IN THE MATTER OF AN OPPOSITION by Mirabel Fisheries Limited to application No. 614,334 for the trade-mark MIRABEL FRAIS & Design presently standing in the name of HydroSerre Inc.

On September 6, 1988, a form of application dated August 29, 1988 for registration of the trade-mark MIRABEL FRAIS & Design, a representation of which is set out below, was filed with the Trade-marks Office. The application was based upon proposed use of the trade-mark in Canada in association with "Légumes, laitue". The applicant disclaimed the right to the exclusive use of the word FRAIS apart from the trade-mark in the form of application as originally filed.

The applicant subsequently submitted an amended form of application dated December 2, 1988 in which the applicant disclaimed the right to the exclusive use of all the reading matter with the exception of MIRABEL apart from the trade-mark.

The opponent, Mirabel Fisheries Limited, filed a statement of opposition on March 22, 1990. In its statement of opposition, the opponent alleged that the applicant's application is contrary to Section 30(e) of the Trade-marks Act in that, as of the date of filing of the present application: (i) Luc Desrochers did not himself intend to use the trade-mark in Canada MIRABEL FRAIS & Design in Canada; and (ii) the applicant identified in the application as advertised, or any predecessor-in-title that might exist, did not state its intention to use the trade-mark in Canada, or that it was satisfied that it was entitled to use the trade-mark in Canada. The opponent further alleged that the present application is contrary to Section 30(i) of the Trade-marks Act in that the applicant could not have been satisfied that it was entitled to use the trade-mark MIRABEL FRAIS & Design in Canada since it was already aware, or should have been aware, of the opponent's trade-marks MIRABEL BRAND and MIRA BELLA which had previously been used and made known in Canada, as well as the opponent's trade-name Mirabel Fisheries Limited associated with fish and seafood.

The opponent next alleged that the applicant's trade-mark is not registrable and not

distinctive, and that the applicant is not the person entitled to its registration, in that the applicant's trade-mark is confusing with the opponent's registered trade-marks MIRABEL BRAND, registration No. 202,723 and MIRA BELLA, registration No. 310,683, which had been previously used and made known in Canada. Further, the opponent alleged that the applicant is not the person entitled to registration and that the applicant's trade-mark is not distinctive in view of the prior use by the opponent of its trade-name Mirabel Fisheries Limited in association with fish and seafood.

HydroSerre Inc., the person identified as the applicant in the application as advertised in the Trade-marks Journal, filed a counter statement in which it effectively denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavits of Paul Brosseau and Generosa Castiglione. Mr. Brosseau was cross-examined on his affidavit, the transcript of the cross-examination and the responses to undertakings given during the Brosseau cross-examination forming part of the opposition record. The applicant filed as its evidence the affidavits of Anthony Merulla and Alan Booth.

Both parties filed written arguments and both were represented at an oral hearing.

As its first ground of opposition, the opponent alleged that, as of the filing date of the present application (September 6, 1988), Luc Desrochers did not himself intend to use the trade-mark MIRABEL FRAIS & Design in Canada, such that the present application is contrary to Section 30(e) of the Trade-marks Act. While the legal burden is upon the applicant to establish that its application is in compliance with Section 30(e) of the Trade-marks Act, there is an initial evidential burden on the opponent in respect of the Section 30 ground (see Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd., 3 C.P.R. (3d) 325, at pp. 329-330). To meet the evidential burden upon it in relation of a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist (see John Labatt Limited v. The Molson Companies Limited, 30 C.P.R. (3d) 293, at p. 298). Further, the amount of evidence necessary to discharge an evidential burden on an opponent will vary, depending upon the issue to be decided (see, for example, Tune Masters v. Mr. P's Mastertune, 10 C.P.R. (3d) 84, at p. 89). Finally, the material date in respect of the Section 30(e) ground of opposition is as of the filing date of the application (see Hunter Douglas Canada Ltd. v. Flexillume Inc., 78 C.P.R. (2d) 212, at p. 220).

With respect to the evidential burden upon it, the opponent filed a certified copy of the file history of the present application as Exhibit A to the Castiglione affidavit. Included in Exhibit A is a copy of the trade-mark application which appears to have been signed by Luc Desrochers on August 29, 1988 and which was accorded a filing date of September 6, 1988. A reduced size copy of that application is set out below.

In the Office letter dated June 2, 1989 (see Exhibit A to the Castiglione affidavit), the Examiner advised Luc Desrochers that in order to support the allegation that an error was made in identifying the applicant as Luc Desrochers rather than HydroSerre Inc., the Registrar would require an affidavit describing the error. No such affidavit was ever filed on behalf of the applicant. Rather, for some unexplained reason, the Examiner permitted the identity of the applicant to be changed to HydroSerre Inc. based on a letter received from Lucie Dagenais on behalf of HydroSerre Inc., dated August 9, 1989. I would note that Rule 36(a) of the Trade-marks Regulations precludes the amendment of an application to change the identity of the applicant, except after recognition of a transfer by the Registrar.

The agent for HydroSerre Inc. submitted that the form of application as originally filed on September 6, 1988 was signed by Luc Desrochers on behalf of HydroSerre Inc. and that the original applicant was, in fact, HydroSerre Inc. and not Luc Desrochers. Further, the agent argued that the failure to indicate in the original form of application that the applicant was HydroSerre Inc. was merely a clerical error. In my opinion, the form of application set out above identifies the applicant as being Luc Desrochers and not HydroSerre Inc. The Trade-marks Office acknowledged that the original applicant was Luc Desrochers, as confirmed by the file cover of the application which was prepared at the time of filing the present application, as well as the Office letters dated November 23, 1988 and June 2, 1989, both of which are addressed to Luc Desrochers (see Exhibit A to the Castiglione affidavit). It was not until an amended form of application dated August 9, 1989 was filed with the Trade-marks Office that HydroSerre Inc. was identified as being the intended applicant for registration of the trade-mark MIRABEL FRAIS & Design.

From the submissions made on behalf of HydroSerre Inc., it is apparent that the original applicant ought to have been identified as HydroSerre Inc. rather than Luc Desrochers. As a result, it would not appear that Luc Desrochers intended to use the trade-mark MIRABEL FRAIS & Design in Canada as of the filing date of the application, the material date in relation to the Section 30(e) ground. I am satisfied, therefore, that the opponent has met the evidential burden upon it in respect of the Section 30(e) ground of opposition. Accordingly, the legal burden is upon the applicant to establish that the present application is in compliance with Section 30(e) of the Trade-marks Act.

The applicant submitted the Booth and Merulla affidavits as evidence in this opposition. However, neither affidavit assists the applicant insofar as meeting the legal burden upon it in relation

to the Section 30(e) ground of opposition. As the applicant has failed to meet the legal burden upon it in respect of the Section 30(e) ground, I have refused the applicant's application pursuant to Section 38(8) of the Trade-marks Act. As a result, I have not considered the opponent's remaining grounds of opposition.

DATED AT HULL, QUEBEC THIS _29th_____ DAY OF __April_____, 1994.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.