

## TRADUCTION/TRANSLATION

**IN THE MATTER OF THE OPPOSITION  
OF Hurteau & Associés s.e.n.c. to  
application for registration No. 1152225 for  
the trade-mark PASSION DES FRUITS  
filed by Courtney  
Clarke**

### **I Proceedings**

Courtney Clarke (the “Applicant”) filed an application on September 11, 2002 for registration of the trade-mark PASSION DES FRUITS (the “Mark”), application number 1152225, based on its use since July 1994 in association with the services of sale of fruits and vegetables (the “Services”). The Applicant disclaimed the right to the exclusive use of the word “fruits” apart from the Mark.

The application was published on December 31, 2003 in the *Trade-marks Journal* for purposes of opposition. On January 12, 2004, Le Groupe Fruits et Passion Inc./ The Fruits and Passion Group Inc. filed a statement of opposition raising the following grounds of opposition:

[TRANSLATION]

1. Under paragraph 38(2)(a) and section 30 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”), the application for registration does not meet the requirements of the Act in that:

- (a) the Applicant has not used the Mark in association with the Services as it said;
- (b) The Applicant abandoned the Mark in whole or in part by discontinuing its use;
- (c) The Applicant falsely stated that it was convinced that it was entitled to use the Mark in Canada in association with the Services.

2. The Mark is not registrable under the provisions of paragraph 12(1)(d) of the Act since it is confusing with the opponent’s trade-marks FRUITS & PASSION, registration certificate TMA412083 and FRUITS & PASSION & drawing, certificate of registration TMA466166.

3. Under paragraph 16(1)(a) of the Act, the Applicant is not the person who is entitled to secure registration of the Mark because it is confusing with the opponent’s trade-marks FRUITS & PASSION and FRUITS & PASSION & drawing used prior to the date of first use alleged in this application for registration in association with its wares and the services of retail trade in food

products, toiletries, cosmetic products and personal-care or body-care products and the related accessories.

4. Under paragraph 16(1)(b) of the Act, the Applicant is not the person who is entitled to secure registration of the Mark because it is confusing with the opponent's trade-mark FRUITS & PASSION, for which an application for registration, No. 692122, had been filed in Canada prior to the date of first use alleged in this application for registration.

5. Under paragraph 16(1)(c) of the Act, the Applicant is not the person who is entitled to secure registration of the Mark because it is confusing with the opponent's trade-names FRUITS & PASSION, GROUPE FRUITS & PASSION INC., THE FRUITS & PASSION GROUP INC. and GROUPE FRUITS & PASSION INC./ THE FRUITS & PASSION GROUP INC. used or disclosed in Canada prior to the date of first use alleged in this application for registration.

6. Under paragraph 38(2)(d) and section 2 of the Act, the Mark is not distinctive in that:
- (a) in view primarily of the adoption, use, disclosure and registrations of the marks held by the opponent as well as the use and disclosure of the trade-names alleged by the opponent;
  - (b) following the transfer thereof, two or more persons had rights to use the Mark and these rights were exercised by the said persons concurrently, contrary to the provisions of subsection 48(2) of the Act;
  - (c) the Applicant permitted third parties to use the Mark in Canada and in fact, these third parties used it without observing the legislative provisions governing the use under licence of a mark, that is, contrary to the provisions of section 50 of the Act.

On October 29, 2003, the Applicant filed a counter statement of opposition denying the grounds of opposition raised by the opponent and containing several arguments concerning the tests set out in subsection 6(5) of the Act.

The opponent offered in evidence the affidavit of Jean Hurteau while the Applicant introduced his own declaration. By way of rebuttal evidence, the opponent offered the affidavit of Karine Iskandar. None of the parties filed written submissions and a hearing was held at which they were represented.

