

## TRADUCTION/TRANSLATION

**SECTION 45 PROCEEDINGS**  
**TRADE-MARKS: FRUITE DESIGN**  
**REGISTRATION NOS: TMA 477,835 and TMA 485,575**

At the request of Messrs. Gowling Lafleur Henderson, the Registrar forwarded the notice required under Section 45 of the Trade-marks Act to Industries Lassonde Inc., the registered owner of each of the above-referenced trade-mark registrations. The notice issued on July 24, 2001 with respect to Registration No. 477,835 and on June 29, 2001 with respect to Registration No. 485,575.

Both registrations are for the trade-mark FRUITE Design (shown below) registered for use in association with the following wares: "Boissons (non alcoolisées) aux fruits".

The logo for 'FRUITE' is rendered in a bold, black, sans-serif font. The letters are thick and blocky. The 'F' and 'R' are particularly prominent, with the 'R' having a curved bottom. The 'U' is a simple, solid block. The 'I' is a thin vertical bar. The 'T' is a solid block with a horizontal top bar. The 'E' is a solid block with three horizontal bars. The overall style is modern and industrial.

Section 45 of the Trade-marks Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares listed on the registration at any time within the three-year period immediately preceding the date of the notice, and if not, the date when it was last in use and the reason for the absence of use since that date. The relevant period concerning Registration No. 477,835 is any time between July 24, 1998 and July 24, 2001 and concerning Registration No. 485,575 it is any time between June 29, 1998 and June 29, 2001.

In response to each notice, an affidavit of Jean Gattuso and of Gaston Patenaude have been furnished. Each party filed a written argument and was represented at the oral hearing.

Mr. Jean Gattuso (President and Director General of A. Lassonde Inc.) states that A. Lassonde Inc. (hereinafter "A. Lassonde") was the owner of the trade-mark from July 1987 to July 2000. He then indicates that since July 2000 A. Lassonde is a licensed user of the trade-mark. He adds that Industries, as owner, controls the character and quality of the wares. He states that A. Lassonde has used the trade-mark without interruption since at least July 10, 1987 and he provides approximate sales figures for the wares for each of the years 1997 to 2001 which are as follows:

<u>Year</u>	<u>(Units)</u>
1997	30 000 000
1998	27 000 000
1999	30 000 000
2000	37 000 000
2001(partial)	30 000 000

As Exhibit JG-1 he attaches sample labels of the type used in association with the wares from 1987 to November 1997. As Exhibit JG-2 he provides sample labels as used in association with the wares since November 1997. As Exhibit JG-3 he provides copies of invoices bearing dates from 1998 to 2001 which he states show sales of the wares.

Mr. Patenaude (Vice-President Administration and Secretary of Industries Lassonde Inc.) states that since July 2000 the trade-mark FRUITE Design has been owned by Industries Lassonde Inc. (hereinafter "Industries") who has granted a licence to A. Lassonde Inc. (hereinafter "A. Lassonde") to use it. As Exhibit GP-1 he provides a copy of the assignment document dated July 19, 2000. As Exhibit GP-2 he provides a copy of the license agreement which he states is dated December 24, 1999 and he adds that, under the license, Industries controls the character and quality of the wares bearing the trade-mark. At paragraph 10 of the affidavits he explains that Industries has put in place sanitary standards and quality standards that A. Lassonde must follow. He then states

that at regular intervals the registrant visits the licensee's establishment to ensure the wares bearing the trade-mark are manufactured in conformity with the registrant's standards.

Concerning the Patenaude affidavit, the requesting party submits that it is insufficient to show use and at best is ambiguous concerning the entity owning the trade-mark during the relevant period. In this regard, it argues that Exhibits GP-1 and GP-2 attached thereto contradict each other and create much ambiguity as to the ownership of the trade-mark during the relevant period. In addition, it submits that the Gattuso affidavit is also insufficient in showing use of the trade-mark and is ambiguous in terms of showing use accruing to the proper entity during the relevant period. Accordingly, it submits that the evidence as a whole should be dismissed as insufficient to show use by the proper owner during the relevant period. Further, it argues that any use shown by the evidence is not use of the trade-mark as registered.

On the issue of "ownership" of the trade-mark, as the assignment document (Exhibit GP-1 to the Patenaude affidavit) executed on July 19, 2000 is a confirmation to the effect that the trade-mark FRUITE Design was transferred from A. Lassonde to Industries and as Mr. Patenaude has stated that since July 2000 Industries has owned the trade-mark, I accept that on July 19, 2000 Industries owned the trade-mark FRUITE Design. The trade-mark registration page shows that the Trade-marks Office recorded the transfer on January 17, 2001 and that Industries is still the entity recorded as the owner of the trade-mark. Concerning the owner prior to July 19, 2000, as Mr. Gattuso has stated that A. Lassonde was the owner from July 1987 to July 2000, I accept that during the first portion of the relevant periods A. Lassonde owned the trade-mark. Consequently, for the period July 19, 2000 to June (or July) 2001 the use required to be shown is "use" by Industries as owner or use accruing to Industries pursuant to Section 50 of the Act. For the period June (or July) 1998 to July 19, 2000 the use required to be shown is use by A. Lassonde as owner or use accruing to A. Lassonde.

