

**IN THE MATTER OF AN OPPOSITION
by Labatt Brewery Company Limited to
application No. 725,780 for the trade-mark
NORTHERN GLACIER filed by Fairlee
Fruit Juice Limited and subsequently
assigned to CC & S Provisions, Inc.**

On March 29, 1993, Fairlee Fruit Juice Limited filed an application to register the trade-mark NORTHERN GLACIER based on proposed use in Canada for the following wares:

fruit juices and non-alcoholic fruit flavoured and fruit based beverages; naturalized spring water; demineralized water; ready to eat fruit flavoured jelly desserts.

The application was assigned to CC & S Provisions, Inc. on December 20, 1994 and was subsequently advertised for opposition purposes on November 1, 1995.

The opponent, Labatt Brewery Company Limited, filed a statement of opposition on May 1, 1996, a copy of which was forwarded to the applicant on May 17, 1996. The first ground of opposition is 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 GLACIER registered under No. 156,422 for "soft drinks" and related wares and under No. 289,981 for "alcoholic brewery beverages."

The second ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3) of the Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the trade-mark GLACIER previously used in Canada by the opponent with soft drinks and alcoholic brewery beverages. The third ground is that the applied for mark is not distinctive because it is confusing with the opponent's mark.

The applicant filed and served a counter statement. As its evidence, the opponent submitted an affidavit of Bernard Beasley. The applicant did not submit evidence. Only the opponent filed a written argument and an oral hearing was conducted at which only the opponent was represented.

As for the first ground of opposition, 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.). I have checked the trade-marks register and determined that both of the opponent's trade-mark registrations were expunged on July 3, 1997. Thus, there is no longer a basis for the first ground of opposition and it is unsuccessful.

As for the second ground of opposition, the opponent failed to evidence use of its trade-mark GLACIER for soft drinks and related wares prior to the applicant's filing date. Thus, that aspect of the second ground is unsuccessful.

As for the other aspect of the second ground, the opponent has met its initial burdens by evidencing use of its trade-mark GLACIER for beer prior to the applicant's filing date and showing non-abandonment of that mark as of the applicant's advertisement date. The second ground therefore remains to be decided on the issue of confusion between the applicant's mark NORTHERN GLACIER and the opponent's mark GLACIER as used for beer as of the applicant's filing date. The onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Furthermore, 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.

As for Section 6(5)(a) of the Act, the applicant's mark NORTHERN GLACIER is slightly suggestive of the character of the applicant's beverage wares in that they are made or derived from glacial waters. Thus, although the applicant's mark is inherently distinctive, it is not inherently strong. There is no such suggestive connotation when the mark is used with the wares "jelly desserts." There being no evidence from the applicant, I must conclude that its mark had not become known at all in Canada as of the applicant's filing date.

The opponent's mark GLACIER is also slightly suggestive of beer since it suggests that glacial water is used in its production. Thus, the opponent's mark is not inherently strong. Although the opponent's evidence is not as precise as it could have been, it does allow me to conclude that there have been extensive sales of beer bearing the trade-mark GLACIER by

the opponent and its successors for many years. However, it would appear that typically the mark GLACIER appeared on the containers or packaging as a subsidiary or secondary mark, the primary mark being KOKANEE. Nevertheless, given the extent of sales evidenced by the opponent, I am able to conclude that the mark GLACIER had become known to some extent as of the material time.

The length of time the marks have been in use favors the opponent. As for Sections 6(5)(c) and 6(5)(d) of the Act, the applicant's wares "ready to eat fruit flavoured jelly desserts" are completely different from beer. The applicant's remaining wares are similar to the opponent's wares since they are all beverages. They differ, however, since the opponent's wares are alcoholic beverages and the applicant's are not.

Presumably the trades of the parties are dissimilar respecting the applicant's jelly desserts. As for the remaining wares, it is unclear as to a potential overlap in the trades of the parties although Mr. Beasley indicates that he is aware that both alcoholic and non-alcoholic beverages are sold in bars and restaurants. Thus, given that the onus is on the applicant, it was incumbent on the applicant to submit evidence to distinguish the trades of the parties.

As for Section 6(5)(e) of the Act, I consider that there is a fairly high degree of resemblance between the marks at issue in all respects. In fact, the applicant's mark NORTHERN GLACIER includes the entirety of the opponent's mark GLACIER.

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 resemblance between the marks at issue, the reputation associated with the opponent's mark and the potential connection between the beverage wares and trades of the parties, I find that the applicant's mark NORTHERN GLACIER for its various beverage products is confusing with the opponents' mark GLACIER for beer. On the other hand, given the differences between the wares and trades in respect of the applicant's "jelly desserts", I consider that the marks would not be confusing for such wares. Thus, the second ground of opposition based on prior use of the mark GLACIER for beer is successful in part.

As for the third ground of opposition, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Furthermore, the material time for considering the circumstances respecting this issue is as of the filing of the opposition (i.e. - May 1, 1996): see Re Andres Wines Ltd. and E. & J. Gallo Winery (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.) and Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.). Finally, there is an evidential burden on the opponent to prove the allegations of fact in support of its ground of non-distinctiveness.

The fourth ground essentially turns on the issue of confusion between the applicant's mark and the opponent's trade-mark GLACIER as used for beer. Given my conclusions above respecting the issue of confusion respecting the second ground, it also follows that the applicant's mark is confusing with the opponent's mark as of the filing of the present opposition in respect of the applicant's beverage wares but not with respect to the applicant's additional wares. Thus, the fourth ground is also successful in part.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the application insofar as it covers the wares:

fruit juices and non-alcoholic fruit flavoured and fruit based
beverages; naturalized spring water; demineralized water

and I otherwise reject the opposition. Authority for such a divided result may be found in Produits Menagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH (1986), 10 C.P.R.(3d) 482 at 492 (F.C.T.D.).

DATED AT HULL, QUEBEC, THIS 25th DAY OF MARCH, 1999.

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