## **II Preliminary remarks**

For the purposes of this decision, I must summarize the incidents that occurred while this case was proceeding. In a decision dated August 31, 2005, the Registrar granted the opponent leave to make a first amendment to its statement of opposition in order to:

- (a) Change the identity of the opponent to Groupe Fruits & Passion Inc. (Le)/ The Fruits & Passion Group Inc.;

- (b) Indicate that the Applicant has not used the Mark since October 1997;
- (c) Add the Applicant's knowledge of the rights of the opponent and the unlawfulness of any use of the Mark that violates the rights of the opponent;
- (d) Add the ground of opposition based on paragraph 12(1)(b) of the Act to the effect that the Mark was either clearly descriptive or deceptively misdescriptive in the English or French language, of the character of the Services, namely not only a fruit retail store but also a fruit and vegetable retail store;
- (e) Add the use of the mark or name PASSION DES FRUITS in association with a fruit and vegetable store by 9039-7985 Québec Inc., 9102-0149 Québec Inc., Fruiterie Muscat Ic. and 9144-2293 Québec Inc. in support of its ground of opposition concerning the distinctiveness of the Mark (under the three allegations in this ground of opposition).

On October 25, 2005, the Registrar authorized the filing of Ms. Iskandar's affidavit as additional evidence and of the compliance certificates issued by the Companies Registrar for Quebec concerning the corporate bodies identified in the amended statement of opposition and in the Applicant's declaration.

On April 10, 2006, the Registrar allowed the opponent to amend its statement of opposition a second time in order to list the wares and services covered by its certificate of registration TMA412083, amended on November 10, 2005. In the same decision, the opponent was granted leave to file the said amended certificate of registration and the Applicant to submit a file of documents from the Companies Registrar for Quebec attached to correspondence dated November 2, 2005.

Finally, on March 30, 2007 the opponent was granted further leave by the Registrar to amend its statement of opposition to amend the name of the opponent to Hurteau et Associés S.E.N.C. following a transfer of ownership to this entity of the trade-marks referred to in the statement of opposition. Thus, I shall use the expression "the Opponent" to refer to Le Groupe Fruits et Passion Inc./ The Fruits and Passion Group Inc., Groupe Fruits & Passion Inc. (Le)/ The Fruits & Passion Group Inc. and/or Hurteau et Associés S.E.N.C., as the case may be.

In these numerous amendments, we note that, generally, the Opponent raises the following grounds of opposition: a failure to meet the requirements of section 30; the Mark is not registrable under the provisions of paragraphs 12(1)(b) and 12(1)(d); the Applicant is not the person entitled to registration of the Mark because of the prior use of the Opponent's trade-marks

and trade-names, the prior filing of an application for registration of the trade-mark FRUITS & PASSION and, finally, the Mark's lack of distinctiveness.

At the commencement of the hearing, the Opponent's agent indicated that he did not expect to make any submission concerning the grounds of opposition based on paragraph 12(1)(b) and section 16 of the Act.

### **III Summary of corporate documents filed in the record**

A brief summary should be given of the information contained in the documents filed by both parties concerning certain legal entities.

9039-7985 Québec Inc. is a company incorporated on September 4, 1996 of which the Applicant is the sole director and shareholder. It is indicated in the initial declaration signed on September 3, 1996 that it also carries on business under the name PASSION DES FRUITS and operates a fruit and vegetable business located at 2001 Ave. Mont-Royal Est in Montreal.

9102-0149 Québec Inc. is a company incorporated on March 15, 2001. The information in the initial declaration dated March 19, 2001 confirms that the Applicant was its principal shareholder and sole director and that it also operated a fruit and vegetable sales business under the name of PASSION DES FRUITS located at 5000 Saint-Denis in Montreal. This company changed its name to Fruiterie Muscat Inc. on a date that is not indicated in the documents filed in the record. The annual return for 2004 indicates that the Applicant is no longer its majority shareholder or sole director. It is stated that this company carries on business under the name PASSION DES FRUITS. However, an amending declaration dated June 13, 2005 confirms that this company no longer uses the trade-name PASSION DES FRUITS.

9144-2293 Québec Inc. was incorporated on July 6, 2004. The extract from the Companies Register filed in the record indicates that the Applicant is its principal shareholder and sole director. This company also operates a fruit and vegetable business under the trade-name PASION DES FRUITS located at 2001 Ave. Mont-Royal Est in Montreal.

I will not go beyond that information. The Applicant's agent provided certain explanations concerning these different companies and the addresses indicated above, but I cannot take these explanations into account because this additional information was not contained in an affidavit. Evidence of material facts must be adduced before the Registrar in the form of an affidavit or statutory declaration and not during argument. [See rules 41, 42, and 43 of the *Trade-marks Regulations*.]