I have considered the evidence and as I find that the use shown during the period July 19, 2000 to June (or July) 2001 is sufficient for purposes of Section 45, I conclude that I need not have regard to the use prior to that period.

The use shown during the period July 19, 2000 to June (or July) 2001 is by A. Lassonde as "licensee". The evidence shows that Industries has granted a license to A. Lassonde to use the trade-mark. The license agreement has been submitted in evidence.

I agree with the requesting party that the license agreement contains irregularities or possible misstatements. It is dated December 24, 1999 and yet it identifies Industries as the owner of the trade-mark, that is, approximately seven (7) months prior to the trade-mark having been transferred from A. Lassonde to Industries (as per transfer document dated July 19, 2000 filed as Exhibit GP-1).

Notwithstanding the fact that initially the license document might be considered void, it appears from the statements in the Patenaude affidavit that the parties are considering it and have considered it as their governing document with respect to the use of the trade-mark by A. Lassonde as licensee. In the circumstances, I am prepared to accept it as valid between the parties.

I would add that even if I had concluded that the document was void, I would have inferred a licence from the actions of both parties. In this regard, I find the actions of both parties as described in paragraphs 7 to 13 of the Patenaude affidavit to be consistent with the existence of a license arrangement. Consequently, I would have found it clear from the evidence as a whole that a license agreement existed between the parties and that Industries had control of the character and quality of the wares associated with the trade-mark and produced by the licensee.

In view of the above, I conclude that any use shown by A. Lassonde during the period July 19, 2000 to June (or July) 2001 is use accruing to Industries, the owner during that period.

As the evidence shows that transfers of the wares bearing the trade-mark were made by A. Lassonde as "licensee" subsequent to July 19, 2000 and prior to June (or July) 2001, I conclude that the evidence is sufficient to permit me to conclude that the trade-mark was

in use in Canada in association with the wares during the relevant period and that such use accrued to the registered owner. Concerning the sales figures provided, I accept that the sales made in the year 2001 and a portion of the sales made in the year 2000 represent sales made by A. Lassonde as “licensee” pursuant to Section 50 of the Act. Further, as the labels furnished as Exhibit JG-2 to the Gattuso affidavit show the manner the trade-mark has been associated with the registered wares since 1997, and therefore during the relevant period, this satisfies me that at the time of transfer of the wares the trade-mark was associated with the wares in a manner complying with subsection 4(1) of the Act.

The last issue raised by the requesting party is that the labels furnished as Exhibit JG-2 bear a trade-mark that differs from the registered trade-mark. It argues that use of that trade-mark does not constitute use of the registered trade-mark. The registrant, on the other hand, argues that the changes are so minor as to be hardly noticeable and it submits that the trade-mark shown to be in use constitutes use of the registered trade-mark. For convenience I reproduce below the trade-mark as registered and the trade-mark as used:

as registered

as used (from Exhibit JG-2)

The logo consists of the word "FRUITÉ" in a bold, black, sans-serif font. The letters are closely spaced, and the "É" has a small accent mark above it. The overall style is clean and modern.

I agree with the registrant that the mark shown to be in use is not substantially different from the trade-mark as registered. The trade-mark appearing on the labels closely resembles the trade-mark as registered. The variations in the lettering are considered to be only slight unimportant alterations. Consequently, the differences between the marks are very minor and are not such as to deceive the public in any way. Contrary to the view of the requesting party, I find that the dominant features of the registered mark have been preserved in the mark as used.

As stated in *John Labatt Ltd. v. Molson Breweries, a partnership*, 46 C.P.R.(3d) 6, Section 45 proceedings are narrow in scope. The basic principle to be derived is that a registered owner of a trade-mark will not lose his rights to the trade-mark even if the mark as used deviates from the registered mark when the deviation is such that no person would be deceived or injured by it: *Promafil Canada Ltée v. Monsingwear Inc.*, 44 C.P.R.(3d) 59. The jurisprudence provides that if a registered mark, as used, is not substantially different from the mark as registered, preserving the dominant features, the trade-mark registration ought to be maintained. In my view, this is the situation here. Consequently, I conclude that the use shown constitutes use of the registered trade-mark.

In view of the above, I conclude that the trade-mark registrations ought to be maintained.

Registration Nos. TMA 477,835 and TMA 485,575 will be maintained in compliance with the provisions of Section 45(5) of the Trade-marks Act.

DATED AT GATINEAU, QUEBEC. THIS 23<sup>rd</sup> DAY OF DECEMBER, 2004.

D. Savard  
Senior Hearing Officer  
Section 45 Division