

IN THE MATTER OF AN OPPOSITION
by Bi-Way Stores Limited to
application No. 579,961 for the
trade-mark FANTA SEA Design filed
by Caitlin Financial Corporation NV

On March 13, 1987, the applicant, Caitlin Financial Corporation NV, filed an application to register the trade-mark FANTA SEA Design (illustrated below) based on proposed use in Canada for the following wares:

cosmetics, skin care and personal care
products, namely, moisturizing bath
additives, hand soap, shower gels, bath
salts, and depilatories.

The application was advertised for opposition purposes on November 25, 1987.

The opponent, Bi-Way Stores Limited, filed a statement of opposition on February 9, 1988, a copy of which was forwarded to the applicant on February 24, 1988. The first ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3) of the Trade-marks Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the opponent's trade-mark FANTASEAS for which an application (No. 553,524) had previously been filed for "girls' clothing, namely, bathing suits and bathing cover ups." The second ground is that the applicant's trade-mark is not distinctive in view of the opponent's use of its mark.

The applicant filed and served a counter statement. The opponent did not file evidence. The applicant filed the affidavits of Kim Pelletier and Valerie Miller. Only the applicant filed a written argument and no oral hearing was conducted.

As for the second ground of opposition, there was an evidential burden on the opponent to show at least some use of its trade-mark. The opponent having failed to file any evidence, the second ground is therefore unsuccessful.

Since the opponent's application was filed prior to the applicant's filing date and since it was pending as of the applicant's advertisement date, the first ground remains to be decided on the issue of confusion between the marks of the parties. The material time for considering the circumstances respecting that issue is as of the applicant's filing date. Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion. Finally, 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.

The marks of both parties are inherently distinctive in relation to the associated wares. Neither mark has become known at all. The length of time the marks have been in use is not a material circumstance in this case. The wares and trades of the parties would appear to be different: see the decision in S.C. Johnson & Son, Inc. v. Esprit de

Corp. (1986), 13 C.P.R.(3d) 235 at 248 (F.C.T.D.). The marks themselves bear a high degree of resemblance. However, the applicant's evidence points, to some extent, to common adoption by other traders of trade-names and trade-marks which include the word FANTASY, that word being the phonetic equivalent of the two marks at issue.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. I have also considered that the opponent has taken no active step in this opposition subsequent to filing its statement of opposition. In view of the foregoing, and particularly in view of the differences in the wares and trades of the parties, I find that the applicant has satisfied the onus on it to show that the marks are not confusing. The first ground is therefore also unsuccessful.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 28th DAY OF February, 1991.

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