

IN THE MATTER OF AN OPPOSITION by Goudas Food Products & Investments Limited to application No. 669,232 for the trade-mark SNAPPLE filed by Unadulterated Food Products, Inc and subsequently assigned to Snapple Beverages Corp.

On October 26, 1990, Unadulterated Food Products, Inc. filed an application to register the trade-mark SNAPPLE for the wares (1) "carbonated and non-carbonated soft drinks," and for the wares (2) "soft drinks." The application is based on use of the mark SNAPPLE in Canada since at least as early as August 7, 1987 for the wares denoted (1), and based on use and registration (under regn. No. 1,326,262) of the mark in the United States of America for the wares denoted (2).

The application was advertised for opposition purposes in the Trade-marks Journal issue dated October 2, 1991 and was opposed by Goudas Food Products & Investments Limited on November 1, 1991. A copy of the statement of opposition was forwarded to the applicant on December 12, 1991. The applicant responded by filing and serving a counter statement. The application was later assigned to Snapple Beverages Corp.

The first ground of opposition is that the applied for mark SNAPPLE is not registrable, pursuant to Section 12(1)(d) of the Trade-marks Act, because it is confusing with the opponent's mark SNAPPY POP, regn. no. 232,413, covering the wares soft drinks. The second ground of opposition is that the applicant is not the person entitled to register the applied for mark, pursuant to Sections 16(1)(a) and 16(1)(b), because the applied for mark is confusing with the opponent's mark SNAPPY POP previously used in Canada by the opponent. The last ground of opposition is that the applied for mark is not distinctive of the applicant's wares "in that the applicant's trade-mark neither distinguishes nor is adapted to distinguish the applicant's wares from those offered for sale and sold by the opponent in association with its trade-mark [SNAPPY POP] . . ."

The opponent's evidence consists of the affidavit of Karen R. Scantlebury, which affidavit merely serves to introduce into evidence a certified copy of the opponent's trade-mark regn. No. 232,413 for SNAPPY POP. The applicant's evidence consists of the affidavit of Jennifer Leah Stecyk, trade-mark searcher. Her affidavit serves to introduce into evidence copies of expunged trade-mark registrations for the marks SNAPPLE and SNAPPLE & Design (both for fruit beverages), and copies of extant registrations for the marks SNAP-CAP(for ale) and RED SNAPPER (for distilled alcoholic beverages). Each party filed a written argument and each was represented at an oral hearing. At the oral hearing, the opponent indicated that the trade-mark registration for RED SNAPPER had been expunged. The applicant denied knowledge of any such expungement which was not in the evidence of record. I have not given any weight to the opponent's submission that the registration for RED SNAPPER has been expunged.

With respect to the second ground of opposition alleging non-entitlement, it was incumbent on the opponent to evidence the use of its trade-mark SNAPPY POP (i) prior to August 7, 1987 regarding the wares denoted by (1) above and (ii) prior to October 26, 1990 regarding the wares denoted by (2) above. It was also incumbent on the opponent to show that its trade-mark SNAPPY POP was not abandoned as of the date of advertisement of the subject application, that is, October 2, 1991 [see Sections 16(5) and 17(1) of the Act]. With respect to the last ground of opposition alleging non-distinctiveness, it was incumbent on the opponent to establish actual use of, or a reputation for, its mark SNAPPY POP prior to the date of opposition namely, November 1, 1991. As the opponent has not filed any evidence to show that its mark SNAPPY POP was in actual use in Canada, the opponent has failed to meet the statutory and evidential burdens on it to support the second and third grounds of opposition, respectively, which are therefore rejected [with respect to the statutory burden on an opponent relying on Section 16, see *Casual Corner of America, Inc. v. Casual Corner Ltd.* (1985), 5

C.P.R.(3d) 503 at pp. 506-507 (TMOB); with respect to the evidential burden on an opponent alleging non-distinctiveness of the applicant's mark, see *Casual Corner*, above, at p. 508].

The remaining ground of opposition pursuant to Section 12(1)(d) alleges that the applied for mark SNAPPLE is not registrable because it is confusing with the opponent's registered mark SNAPPY POP. The material date to consider the issue of confusion arising pursuant to Section 12(1)(d) is the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (F.C.A.); *Conde Nast Publications Inc. v. The Canadian Federation of Independent Grocers* (1991), 37 C.P.R. (3d) 538 (TMOB)].

The legal burden is on the applicant to show that there would be no reasonable likelihood of confusion, within the meaning of Section 6(2), between the applied for mark SNAPPLE and the opponent's registered mark SNAPPY POP. In determining whether there would be a reasonable likelihood of confusion, I am to have regard to all the surrounding circumstances, including those enumerated in Section 6(5), shown below:

- 6(5) In determining whether trade-marks . . . are confusing, the . . . Registrar . . . shall have regard to all the surrounding circumstances including
- (a) the inherent distinctiveness of the trade-marks . . . and the extent to which they have become known;
 - (b) the length of time the trade-marks . . . have been in use;
 - (c) the nature of the wares, services or business;
 - (d) the nature of the trade; and
 - (e) the degree of resemblance between the trade-marks . . . in appearance or sound or in the ideas suggested by them.