#### **IV Applicable law**

As part of the proceedings involved in an opposition to the registration of a trade-mark, the Opponent must submit sufficient evidence concerning the grounds of opposition it raises in order to make it clear that there are facts that may support these grounds of opposition. If the Opponent meets this requirement, the Applicant must then convince the Registrar that the grounds of opposition should not prevent the registration of the Mark. [See *Sunshine Biscuits Inc. v. Corporate Foods Ltd.* (1982), 61 C.P.R. (2d) 53, *Joseph Seagram & Sons Ltd. v. Seagram Real Estate Ltd.* (1984), 3 C.P.R. (3d) 325 and *John Labatt Ltd. v. Molson Companies Limited*, (1990), 30 C.P.R. (3d) 293.]

The relevant date for analysing the various grounds of opposition varies with the ground of opposition raised. Thus, for grounds of opposition based on section 30 of the Act, the relevant date is that of filing the application for registration (September 11, 2002) [see *Dic Dac Holdings (Canada) Ltd v. Yao Tsai Co.* (1999), 1 C.P.R. (4<sup>th</sup>) 263 and *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R. (3d) 469]. When the ground of opposition is based on subsection 16(1) of the Act, the date of first use of the Mark (July 1994) alleged in the application for registration is the reference date as indicated in the said section. The registrability of the Mark under paragraph 12(1)(d) of the Act must be determined as of the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 413 (FCA)] whereas under paragraph 12(1)(b), it must be determined as of the date on which the application for registration is filed. [See *Fiesta Barbeques Limited v. General Housewares Corporation* (2003), 28 C.P.R. (4<sup>th</sup>) 60.] Finally, it is generally recognized that the date on which the statement of opposition is filed (January 12, 2004) is the relevant date for analysing the ground of opposition based on the

Mark's lack of distinctiveness. [See *Andres Wines Ltd. and E&J Gallo Winery* (1975), 25 C.P.R. (2d) 126 (F.C.A.) at page 130, and *Metro-Goldwyn-Meyer Inc v. Stargate Connections Inc.* (2004), 34 C.P.R. (4<sup>th</sup>) 317.]

### **V Registrability of the Mark under paragraph 12(1)(d)**

The Opponent discharged the initial onus of proof imposed on it under paragraph 12(1)(d) of the Act by filing certified copies of the following certificates of registration:

➤ TMA412083 for the mark FRUITS & PASSION covering the following wares:

- (1) Bubble baths, bath oils, body soaps, hair shampoos, toilet water, body creams and milks, and essential oils.
- (2) Personal care products, namely shower gel, foaming bath cream, massage oil, body milk lotion, talcum powder, powder deodorant, hand soap, bath sea salts, eau de fruits, body cream, lip balm, hand cream, moisturizing body milk, shower gel cream, after-shave lotion, shaving cream, deodorant, gel scrub, body shampoo, eye contour cream, cream mask, cleansing milk, cleansing gel, regenerating toners, hair shampoo, hair moisturizing, hair conditioner, sunscreen lotion, after-sun neutralizing lotion, after-sun regenerating butter, moisturizing deodorant foot cream, cleansing & soothing foot bath, exfoliating foot cream, refreshing and deodorant foot powder; potpourri, perfumed sachet, eye bags; candles; air fresheners and deodorizers, perfumed oil; electric pedicure sets; pedicure implements namely, nail files, nail cutters, nail scissors; pedicure groomed; massager, massage brushes, exfoliating gloves and sponges; diffuser for room fragrance; candle-holders, soap dish, bath brushes, hair brushes; maple butter, fruits compotes, fruits preserved in alcohol, cooking oil, vinaigrettes; honey, maple syrup, mustard, fruits and honey chutney, vinegar, teas, herbal teas, marinades sauces, condiments sauces.
- (3) Laundry detergent, all purpose household cleaning preparations and disinfectants with cleaning, deodorizing and germicidal properties.

And the following services:

Retail store services featuring food products, beauty products and grooming products.

➤ TMA 466166 for the trade-mark FRUITS & PASSIONS and drawing



covering the following wares:

- 1) Bubble baths, bath oils, body soaps, hair shampoos, toilet water, body creams and milks,

essential oils for personal use, potpourri, and sea water bath salts.

(2) Candles.

(3) Jams, fruits preserves, dried fruits, olive oil.

