwan's Mark in Canada.

Re: subsection 6(5)(c) Nature of the Goods

[22] Although the goods are intrinsically different, the evidence shows that they may be served together. Hence, they are related. In reaching this conclusion, the Registrar relied on *Cheung Bakery Products Ltd v Saint Honore Cake Shop Ltd*, 2011 TMOB 94 at paras 114 and 128-129 [*Cheung*]. In *Cheung* the Registrar considered the nature of the goods and concluded that the Opponent's bakery products were related to the Applicant's wares, which included coffee, because they could be used together.

Re: subsection 6(5)(d) Nature of the Trade

[23] Schwan's and Sobeys' goods can be sold in supermarkets; therefore, the Schwan's Mark could be used where the Sobeys' Mark is in use.

Re: subsection 6(5)(e) Degree of Resemblance

[24] At paragraph 36 of the Decision the Registrar concluded that:

[36] This factor favours the Opponent. There is high degree of resemblance in appearance and sound suggested by the marks in view of the presence of the word EDWARDS in both trade-marks. The addition of stylized lettering, background and the image of a pie server do not significantly diminish the degree of resemblance in appearance or sounded since they simply emphasize the word EDWARDS which remains the dominant element of the Mark. Further, the ideas suggested by both trade-marks is similar, products which are connected to someone with the surname EDWARDS.

A. *Other Circumstances*

i) The State of the Register and the Marketplace

[25] The Registrar considered the state of the register and marketplace evidence in the Romeo, Lauriola and D'Amours affidavits filed by Schwan's IP to support its submission that variations of the EDWARDS name were common in Canada in association with food and beverages.

[26] The Romeo affidavit included a "how common" search of the Canadian Trade-marks Register for all registered or applied-for trade-marks including EDWARD, EDWARDS and EDWARD'S for all food and beverage products in Canada. The closest matches are shown in Group 1, which includes only the Sobey's and Schwan's Marks. This means that they are the only marks which use Edward, Edwards or Edward's alone for food or beverage products. Accordingly the Registrar found at paragraph 39 of the Decision that there was an "insufficient number of trade-marks to conclude that EDWARD or EDWARDS is widely used on its own in the food and beverage field such that the average Canadian consumer is accustomed to distinguishing these marks".

[27] The Romeo affidavit also included domain names using EDWARD, EDWARDS and EDWARD'S. However, the Registrar found them irrelevant as there was no evidence that the webpages had been viewed in Canada.

[28] The D'Amours affidavit also showed the results of a "how common" search for the words EDWARD, EDWARDS and EDWARD'S in association with food and beverage products and services. However, the Registrar found the results broad and imprecise.

[29] Lastly, the Lauriola affidavit showed:

- websites from the food and beverage field which all showed PRINCE EDWARD as part of the trade-marks;
- Google searches showing Prince Edward Island;
- LCBO searches; and
- Canada 411 searches which included names used for women's clothing and financial services.

[30] All this evidence led the Registrar to conclude at paragraphs 43 and 44 that the word EDWARDS is incorporated in many names but is not used on its own. As well, there was no evidence that other trade-names or trade-marks had acquired significant reputations.

ii) Use with liqueur and iii) not a house brand

[31] The Registrar accepted that Sobeys had not used Edwards as a house brand. The Registrar declined to admit the Léger affidavit, which showed that coffee and liqueur are

sometimes combined, for the truth of its contents. The Registrar held that neither the lack of Edwards house brand coffee nor consumers' potential awareness that coffee and liqueur are sometimes mixed supported an inference that consumers are able to distinguish between Schwan's and Sobey's products.

VII. The Conclusion about Confusion under 12(1)(d) of the Act

[32] The Registrar concluded at paragraph 47 of the Decision:

[47] I find that the Applicant has not established, on a balance of probabilities, that confusion is not likely between the Mark and the Opponent's registered trade-mark EDWARDS as of today's date. I reach this conclusion because while EDWARDS is not the type of mark that is typically afforded a broad scope of protection, only the Opponent has acquired a reputation in association with its Mark as of today's date, the Opponent Sobey's West Inc. or its predecessor in title Canada Safeway Limited has a long history of use from at least 1988, the parties goods may be served together and sold at grocery stores (even if not at the same stores or the same section of stores specifically) and the Mark is highly similar in appearance, sound and idea suggested to the Opponent's trade-mark. As stated in *Beverly Bedding & Upholstery Co v Regal Bedding & Upholstery Ltd* (1980), 47 CPR (2d) 145 at 149 (FCTD), "Realistically appraised it is the degree of resemblance between trade marks in appearance, sound or in ideas suggested by them that is the most crucial factor, in most instances, and is the dominant factor and other factors play a subservient role in the over-all surrounding circumstances."

