

**IN THE MATTER OF AN OPPOSITION
by Delta Air Lines, Inc. to application No.
513,902 for the trade-mark DELTA Design
filed by Delta Rent-A-Car Ltd.**

On December 15, 1983, the applicant, Delta Rent-A-Car Ltd., filed an application to register the trade-mark DELTA Design (illustrated below) based on use in Canada since July of 1982 by the applicant and its predecessor in title, East Coast Rentals, with the services of "leasing and daily rental of motor vehicles" and on proposed use in Canada with the following services:

operating a franchising system in respect of leasing and daily rental of motor vehicles.

The application was advertised for opposition purposes on March 20, 1985.

The opponent, Delta Air Lines, Inc., filed a statement of opposition on August 20, 1985, a copy of which was forwarded to the applicant on September 12, 1985. The grounds of opposition include, among others, that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Trade-marks Act because it is confusing with the opponent's trade-mark DELTA registered under No. 226,289 for services described as "air transportation of persons, property and mail."

The applicant filed and served a counter statement. As its evidence, the opponent filed an affidavit of its Director-Canada, Harold J. Canvin. As its evidence, the applicant filed an affidavit of its President, Peter Dykeman, and an affidavit of Brigitte Fouillade. Mr. Dykeman

was cross-examined on his affidavit and the transcript of that cross-examination forms part of the record of this proceeding. As evidence in reply, the opponent filed an affidavit of Terry Keeney. However, Mr. Keeney's affidavit was not confined strictly to matter in reply as required by Rule 45 of the Trade-marks Regulations and I have therefore disregarded it. Only the opponent filed a written argument and no oral hearing was conducted.

As for the ground of opposition based on Section 12(1)(d) of the Act, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Finally, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

The opponent's registered trade-mark DELTA is inherently distinctive in relation to air transportation services. The Canvin affidavit evidences continuous use of the opponent's mark in Canada for a number of years. Mr. Canvin also attests to fairly significant Canadian advertising expenditures for his company's mark. Thus, I am able to conclude that the opponent's mark has become known to some extent throughout Canada.

The applicant's mark DELTA Design is inherently distinctive in relation to car rental services. The Dykeman affidavit establishes that the applicant has carried on a car rental business in several locations, primarily in New Brunswick and southern Ontario, all but one of the locations having been opened in 1985. Although Mr. Dykeman swore his affidavit on January 11, 1990, he was only able to provide sales and advertising figures up to 1986. The level of business and advertising conducted at the various locations up to 1986 was steady but not substantial. Given the level of business activity by the applicant and the lack of evidence of use of the applicant's mark since 1986, I am only able to conclude that the applicant's mark has become known to a very minor extent in New Brunswick and southern Ontario.

The length of time the marks have been in use favors the opponent. The applicant's car rental services differ from the opponent's air transportation services although both could be said to fall within the broad category of travel services. There is, however, a connection between the trades of the parties as established by the evidence of both parties. Mr. Canvin states, in his affidavit, that car rental outlets are commonly located in airports. Mr. Dykeman confirmed this observation (see page 10 of the Dykeman transcript). Paragraphs 17ff. of the Fouillade affidavit also confirm this observation, at least for the Ottawa area. Mr. Canvin also stated that the opponent engages in cooperative advertising with car rental companies and Mr. Dykeman stated that he was familiar with cooperative business arrangements between airlines and car rental companies (see page 7 of the Dykeman transcript). Thus, the trades of the parties do overlap at least to some extent.

As for Section 6(5)(e) of the Act, I consider that there is a high degree of resemblance between the marks at issue in all respects. In fact, the applicant has adopted the entirety of the opponent's registered mark as its mark in a particular design format.

Without the benefit of a written argument from the applicant, it is difficult to know what position it is taking with respect to the issue of confusion. It would appear that the applicant filed the Fouillade affidavit, in part, to show that it is common in the marketplace to find airlines and car rental firms having similar names and that consequently they comprise separate and distinct trades. Initially, it should be noted that Ms. Fouillade relied on two directories from the United States to support this contention and she has no firsthand knowledge or expertise which would allow her to attest to the accuracy of those directories. Thus, the excerpts from those directories appended as exhibits to her affidavit cannot be relied on for the truth of their contents.

Even if the entries located by Ms. Fouillade comprise reliable evidence, they are of little value since the directories appear to relate primarily to American businesses rather than the Canadian marketplace. Furthermore, most of the entries located by Ms. Fouillade are for

other than car rental firms and airlines and are thus irrelevant to the issue at hand. Finally, it may well be that the car rental firms and airlines having similar names that were located by Ms. Fouillade are, in fact, related to one another.

In any event, even if I could overlook the deficiencies in the Fouillade evidence, it would not support the conclusion that the trades of the parties are different or that there would be no confusion between the marks. In the absence of evidence that the different entities identified by Ms. Fouillade are not related, that they have actually used their trade-names and that they have used their names contemporaneously without confusion, her evidence cannot serve to distinguish the trades of the parties in this case. By way of analogy, reference may be made to the opposition decision in Saturn Sunroof Inc. v. General Motors Corp. (1989), 25 C.P.R.(3d) 343 at 346-347.

It would appear that the applicant also wished to rely on the contention that there have been no instances of actual confusion between the marks at issue since Mr. Dykeman makes such an observation in paragraph 10 of his affidavit. However, on cross-examination, he admits that the applicant is a small company in the car rental business and does not operate any outlets at airports in Canada. Given the further fact that the applicant has only evidenced use and advertising of its mark for the period 1985-1986 in several locations, it is not surprising that Mr. Dykeman was not aware of any instances of actual confusion.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the high degree resemblance between the marks at issue, the extent to which the opponent's mark has become known in Canada and the potential overlap in the trades of the parties, I find that the applicant has failed to satisfy the onus on it to show that its proposed mark is not confusing with the opponent's registered mark DELTA. The ground of opposition based on Section 12(1)(d) of the Act is therefore successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 30TH DAY OF JUNE 1994.

**David J. Martin,
Member,
Trade Marks Opposition Board.**