

**IN THE MATTER OF AN OPPOSITION by The Canadian Arctic Beverage Corporation to application No. 713,626 for the trade-mark ARCTIC BREEZE filed by Tritap Food Broker, a Division of 676166 Ontario Limited**

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On September 25, 1992, the applicant, Tritap Food Broker, a Division of 676166 Ontario Limited, filed an application to register the trade-mark ARCTIC BREEZE based upon proposed use of the trade-mark in Canada in association with "flavoured mineral water and soft drinks".

The applicant's application was advertised for opposition purposes in the *Trade-marks Journal* of April 7, 1993 and the opponent, The Canadian Arctic Beverage Corporation, filed a statement of opposition on September 3, 1993. As its first ground of opposition, the opponent alleged that the present application is not in compliance with Section 30(i) of the *Trade-marks Act* in that the applicant could not have been satisfied that it was entitled to use its trade-mark ARCTIC BREEZE in Canada because, as of the applicant's filing date, the applicant had knowledge of the opponent's trade-marks ARCTIC TWIST, CANADIAN ARCTIC TWIST and THE CANADIAN ARCTIC SELECTION previously used and applied for or registered in Canada by the opponent in association with the wares covered in the opponent's registrations and application. As its second ground, the opponent alleged that the applicant's trade-mark ARCTIC BREEZE is not registrable in that the applicant's trade-mark is confusing with its registered trade-marks ARCTIC TWIST and CANADIAN ARCTIC TWIST, registration Nos. 398,254 and 412,908. The third ground is based on Section 16(3)(a) of the *Trade-marks Act*, the opponent alleging that the applicant is not the person entitled to registration of the trade-mark ARCTIC BREEZE because, as of the applicant's filing date, the applicant's trade-mark ARCTIC BREEZE was confusing with its trade-marks ARCTIC TWIST and CANADIAN ARCTIC TWIST previously used in Canada in association with the wares covered in the opponent's registrations. The fourth ground is based on Section 16(3)(b) of the Act, the opponent alleging that the applicant is not the person entitled to registration of the trade-mark ARCTIC BREEZE because, as of the applicant's filing date, the applicant's trade-mark ARCTIC BREEZE was confusing with its trade-marks CANADIAN ARCTIC TWIST and THE CANADIAN ARCTIC SELECTION in respect of which applications for registration had previously

been filed in Canada under application Nos. 700,060 and 697,419, both of which were pending as of the date of advertisement of the present application. The next ground is based on Section 16(3)(c) of the *Trade-marks Act*, the opponent challenging the applicant's entitlement to registration in view of the opponent's prior use in Canada of its trade-name The Canadian Arctic Beverage Corporation. As its final ground, the opponent alleged that the applicant's trade-mark is not distinctive in view of the opponent's trade-marks identified in the statement of opposition.

The applicant filed a counter statement in which it denied the allegations set forth in the statement of opposition. The opponent filed as its evidence certified copies of its registrations for the trade-marks ARCTIC TWIST, CANADIAN ARCTIC TWIST and THE CANADIAN ARCTIC SELECTION. The applicant submitted as its evidence the affidavits of L. Jane Sargeant, David Heller and Joel Usher. The applicant alone filed a written argument and neither party requested an oral hearing.

The first ground of opposition is based on Section 30(i) of the *Trade-marks Act*. While the legal burden is upon the applicant to show that its application complies with Section 30(i) of the Act, there is an initial evidentiary burden on the opponent in respect of its 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]. As no evidence has been filed by the opponent in support of its allegation that the applicant could not have been satisfied that it was entitled to use the trade-mark ARCTIC BREEZE in Canada, the opponent has failed to meet the evidentiary burden upon it in respect of the Section 30 ground. In any event, and even had the applicant been aware of the opponent's trade-marks prior to filing the present application, such a fact is not inconsistent with the statement in the application that the applicant was satisfied that it was entitled to use the trade-mark ARCTIC BREEZE in Canada on the basis *inter alia* that its mark is not confusing with the opponent's trade-marks relied upon in its statement of opposition. Thus, the success of this ground is contingent upon a finding that the trade-marks at issue are confusing [see *Consumer Distributing Co. Ltd. v. Toy World Ltd.*, 30 C.P.R. (3d) 191, at pg. 195; and *Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R. (2d) 152, at pg. 155].