VIII. The Conclusion about Confusion under 16(2) and (3) of the Act

[33] The Registrar decided that, notwithstanding the difference in material dates under sections 16 and 12 of the Act, her conclusion was unchanged.

IX. The Conclusion on Distinctiveness

[34] Based on the Pullar affidavit, the Registrar found that the Sobeys' Mark had become sufficiently known by June 27, 2011 to negate the distinctiveness of the Schwan's Mark. Then the Registrar found that Schwan's IP had not met its onus to show that the Schwan's Mark was unlikely to create confusion with the Sobeys' Mark. Accordingly, it would not serve to distinguish Schwan's IP's goods from those of Sobeys.

X. The Standard of Review on this Appeal

[35] The normal rule is that a Registrar's decision is to be reviewed on a reasonableness standard. However, the normal rule does not apply if new evidence filed on appeal pursuant to section 56 of the Act would have materially affected the Registrar's decision (see: *Eclectic Edge Inc v Gildan Apparel (Canada) LP*, 2015 FC 1332 [*Eclectic Edge*]).

[36] In this case, eight new affidavits have been filed [collectively, the New Evidence]. Accordingly the initial task is to review them to determine whether they would have materially affected the Decision. Sobeys says that the New Evidence is not material and Schwan's IP argues the opposite position.

XI. The New Evidence and its Materiality

[37] At paragraph 43 of *Eclectic Edge*, Mr. Justice Gascon provides authorities and describes the approach to be taken to materiality. It can be summarized as follows:

- To what extent does the New Evidence have substantial probative value beyond the evidence that was before the Registrar?
- Does the New Evidence add something of significance or is it merely repetitive?
- Quality not quantity should be determinative.

[38] With these principles in mind, I turn to the New Evidence from Schwan's IP.

A. *The Perez Affidavit*

[39] Mr. Perez is the former Senior Director of International Sales for SCB and is currently retained as its consultant.

[40] The Perez affidavit provides information about the US market and register. Since 2001, the US version of the Schwan's Mark [Schwan's US Mark] which includes the pie server, was used on products sold to Safeway in the US [US Safeway].

[41] The US version of the Sobeys' Mark [Sobeys' US Mark] was used by US Safeway until it expired in 1996.

[42] Further, for two or three years in the US, a trademark owned by Schwan's IP which is similar to Schwan's US Mark (but lacks the pie server), [the Similar Schwan's US Mark] had a registration and use which overlapped with US Safeway's registration and use of the Sobeys' US Mark. There were also other EDWARDS word marks which were registered when the Sobeys' US Mark was on the register but the extent of the overlap is not described.

[43] In Mr. Perez's experience, there was never any confusion in the US between the source of the Schwan's and US Safeway goods. As well, US Safeway did not oppose Schwan's IP's registration of the Similar Schwan's US Mark.

[44] Mr. Perez also deposed that between mid-2010 and 2014, SCB sold frozen baked goods and frozen dessert products in Canada to a variety of food retailers, who only sold them in the frozen food freezer sections of their stores. Canada Safeway was not listed as a purchaser. Sobeys purchased the products but this occurred before it bought Canada Safeway and acquired the Sobeys' Mark.

[45] On cross-examination, it was revealed that only frozen pies were sold in Canada and that a decision was made to exit the Canadian market in 2014.

[46] Mr. Perez stated that sales in Canada had totalled "hundreds of thousands of dollars".

[47] The Perez affidavit made it clear that all Schwan's products are frozen and counsel for Schwan's IP asked that if I allow the appeal, I notify the Registrar that the trade-mark Application should be amended to show that all the goods are frozen.