The presence of a legal burden on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant [see *John Labatt Ltd. v. Molson Companies Ltd.* (1990) 30 C.P.R.(3d) 293 at 297-298 (F.C.T.D.)].

With respect to 6(5)(a) above, I consider that the applied for mark SNAPPLE is a relatively strong mark since it is a coined word having no immediately apparent connection to soft drinks. The inherent distinctiveness of the mark SNAPPLE is, however, lessened to the extent that the mark suggests that the applicant's beverages are apple flavoured or that apple juice is a constituent of the beverage. There is no evidence that the applied for mark has acquired any reputation in Canada. The opponent's mark SNAPPY POP is a relatively weak mark since the word "snappy", in relation to drinks, means drinks having a pungent or brisk flavour. Further, the word "snappy" connotes "stylish" in relation to clothes. Therefore, there is also a laudatory aspect to the mark SNAPPY POP which further acts to diminish the inherent distinctiveness of the mark [the dictionaries to which I have referred are Webster's Third New International Dictionary and The Oxford English Dictionary (2nd. ed., 1989)]. The component POP has been disclaimed by the opponent (in registration No. 232,413) and it adds nothing to the inherent distinctiveness of the mark SNAPPY POP. As noted earlier, there is no evidence that the opponent's mark has acquired any reputation in Canada. The inherent distinctiveness of the marks in issue is a factor that favours the applicant.

With respect to Section 6(5)(b) above, the subject application for SNAPPLE is based (partially) on use of the mark in Canada since 1987 while the opponent's registration for SNAPPY POP indicates that its mark was first used in Canada in 1977. However, the length of time that the marks have been in use does not favour either party in the absence of evidence of use of the marks. With respect to Sections 6(5)(c) and (d), the nature of the parties' wares are the same and consequently the nature of the parties' trades would also be the same. The latter two factors therefore favour the opponent.

With respect to Section 6(5)(e), the marks resemble each other visually and aurally to the extent that both marks are prefixed by the component SNAPP. The idea suggested

by the opponent's mark SNAPPY POP is a fashionable, pungent soft drink while the mark SNAPPLE implies a connection with "apples". The visual and aural resemblances between the marks in issue favour the opponent. The different ideas suggested by the marks in issue favour the applicant.

In deciding the issue of confusion, I have been guided by the approach taken by Joyal J. in *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R.(3d) 483 (F.C.T.D.). In that case the Court overturned a decision of this Board which had found the applicant's mark K.C. MASTERPIECE & Design (for barbecue sauce) was confusing with the opponent's registered mark MASTERPIECE (for cakes and chocolates). A summary of the applicant's submissions appears at p. 486 of the reported decision reproduced, in part, below:

The Court later considered the limited ambit of protection accorded to marks which are descriptive of the quality of the associated wares [see p. 490 of the reported decision]:

In the instant case there is no evidence that the component SNAPP, or variations of it, have been commonly adopted for trade-marks in the food and beverage industries. However, the opponent's mark SNAPPY POP for soft drinks does have descriptive and laudatory aspects which limit the ambit of protection to be accorded to the mark. Of course, the issue of confusion is as between the marks SNAPPLE and SNAPPY POP in their entireties (regardless of whether the opponent has disclaimed the component POP).

In deciding the issue of confusion, I have considered that the test is one of first impression and imperfect recollection as applied to the marks in their entireties. Keeping in mind the descriptive and laudatory aspects of the opponent's mark SNAPPY POP, that the opponent's mark has not acquired any reputation in Canada, and that the applied for mark has a relatively high degree of inherent distinctiveness, I find that the differences between the parties' marks is all that is required to avoid confusion.

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

I would add that the applicant, in its written argument and at the oral hearing, relied

on its state of the register evidence to support its case. In my view, the applicant's reliance on the state of the register evidence is without merit. Firstly, too few registrations have been evidenced to allow me to make any inference concerning the use of the prefix SNAPP as a component of trade-marks in the food and beverage industries. Secondly, this tribunal is not in a position to explain why particular marks were permitted to proceed to registration by the examination section of the Trade-marks Office [in this regard, see *Simmons I.E. Inc. v. Park Avenue Furniture Corp.* (1994), 56 C.P.R.(3d) 284 at 288 (TMOB)].

DATED AT HULL, QUEBEC, THIS 11th DAY OF DECEMBER, 1995.

Myer Herzig,
Member,
Trade-marks Opposition Board