IN THE MATTER OF AN OPPOSITION by
The Quaker Oats Company of Canada/ La Compagnie
Quaker Oats du Canada Limitée to application
No. 668,906 for the mark THE HYDRATION
DRINK filed by Absopure Water Company

On October 23, 1990, the applicant, Absopure Water Company, filed an application to register the trade-mark THE HYDRATION DRINK, based on proposed use in Canada, for the wares "drinking water." The application claims a priority filing date pursuant to Section 34 of the Trade-marks Act on the basis of a corresponding application (No. 069,966) filed in the United States of America on June 18, 1990. The subject application was advertised for opposition purposes on January 1, 1992, after the applicant revised its application to disclaim the word component WATER and after the applicant overcame an objection raised at the examination stage that the mark was clearly descriptive of the wares "drinking water."

The opponent, The Quaker Oats Company of Canada/ La Compagnie Quaker Oats du Canada Limitée, filed a statement of opposition on February 28, 1992, a copy of which was forwarded to the applicant on April 3, 1992. The grounds of opposition are, firstly, that the applied for mark is not registrable, pursuant to Section 12(1)(b), because the mark is clearly descriptive of the character or the quality of the wares "drinking water"; secondly, that the applied for mark is not registrable, pursuant to Section 12(1)(c), because the mark THE HYDRATION DRINK is the name of the wares namely, drinking water; thirdly, that the applied for mark is not distinctive, being clearly descriptive and being the name of the wares. The applicant filed and served a counter statement in response.

The opponent's evidence consists of the affidavit of Warren N. Springs, a lawyer with the firm representing the opponent. His affidavit merely serves to introduce into evidence excerpts from medical journals and from medical and standard reference dictionaries. The applicant's evidence consists of the affidavit of Mary E. Young, Treasurer of the applicant company. Her evidence is not particularly helpful. No cross-examinations were conducted. Both parties filed a written argument, however, only the opponent was represented at the oral hearing.

With respect to the first ground of opposition, the issue arising under Section 12 (1)(b) is to be determined from the point of view of an everyday user of the wares considering the mark in its entirety (as opposed to carefully analyzing and dissecting the mark into its component parts) and as a matter of first impression: see *Wool Bureau of Canada Ltd. v. Registrar of Trade-marks* (1978), 40 C.P.R. (2d) 25 at pp. 27-8 (F.C.T.D.); *Atlantic Promotions Inc. v. Registrar of Trade-marks* (1984), 2 C.P.R. (3d) 183 at p. 188 (F.C.T.D.). The material time for considering the circumstances respecting the issue arising pursuant to Section 12(1)(b) is as of the date of my decision: see *Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers* (1992) 41 C.P.R.(3d) 234 (F.C.A.).

The opponent's evidence shows that the primary meaning of the word hydration, in ordinary and in medical contexts, is "the act or process of combining with water." The secondary and /or tertiary meanings of the word hydration, in both ordinary and medical contexts, are "the quality or state of being hydrated; as **a** : the condition of having adequate fluid in the body tissues . . ."; "the condition of the body with regard to its water content"; "fluid replacement." I note that none of the above definitions refer specifically to adding water to the body by drinking. The opponent's evidence also shows that the word hydration is used most often in medical literature in the context of its secondary or tertiary meanings, as illustrated in the following phrases: "hydration was maintained by simply adding water", "maintenance of hydration with water ingestion prevented SV from declining", "tests were performed in two hydration states", "hydration state was manipulated in randomized order", "we used a preexposure period of water loading to ensure adequate hydration in all subjects", "the three hydration states were", "the influence of the state of hydration on various biological parameters."

In my view, the evidence does not support the conclusion that the phrase THE HYDRATION DRINK clearly describes the character or quality of drinking water, or its effect. The mark does not, for example, describe any level of constituents that might be present in water, or describe any specific hydration state. In my view, the mark is a coined phrase suggesting that drinking the opponent's water will raise or maintain the hydration state of the body at a desirable level. Of course, a mark may be suggestive without being clearly descriptive. I find some similarities between this

case and the PIZZA PIZZA case decided by Mr. Justice Rouleau, reported at *Pizza Pizza Ltd. v. Registrar of Trade Marks* (1982), 67 C.P.R.(2d) 202 (F.C.T.D.), where Mr. Justice Rouleau stated as follows:
at p. 203-204

Similarly, in the instant case, the expression THE HYDRATION DRINK is not a linguistic construction that is part of normally accepted spoken or written English. The words THE HYDRATION DRINK do not go together in a natural way. In view of the foregoing, the first ground of opposition is rejected.

There is no evidence to support the second ground of opposition that the applied for mark is the name of the wares. In any event, such a finding would be inconsistent with my finding that the applicant has coined a phrase. Accordingly, the second ground is rejected. As the third ground is dependant on a favourable finding on either
of the preceding grounds, it too is rejected.

In view of the above, the opponent's opposition is rejected.

DATED AT HULL, QUEBEC, THIS 31st DAY OF MARCH, 1995.

Myer Herzig,

Member,
Trade-marks Opposition Board