[48] Mr. Perez testified that there was no confusion in Canada or any concerns expressed by consumers or more sophisticated wholesale purchasers about the likelihood of confusion in Canada between the Schwan's and Sobeys' Marks.

[49] The Schwan Food Company and its subsidiaries operate websites showing products bearing the Schwan's US Mark. The sites are available in Canada and Mr. Perez says they are accessed by Canadians and that there have been no complaints or inquiries suggesting or arising from confusion.

[50] Mr. Perez also testified that thousands of flyers promoting the frozen pies would have been distributed by retailers in Canada but no examples were provided to show whether the Schwan's Mark appeared. Mr. Perez also said in cross-examination that "millions" had been spent on promotion.

[51] Schwan's IP says that this evidence about use and co-existence in the US in the market and on the Register and about sales and promotion in Canada together with the lack of any evidence of confusion in either country would have materially affected the Registrar's findings. Schwan's IP says she would have concluded that the degree of resemblance between the marks, which was her main concern, was less important because the resemblance was not in fact causing confusion.

[52] Sobeys' position is that the Perez affidavit is not probative because it asserts vague generalities and is misleading. For example, Mr. Perez deposed that "hundreds of thousands of dollars of sales of these goods and dessert products bearing the EDWARDS DESIGN mark have been made in Canada." However, on cross-examination he acknowledged that only frozen pies had been sold in Canada and he provided no sales figures. He also deposed that thousands of flyers promoting baked goods and dessert products bearing the EDWARDS DESIGN mark

would have been distributed in Canada and said on cross-examination that “millions” had been spent on promotion. However, no promotional material was produced.

B. *Conclusions about the Perez Affidavit*

[53] The Perez affidavit’s description of sales in the United States and the sale of frozen pies in Canada from 2010 to 2014 had the potential to materially affect the finding that the Sobeys’ and Schwan’s Marks were confusing. However, for the reasons which follow, I have concluded that the evidence about the US and Canadian sales is, in fact, not material.

[54] In paragraphs 8-10 of his affidavit, Mr. Perez says that both the Schwan’s US Mark and the Sobeys’ US Mark were in use in the US. This may be so but the use did not overlap. US Safeway’s Mark expired on September 30, 1996 and there was no evidence that US Safeway continued to use its unregistered mark in the US after 1996. The Schwan Food Company did not begin to use its Schwan’s US Mark until 2001. In these circumstances, I have concluded that the Registrar would not have relied on this evidence and the lack of complaints to conclude that there was no confusion.

[55] Similarly, I have determined that two to three years co-existence of the Similar Schwan’s US Mark and other Schwan’s EDWARDS word marks with the Sobeys’ US Mark on the Register and in use in the US is not probative because the period of coexistence is relatively short. Further, the state of a foreign Register is not relevant (see: *Emilio Pucci International BV v El Corte Ingles, SA*, 2011 TMOB 32 at paragraphs 67-68; *Novartis AG v Satisloh AG*, 2016 COMC 158 at paragraph 83).

[56] Turning to the sales in Canada, an examination of the exhibits attached to Mr. Perez's affidavit shows that sales began in the fall of 2010 and ended at the end of 2013. There are therefore approximately three years of sales, not four as the Perez affidavit suggests. As well, these sales all postdate the material date of August 19, 2009 which applies to sections 16(2)(a) and 16(3)(a) of the Act. This means that this evidence has no bearing on the Registrar's finding that under those sections the Marks are confusing.

[57] For the following reasons, I have concluded that the Registrar would have found the evidence about the use and promotion the Schwan's Mark in Canada weak and somewhat unreliable:

- the period of use was approximately three years. It was overstated by a full year in the Perez affidavit;
- the products sold in Canada were misdescribed in the Perez affidavit to include a variety of desserts and baked goods when, in fact, only pies were sold in Canada;
- there was no documentary evidence to support the alleged "hundreds of thousands" in sales; and
- there was no documentary evidence to support the alleged "millions" in promotion.

[58] Accordingly, in view of the tendency towards hyperbole in the Perez affidavit, it is reasonable to conclude that sales volumes were modest and promotion was limited. When this is contrasted with the use of the Sobeys' Mark in Canada since 1998 and the promotion it received, I am satisfied that the evidence about the lack of retail consumer and wholesale purchaser

confusion in Canada over a relatively short period would not have altered the Registrar's conclusions.