As its third and fifth grounds, the opponent has relied upon prior use of its trade-marks

ARCTIC TWIST and CANADIAN ARCTIC TWIST, as well as its trade-name The Canadian Arctic Beverage Corporation, in challenging the applicant's entitlement to registration. In view of the provisions of Sections 16(5) and 17(1) of the *Trade-marks Act*, there is a burden on the opponent to establish prior use of its trade-marks and trade-name in Canada, as well as to show that it had not abandoned its trade-marks and trade-name as of the date of advertisement of the present application in the *Trade-marks Journal* [April 7, 1993]. As no evidence has been adduced by the opponent relating to its alleged prior use of its trade-marks ARCTIC TWIST and CANADIAN ARCTIC TWIST and trade-name The Canadian Arctic Beverage Corporation in Canada, the opponent has not met the burden upon it under Sections 16(5) and 17(1) of the *Trade-marks Act*. I have therefore rejected the third and fifth grounds of opposition. Likewise, the opponent has not met the evidentiary burden upon it in respect of its final ground relating to the alleged non-distinctiveness of the applicant's trade-mark which I have also dismissed.

The second ground of opposition is based on Section 12(1)(d) of the *Trade-marks Act*, the opponent asserting that there would be a reasonable likelihood of confusion between the applicant's trade-mark ARCTIC BREEZE as applied to the wares covered in the present application and its registered trade-marks ARCTIC TWIST as applied to "non-alcoholic beverages, namely, fruit-flavoured or non-flavoured carbonated spring water" and CANADIAN ARCTIC TWIST as applied to "soft drinks, namely carbonated flavoured waters". In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue within the scope of Section 6(2) of the *Trade-marks Act*, the Registrar must have regard to all the surrounding circumstances, including those which are specifically enumerated in Section 6(5) of the Act. Further, the Registrar must bear in mind that the legal burden is upon the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks of the parties as of the date of my decision, the material date in relation to the Section 12(1)(d) ground [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (F.C.A.)].

With respect to the inherent distinctiveness of the trade-marks at issue, the applicant's trade-mark ARCTIC BREEZE as applied to the wares covered in the present application and the

opponent's trade-marks ARCTIC TWIST and CANADIAN ARCTIC TWIST as applied to the wares covered in its registrations, are inherently distinctive. As no evidence of use of its trade-marks has been furnished by the opponent, I must assume that its marks had not become known to any extent. Furthermore, while the applicant has established that its trade-mark ARCTIC BREEZE has become known to some extent in association with candies, mints and cough drops, the applicant's trade-mark has not become known to any extent in association with "flavoured mineral water and soft drinks ". Thus, the extent to which the trade-marks have become known and the length of use of the trade-marks at issue does not favour either party in this opposition.

The applicant's flavoured mineral water and soft drinks are similar to the opponent's fruit-flavoured or non-flavoured carbonated spring water and its carbonated flavoured waters covered by its trade-mark registrations. Furthermore, I would expect the channels of trade of the parties would or could overlap.

As for the degree of resemblance between the trade-marks at issue, the applicant's trade-mark ARCTIC BREEZE and the opponent's trade-mark ARCTIC TWIST bear some similarity in appearance and in sounding and, to the extent that the marks suggest the same idea relating to the Arctic, the trade-marks are similar in the ideas suggested by them. The applicant's trade-mark and the opponent's trade-mark CANADIAN ARCTIC TWIST bear less similarity in appearance and in sounding than do the trade-marks ARCTIC BREEZE and ARCTIC TWIST although these marks also suggest some idea associated with the Arctic.