(4) Stationery sections, namely: paper sheets, envelopes, fine perfumed paper, gift wrapper paper.

(5) Honey, lip balm, cosmetic products, namely: skin care creams, skin cleansing lotions; perfumes.

And the following services:

(1) Retail store services featuring food products, beauty products, and grooming products.

The Applicant must accordingly prove on a balance of probabilities that the Mark is not likely to be confusing with the trade-marks of the Opponent [see *Christian Dior, S.A. v. Dion Neckwear Ltd.*, [2002] 3 F.C.405 (FCA)].

The possibility of confusion between two trade-marks must be analysed in light of the unique circumstances of each individual case. A partial list of these circumstances appears in subsection 6(5) of the Act. The Honourable Justice Binnie, writing for the Supreme Court of Canada, recently expressed the Court's views on the scope of this section in *Mattel Inc. v. 3894207 Canada Inc.*, (2006) 49 C.P.R. (4<sup>th</sup>) 321, when he stated:

Within the "all the surrounding circumstances" test, s. 6(5) of the Act lists five factors to be considered when making a determination as to whether or not a trade-mark is confusing. These are: "(a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; (b) the length of time the trade-marks or trade-names have been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them". The list of circumstances is not exhaustive and different circumstances will be given different weight in a context-specific assessment. See *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.). In opposition proceedings, as stated, the onus is on the applicant (here the respondent) to show on a balance of probabilities that there is no likelihood of confusion.

It is on the basis of these principles that I shall analyse each of the relevant circumstances in this case in light of the evidence included in the record. In this analysis, I will carefully compare the word mark FRUITS & PASSION with the Mark because the Opponent's drawing mark would not add anything more advantageous to the word mark.

(a) the inherent distinctiveness of the trade-marks and the extent to which they have become known

Neither the Opponent's word mark FRUITS & PASSION nor the Mark has a strong inherent distinctiveness. They all consist of the same words, which are commonly found in the French language. They all involve a disclaimer of the right to the exclusive use of the word "FRUITS" apart from the trade-mark.

The degree of distinctiveness of a trade-mark may be enhanced by evidence of its use in Canada. Mr. Hurteau has been the founding president of the Opponent since May 1992. The Opponent carries on a business that is involved, *inter alia*, in the manufacture, distribution, marketing and sale of fruit-based body-care, beauty and toilet products and the sale of gourmet products. Exhibits JH-1, JH-2 and JH-3 are brochures explaining the Opponent's commercial activities.

The Opponent operates more than 100 stores on 3 continents, 75 of them in Canada. The stores in Canada belong to the Opponent or to franchisees or licensees. Its sales in Canada account for 70% of its total annual sales of products bearing the mark FRUITS & PASSION and have never been less than \$5 million since 1996.

It has used the trade-mark FRUITS ET PASSION in Canada in association with various body-care, beauty and toiletry products since 1992, in association with gourmet products since October 1994 and in association with the services of retail stores since November 1995. Several of the Opponent's products are perfumed with fruit aromas. In this regard I refer to the photographs of product samples, Exhibit JH-5 to the affidavit of Mr. Hurteau. Copies of invoices from various FRUITS & PASSION stores operated or controlled by the Opponent were filed as Exhibit JH-4. We find there an invoice illustrating the sale of food products such as honey and fruit jams. Exhibit JH-6 consists of photographs of food products bearing the marks L'ART DE LA TABLE and FRUITS & PASSION.



Since 1996 the Opponent has spent a minimum of \$350,000 to promote its products under the mark FRUITS ET PASSION and in 2003 this figure exceeded \$2 million. Exhibit JH-7 is a copy of advertising used in the late 1990s.

Exhibits JH-8 and JH-9 are brochures used in 2003 and 2004, where we find illustrations of food products. Mr. Hurteau also filed extracts from advertising and articles that appeared in newspapers or magazines, except that we have no information concerning the circulation of these publications in Canada. I shall accordingly not attach much importance to this evidence.

