

## Baking Soda and Pie crusts: Cases Consider Comparative Advertising

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Edward Hore  
Hazzard & Hore  
141 Adelaide Street West, Suite 1002  
Toronto, ON M5H 3L5  
(416) 868-1340  
edhore@hazzardandhore.com

Negative campaigning, or trashing your opponent, is much in fashion these days in politics. Bush used it in 1988 to beat Dukakis. The present mid-term US election campaigns seem to be full of it. Kim Campbell used TV spots focussing on Chretien's partly paralyzed face, with disastrous results, in 1993.

Similarly, in the marketing world, it seems to be becoming more common to refer to your competitor's pie crust, detergent, credit card, or what-have-you, and compare it unfavourably with the virtues of your own product. Whether negative, or to use a nicer word, "comparative" advertising actually works is debated by marketing gurus. David Ogilvie's view, for example, is that negative marketing merely gives free publicity to your competitor, and at the same time makes consumers uncomfortable with the mudslinging.

But such weighty issues are obviously beyond the scope of a column on intellectual property. What *is* within the scope of such a column (sort of) is the question, just how nasty can you be about your competitor's widgets?

I say "sort of" because comparative advertising is sometimes thought of as a variety of intellectual property law, and sometimes not. The *Trade Marks Act* section 7(a), prohibits making "a false or misleading statement tending to discredit the business, wares or services of a competitor". The *Competition Act*, at section 52, prohibits various types of misleading advertising, including, at subsection (a), making "a representation to the public that is false or misleading in a material respect". Section 36 creates a civil right of action for breaches of this section. Then there is the tort of "injurious falsehood", akin to trade libel.

But in the end, the law is fairly straightforward, although not always easy to apply to a given case. You can dump on your competitor's products and praise your own all you want provided that what you say is either "truthful" or, if not exactly truthful, is "mere

puffery”, meaning laudatory exaggeration that doesn’t actually mean anything in particular.

What exactly “truthful” means in any may not be easy to say, since advertisements and marketing gimmicks, by their nature, are brief, simple and exaggerated.

Two recent Ontario cases deal with misleading advertsing, both involve lawsuits by angry competitors saying their goods have been unfairly

*Church & Dwight Ltd. v. Sifto Canada Inc.* and *Maple Leaf Foods Inc. v. Robin Hood Multifood Inc.* are both recent decisions of Mr. Justice Peter Jarvis dealing with this issue. In both cases, aggrieved parties got injunctions forcing competitors to stop marketing campaigns until trial.

*Church & Dwight* is about baking soda, which has apparently become very trendy lately in marketing circles as a natural cleaner and deodorizer. The plaintiff Church & Dwight sells Arm & Hammer brand baking soda (formerly Cow Brand), which has an 80% market share. The dispute was about the following wording on the packaging of its competitor the defendant Sifto:

Sifto Baking Soda

One of the richest sources of naturally occurring sodium bicarbonate is found deep in the Colorado Mountains. The North American Salt Plant at Rio Blanco taps into this vast underground deposit, producing the purest possible baking soda, contained in this box. Sifto Baking Soda has no chemical additives, making it the only naturally occurring baking soda on the market

100% effective

100% natural

Mere puffery? No, said Mr. Justice Jarvis, parts of this were a “direct, untruthful disparagement” of Arm & Hammer brand baking soda. However, the words “100% effective” and “100% natural”, although inaccurate, were not actionable, as they were mere puffery.

The differences between Arm & Hammer baking soda and Sifto soda were in fact “so slight as to make the products indistinguishable,” Mr. Justice Jarvis found. The words “producing the purest possible baking soda” and “has no chemical additives” were misleading because they implied that Arm & Hammer soda *did* have “chemical additives”.

The court found that the words would cause irreparable harm to Church and Dwight, even though Arm & Hammer was not actually mentioned on the package. Mr. Justice Jarvis cited various decisions in support of his finding that a loss of actual and potential customers constitutes irreparable harm, not compensable in damages, and granted the interlocutory injunction.

The *Maple Leaf* case, heard the same day the decision in *Church & Dwight* was released, was about frozen pie crusts. Again, the plaintiff was dominant in the market: Maple Leaf enjoyed a 75% market share. Maple Leaf was concerned about an comparative advertisement run by its competitor Robin Hood in the September 1994 issues of *Homemaker's* magazine, which mentioned its trade marks, and in *Chatelaine*, where the same ad also ran, but with the reference to the plaintiff's trade marks removed. Maple Leaf brought injunction proceedings when it appeared that the ads were going to run in other magazines as well, contrary to an undertaking by Robin Hood to pull them.

The ad in *Homemaker's* showed two photographs showing different pies. One showed a pie inverted, and looking, one assumes, unappetizing and yucky. There was a heading, which read "Their idea of a top crust", and the following blurb:

If this pie crust looks remarkably like a bottom crust, it is because bottom's are all Tenderflake and Gainsborough [Maple Leaf's trade marks] have to offer. Every baker who uses frozen pie crust knows the drill - roll it out, fill the cracks, and hope for the best.

Then there was a another photograph of a great-looking pie with the heading "Our idea of a top crust".

The evidence showed that if you followed the instructions on the plaintiff's product, you would not in fact end up with lousy-looking crust like the one in the picture. Mr. Justice Jarvis therefore found that there appeared to be a case of misleading advertising leading to irreparable harm to the plaintiff's brands, and accordingly granted an injunction until trial.

So what it all boils down to is you can be nasty about your competitors in your marketing, but you can't be nasty and unfair.

After considering all these cases, and thinking about my archrival's column, I'm more convinced than ever that negative advertising is not the way to go. There is nothing disparaging and truthful that anyone could possibly say about Elizabeth MacNaughten and her new IP column. So I've come up with the following promotional slogan for my own column:

"100% effective. 100% natural. Do not be fooled by imitations."