As a further surrounding circumstance in respect of the issue of confusion, the applicant submitted evidence of the state of the register, as well as evidence of the adoption and use by third parties of trade-names and business names including the words Arctic as applied to beverages. This evidence establishes that there has been some measure of use of the word ARCTIC in Canada in association with various kinds of beverages, such that consumers in the marketplace would be used to distinguishing between trade-marks including the word ARCTIC.

In view of the above, and bearing in mind that the word ARCTIC has been adopted and used

by other traders in Canada as an element of trade-marks and trade-names applied to various kinds of beverages, I have concluded that the applicant has met the legal burden upon it in respect of the issue of confusion and have therefore rejected the Section 12(1)(d) ground of opposition.

As its fourth ground, the opponent alleged that the applicant is not the person entitled to registration in that, as of the applicant's filing date, the applicant's trade-mark ARCTIC BREEZE was confusing with its trade-marks THE CANADIAN ARCTIC SELECTION and CANADIAN ARCTIC TWIST in respect of which applications for registration had previously been filed in Canada under application Nos. 700,060 and 697,419, both of which were pending as of the date of advertisement of the present application. As the opponent has met the initial burden upon it under Section 16(4) of the *Trade-marks Act*, this ground remains to be decided on the basis of the issue of confusion. The material date for assessing the likelihood of confusion in respect of this ground is the filing date of the applicant's application [September 25, 1992].

With respect to the inherent distinctiveness of the trade-marks of the parties, the applicant's trade-mark ARCTIC BREEZE as applied to the wares covered in the present application and the opponent's trade-marks THE CANADIAN ARCTIC SELECTION and CANADIAN ARCTIC TWIST as applied to the wares covered in its applications are inherently distinctive. As no evidence of use of its trade-marks has been furnished by the opponent, I must assume that its marks had not become known to any extent. Furthermore, while the applicant has established that its trade-mark ARCTIC BREEZE has become known to some extent in association with candies, mints and cough drops, such use did not commence until September of 1993 and therefore subsequent to the material date for considering this ground of opposition. In any event, the applicant's evidence does not establish that its trade-mark had not become known to any extent in association with "flavoured mineral water and soft drinks ". Thus, the extent to which the trade-marks at issue have become known and the length of use of the trade-marks does not favour either party.

The applicant's flavoured mineral water and soft drinks are similar to the opponent's still or carbonated flavoured or unflavoured carbonated waters and its carbonated flavoured waters covered by its pending trade-mark applications. Furthermore, I would expect the channels of trade of the

parties to overlap.

As for the degree of resemblance between the trade-marks at issue, the applicant's trade-mark ARCTIC BREEZE and the opponent's trade-marks CANADIAN ARCTIC TWIST and THE CANADIAN ARCTIC SELECTION bear little similarity in appearance or in sounding when considered in their entireties although, to the extent that the marks suggest some idea relating to the Arctic, the trade-marks at issue are similar in the ideas suggested by them.

As a further surrounding circumstance in respect of the issue of confusion, the applicant submitted evidence of the state of the register, as well as evidence of the adoption and use by third parties of trade-names and business names including the words Arctic or Arctic as applied to beverages. This evidence establishes that there has been some measure of use of the word ARCTIC in Canada in association with various kinds of beverages, such that consumers in the marketplace would be used to distinguishing between trade-marks including the word ARCTIC.

In view of the above, and bearing in mind that the word ARCTIC has been adopted and used by other traders in Canada as a element of trade-marks and trade-names applied to various kinds of beverages, I have concluded that the applicant has met the legal burden upon it in respect of the issue of confusion and have therefore rejected the Section 16(3)(b) ground of opposition.

Having been delegated by the Registrar of Trade-marks pursuant to Section 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to Section 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC, THIS 11<sup>th</sup> DAY OF DECEMBER, 1996.

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