The declaration of the Applicant does not contain any material evidence that might support its allegation that the Mark has been used since July 1994 in association with the Services. There is no evidence of use of the Mark in association with the Services within the meaning of subsection 4(2) of the Act other than a photograph taken on May 29, 2005 by Ms. Iskandar of an outdoor sign bearing the Mark. I should note that the filing of corporate documents cannot in itself constitute evidence of use of the Mark in association with the Services within the meaning of subsection 4(2) of the Act. [See *Pharmx Rexall Drug Stores Inc. v. Vitabrin Investments Inc.* (1995), 62 C.P.R. (3d) 108 (T.M.O.B.) and *Tension 10 Inc. v. Tension Clothing Inc.* (2005) 45 C.P.R. (4th) 136 (T.M.O.B).]

In the light of the evidence included in the record, I consider that the Opponent's word mark FRUITS & PASSION is known in Canada in association with body-care, beauty and toiletry products and the operation of stores offering such products for sale. This factor favours the Opponent.

(b) the length of time the trade-marks or trade-names have been in use

As indicated earlier, I do not have any admissible evidence of use of the Mark prior to May 29, 2005. However, the application for registration refers to use since July 1994, whereas the certificate of registration TMA412083 refers to use of the word mark FRUITS & PASSION since October 1995 in association with the services listed above since December 1992 in association with the following wares: bubble baths, bath oils, body soaps, hair shampoos, toilet

water, body creams and milks, and essential oils. The evidence of the Opponent shows the use of its trade-mark FRUITS ET PASSION since at least November 1995 (see the invoices filed as Exhibit JH-4) in association with the services of sales of food products (fruit jams and honey) and fruit-based body-care, beauty and toilet products. There is no evidence of use of the Mark by the Applicant since the date alleged in its application for registration. I cannot conclude that the Mark has been used in Canada since July 1994 within the meaning of subsection 4(2) of the Act. This factor accordingly favours the Opponent.

(c) the nature of the wares, services or business; and (d) the nature of the trade;

The Applicant submits that the wares and services offered by the parties in these proceedings are completely different such that there could not be any likelihood of confusion in the average consumer with an imperfect knowledge of the Opponent's trade-marks. The Applicant refers to the voluminous evidence filed by the Opponent showing the use of its trade-marks FRUITS & PASSION and FRUITS & PASSION and drawing in association with body-care, beauty and toiletry products whereas the Mark is used in association with services of sales of fruits and vegetables. It is worthy of note that the analysis of the tests set out in subsection 6(5), as part of the ground of opposition based on paragraph 12(1)(d) of the Act, involves comparing the nature of the wares and services described in the certificates of registration of the Opponent's trade-marks with the description of the services contained in this application for registration. We must not limit ourselves to the use made by the Opponent of its trade-mark. [See *Sears Canada v. K.C. Masterpiece Products Inc.* (1990), 33 C.P.R. (3d) 489.] It is clear that certificate of registration TMA412083 for the Opponent's trade-mark FRUITS & PASSION covers the services of sales of food products. There is accordingly an overlap in the kind of services and the nature of the trade described in this application for registration and in the Opponent's certificate of registration TMA412083. These factors also favour the Opponent.

(e) the degree of resemblance between the trade-marks

The degree of resemblance between the trade-marks in question has been considered many times to be one of the most important factors for consideration in the analysis of the likelihood of

confusion that may exist between two trade-marks. [See *Beverly Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2d) 145, aff'd. 60 C.P.R. (2d) 70.]

The Applicant submits that although the marks in dispute consist of the same words, they have different meanings because of the inversion of these words. I am prepared to concede to the Applicant that, for a Francophone, the expressions “passion des fruits” and “fruits et passion” have different meanings. However, as the Federal Court of Appeal noted in *Smithkline Beecham Corporation v. Pierre Fabre Médicament* (2001), 11 C.P.R. (4th) 1, the likelihood of confusion must be analysed from the perspective of both official languages. If there is a likelihood of confusion for an Anglophone consumer who has no knowledge of the language of Molière, this factor would favour the Opponent. Visually and phonetically, the marks are similar for an Anglophone.

The Applicant argues that the logo and the typography used by the parties meant that there could be no likelihood of confusion. The Mark does not include a drawing or particular typography. I must determine whether the Mark, and not that appearing in the photograph of the outdoor sign, may be confusing with the word trade-mark FRUITS & PASION.

I find that this factor also favours the Opponent.