[59] I now turn to the allegation that US Safeway did not oppose the registration of the Similar Schwan's US Mark in 2001. There is no information about why this decision was made by US Safeway but I am asked to infer that it didn't oppose the registration because it did not consider the Similar Schwan's US Mark to be confusing. I am not prepared to draw this inference because US Safeway had let the Sobeys' US Mark expire five years earlier and there is no evidence that its use continued. In these circumstances, it is possible that US Safeway simply had no interest in opposing the registration of the Similar Schwan's US Mark.

[60] The Perez affidavit also introduced the fact that the Schwan's Mark was used for frozen goods that would all be sold in the freezer section of a supermarket. However, I am not persuaded that this fact would have materially affected the Registrar because in her Decision at paragraph 47, she acknowledged, in reaching her conclusion about confusion, that coffee and Schwan's goods might not be sold in the same stores or in the same sections of stores. Further, her finding that coffee and dessert are related goods would not change simply because the desserts are frozen.

[61] For the purposes of Section 2 of the Act, the material date is June 27, 2011. This means that some frozen pies bearing the Schwan's Mark would have been sold in Canada for eight months before this date. There is no information about the packaging used or the promotional

efforts undertaken by retailers in this period. In my view, this insubstantial evidence would not have materially affected the Decision.

[62] The Registrar noted at paragraph 31 of the Decision that there was no evidence that websites which referenced the Schwan's Mark had been viewed by Canadians.

[63] The Perez affidavit addresses this point. He states that there are a number of websites which reference the Schwan's Mark and which are accessible to and viewed by Canadians. However, he provides only one web address and he gives no indication of the number of Canadians who have viewed the sites or an explanation about how he knows the nationality of those who visit the sites. In my view, this evidence is too vague to be probative.

C. *The Affidavit of Hannah Biesterfeld*

[64] Ms. Biesterfeld was an articling student who was asked on behalf of Schwan's IP to conduct online searches for EDWARD, EDWARDS and EDWARD'S products or companies which bear those trade names and which have been active in Canada. Her findings about the state of the market include the following:

- Edward & Sons - food products are available through amazon.ca and have been sold at the Big Carrot store in Toronto for at least three years;
- Edwards Flower Shop – Mattawa, Ontario – since 1962 has sold gift baskets which can include coffee;
- Edwards Farm Store – Innisfil, Ontario – sells local products – honey and milk;
- Edwards Family Organics – sells meat in the Kitchener/Waterloo area;

- Laurigan & Edwards – wine merchants
- Luis Felipe Edwards – wine
- Merry Edwards – wine
- Edwards 1920 – a Toronto restaurant
- Edward Pub & Restaurant – in Quebec City
- T. Edwards Confectionary – candy and nuts in Regina
- Charles Edward Stuart’s Liqueur - Drambuie

[65] There is no doubt that the Registrar understood the import of the “state of the market” evidence. She said at paragraphs 43 to 45:

43. I am prepared to accord some weight to the Lauriola and D’Amours evidence as it seems clear that third parties are active under trade-names or use trade-marks that incorporate the word EDWARD in the general field that the parties operate within. Similar, to Mr. Romeo’s evidence, however, many of the trade-marks located include EDWARD or EDWARDS as part of expressions such as Prince Edward Island or King Edward. Further, there is no evidence that any of these third party trade-names or trade-marks has acquired a significant reputation in the marketplace.

44. As I understand it, the Applicant wishes me to conclude from the state of the register and marketplace evidence that EDWARD and EDWARDS trade-marks are so common in Canada, that the Opponent’s trade-mark should only be granted a very narrow scope of protection. I agree that the Opponent ought not to be able to prevent use of any trade-mark including EDWARDS. However, the state of the register and marketplace evidence does not allow me to conclude that consumers are used to distinguishing such highly similar trade-marks (consisting of EDWARDS on its own whether in a stylized format or not) in the food and beverage field since there is not sufficient examples of use of trade-marks consisting of EDWARD or EDWARDS or a variant without additional elements that evoke ideas different than that of the Mark or the trade-mark EDWARDS.

45. The Applicant has also filed evidence that there are various liqueur and wine brands including the EDWARD or EDWARDS components including PRINCE CHARLES EDWARD brand drambuie (Romeo affidavit, SR-1) and submits that Ms. Léger's evidence shows that coffee and liqueurs are sometimes served as part of the same beverage (see, for example, Léger affidavit, Exhibit I2). Although I have found Ms. Léger's evidence inadmissible for the truth of its contents, I will comment that even if I accepted that the ordinary consumer is aware of these brands and recipes including coffee and liqueurs, I do not find that this results in an inference that consumers will be able to distinguish between the Mark and the Opponent's trade-mark EDWARDS in association with the respective goods of the parties.

[66] In my view, the Biesterfeld affidavit does not substantiate that any of the third-party names or marks therein have acquired a significant reputation. For this reason, it would not have materially affected the Decision.

[67] The last two affidavits filed on behalf of Schwan's IP deal with the state of the Register. Both Mr. Romeo and Ms. D'Amours are employed by Thomson CompuMark as Trade-marks Research Analysts. Their search results are combined as exhibits to their affidavits. Similar evidence was before the Registrar. This evidence, in my view, would not have materially affected the Registrar's Decision because it demonstrates what the Registrar had already seen, as described above in paragraph 26, which is that EDWARDS is not used alone in relation to food and beverages except by Sobeys and Schwan's.

[68] The affidavit of Bruce Bowman provides the first evidence from Sobeys. The Registrar only had evidence from David Pullar of Safeway. Mr. Bowman is Vice-President, Legal. He deposed that EDWARDS is not a Sobeys' house brand and is not used on any other products sold at Sobeys' stores. He also provided updated information on types of coffee blends, sales

figures, promotional activity and labelling. Sales have reduced in the last 10 years but I find nothing that would have materially affected the Registrar's conclusion that the Sobeys' Mark has a substantial reputation.

[69] Schwan's IP says that the affidavits of Jane Buckingham and Barbara Gallagher should be considered inadmissible or given no weight because the evidence was not assembled with reference to a material date. As well, in the case of Ms. Gallagher, her work and work product was significantly controlled by counsel and was not the result of independent research. Jane Buckingham's work was said to not be related to the issues.

[70] In my view, the two searches by Jane Buckingham, who is a trade-marks searcher at the Gowlings law firm, are relevant. They demonstrate that coffee and desserts are related goods. However, in my view, this work would not have materially affected the Registrar's finding that coffee and desserts are related. It would simply have reinforced the finding.

[71] Barbara Gallagher is a law clerk at Gowlings who was provided with direction by counsel about which websites to visit. Her work also related to the relation between coffee and dessert and, in my view, would not have materially affected the Registrar's finding on this topic.

[72] Jessica Smith was a student-at-law employed by Gowlings. She was assigned the enviable task of purchasing coffee and fresh baked goods at various supermarkets to show that they are related products. However, her evidence is not particularly relevant now that only frozen baked goods are at issue.

[73] In my view, for the above reasons, none of the New Evidence would have materially affected the Decision.

XII. Is the Decision reasonable?

[74] I am mindful of the Supreme Court of Canada's definition of reasonableness in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, where the Court said at paragraph 47:

[47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[75] The Registrar used the correct material dates, understood the nature of the goods and their use, made no factual errors and correctly stated the applicable legal tests. In particular, I have concluded that her focus on the resemblance between the marks and her conclusions about distinctiveness were reasonable. She reasonably relied on the long history of use of the Sobey's Marks. I have also concluded that it was reasonable for the Registrar to have relied on *Cheung* to conclude that the goods were related.

[76] The Registrar found that the high degree of resemblance between the marks in “appearance, sound and idea” was important. She made reference to caselaw that said that this factor is often the most crucial or dominant one (see paragraph 32, above). Caselaw also makes clear that the factors in the confusion analysis need not be given equal weight (see: *Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22, *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27). Therefore, it was open to the Registrar to afford relatively more weight to the degree of resemblance. In my view the Decision was reasonable.

[77] For all these reasons the appeal will be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is hereby dismissed with costs to Sobeys West Inc. The quantum of costs is reserved in the expectation that it can be settled. If not, counsel may contact the Registry to arrange a teleconference to discuss the procedure for obtaining a ruling on costs.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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