The Applicant has not therefore discharged the onus of proving on a balance of probabilities that there is no likelihood of confusion between the Mark and the Opponent's registered trade-mark FRUITS & PASSION. Certificate of registration TMA412083 covers services of sales of food products. Furthermore, the Mark consists of words that form the Opponent's word mark, and there is accordingly a similarity between the mark and that of the Opponent. For these reasons, I accept the Opponent's ground of opposition based on paragraph 12(1)(d).

## **VI Other grounds of opposition**

(a) ground based on paragraph 12(1)(b) of the Act

No evidence was included in the record by the Opponent to support such a ground of opposition. Moreover, the Opponent did not make any argument in support of this ground of opposition. Since the Opponent has not discharged its initial onus of proof, I reject this ground of opposition.

(b) grounds based on subsection 16(1) of the Act

I have no evidence of the use of the trade-mark FRUITS & PASSION in association with the services of sales of food products prior to the date of first use of the Mark alleged in the Applicant's application for registration. Even if the Opponent had established prior use of its mark within the meaning of subsection 4(1) of the Act in association with body-care, beauty and toiletry products, I would still conclude that the difference between these products and the nature of the Services meant that there was no likelihood of confusion between the Mark and that of the Opponent.

As regards the ground based on paragraph 16(1)(b) of the Act, the application bearing number 692122, which resulted in certificate of registration TMA412083, was no longer pending when this application for registration was published (subsection 16(4) of the Act). Finally, with respect to paragraph 16(1)(c) of the Act, the Opponent failed to adduce evidence of the use of the trade-names described earlier.

For all these reasons, I also reject these grounds of opposition.

(c) grounds of opposition based on section 30 of the Act

The documentary evidence concerning the various legal entities described above shows that the Applicant was the sole shareholder and director of most of these legal entities. This evidence indicates a certain degree of control within the meaning of subsection 50(1) of the Act on the part of the Applicant over the use made of the Mark by these entities. [See *Lindy v. Canada (Registrar of Trade Marks)*, [1999] CarswellNat 652 and *Smart & Biggar v. Powers* (2001), 16 C.P.R. (4th) 276.] The only entity that did not seem to be controlled by the Applicant was

Fruiterie Muscat Inc. Now, it submitted an amending declaration to confirm that it did not use the Mark. I therefore reject the ground of opposition described above in sub-paragraph 1(b).

With respect to the ground described in sub-paragraph 1(a), the initial onus of proof lies with the Opponent. It did not adduce sufficient evidence to discharge this initial onus. It is true that the Applicant did not adduce any evidence that could meet the tests of use of a trade-mark as defined in subsection 4(2) of the Act, but it did not have to do so in the circumstances. I also reject this ground of opposition.

Finally, the Opponent submits that the declaration of the Applicant found in its application for registration to the effect that it is convinced that it is entitled to use the Mark in Canada on the ground of knowledge of the Opponent's marks was false. Even if the Applicant was aware of the Opponent's marks when this application for registration was filed, it could always claim in complete good faith that it was entitled to use the Mark in Canada in association with the Services. It should be noted that a ground of opposition based on paragraph 30(i) of the Act will be upheld only in exceptional cases such as cases of bad faith or fraud on the part of the Applicant. [See *Sapodilla Co. Ltd. v. Bristol Myers Co.* (1974), 15 C.P.R. (2d) 152.]

(d) loss of distinctiveness of the Mark

This ground is examined as of the date on which the statement of opposition is filed. It is based on the same facts as are described in the previous paragraph, namely use of the Mark by entities other than the Applicant outside the framework of section 50 of the Act, so that the Mark has lost its distinctiveness. For the reasons that were set out in the previous paragraph, I also reject this ground of opposition.

## **VII Conclusion**

The Applicant did not discharge its onus of proving on a balance of probabilities that the Mark is registrable within the meaning of paragraph 12(1)(d) of the Act and is not likely to be confusing

with the Opponent's registered trade-mark FRUITS & PASSION. I so rule following an analysis of the relevant circumstances set out above under this ground of opposition.

Under the powers delegated to me by the registrar of Trade-marks under the provisions of subsection 63(3) of the Act, I dismiss the Applicant's application for registration of the Mark in association with the Services, the whole in accordance with subsection 38(8) of the Act.

DATED AT BOUCHERVILLE, QUEBEC, THIS JUNE 6, 2007

Jean Carrière,  
Member of the Trade-marks Opposition Board