



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Reference: 2014 TMOB 110
Date of Decision: 26/05/2014

TRADUCTION

**IN THE MATTER OF AN OPPOSITION by
Domaines Pinnacle Inc. against registration
applications nos. 1,490,127 and 1,490,128 for the
trade-marks CID and CID&Design in the name of
Les Vergers de la Colline inc.**

Introduction

[1] On July 26, 2010, Les Vergers de la Colline inc. (the Applicant) filed registration applications for the trade-marks CID (Mark 1), application 1,490,127 and CID & Design (Mark 2), application 1,490,128 as reproduced below:



[2] Both applications are based on a planned use in association with:

Dinnerware namely glasses, coasters, bottles, bottle crates, towels, bottle openers. Clothing namely shirts, t-shirts, sweaters, jackets, caps, hats. Alcoholic beverages namely cider (the Wares); and

On-line retail store services for dinnerware, clothing and cider. Retail store services for dinnerware, clothing and cider. Consultation services and educational services namely seminars and workshops related to cider, recipes and cider tasting (the Services).

[3] These applications were published on January 26, 2011 in the *Trade-Marks Journal* for the purposes of opposition.

[4] On March 25, 2011, Domaines Pinnacle Inc. (the Opponent) filed a statement of opposition in each of these files. The grounds of opposition raised in both oppositions are based on sections 30(i), 16(3)(a) and 2 of the *Trade-marks Act*, RSC (1985), ch T-13 (the Act). They are described in greater detail in Appendix A of this decision. In each of these files, the Applicant filed an identical counter-statement of opposition denying each and every ground of opposition.

[5] In each of the files:

- The Opponent filed an affidavit by Charles Crawford (Crawford 1);
- Mr. Crawford was cross-examined on his affidavit Crawford 1;
- The Applicant filed an affidavit by Marc-Antoine Lasnier (Lasnier 1);
- In rebuttal, the Opponent filed an affidavit by Mr. Crawford (Crawford 2);
- As additional evidence and with permission from the Registrar, the Applicant filed an affidavit by Mr. Lasnier (Lasnier 2);
- Each party filed a written argument, and
- a hearing was held at which each party was represented

[6] I must first determine whether the Opponent has filed sufficient evidence to meet its initial evidentiary burden. If such is the case, the grounds of opposition rest on the likelihood of confusion between the Mark and the Opponent's CID and CID & Design marks. However, neither in its written argument nor at the hearing did the Applicant try to persuade the Registrar of the absence of confusion between the parties' marks, except in regard to dinnerware; the on-line retail store services for dinnerware and clothing; and the retail store services for dinnerware and clothing.

[7] In each of these files, and for reasons described in greater detail below, I believe that the Opponent has not met its initial evidentiary burden for each of the grounds of opposition raised.

Evidentiary burden

[8] Under the procedure in the matter of an opposition against the registration of a trade-mark, the Opponent must present sufficient elements of evidence concerning the grounds of opposition that it raises for it to be apparent that facts exist that can support these grounds of opposition. Should the Opponent meet this requirement, the Applicant would then have to persuade the Registrar, according to the balance of evidence, that the trade-mark is registrable [see *Joseph Seagram & Sons Ltd v. Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB) and *John Labatt Ltd v. Molson Companies Limited* (1990), 30 CPR (3d) 293 (FC 1st inst)].

Preliminary comments

[9] During Mr. Crawford's cross-examination, several undertakings were made. When filing the transcript of this cross-examination, several answers were also provided. However, the Applicant was unable to file answers to undertakings 1, 3, 5 and 8, the Opponent still not having provided them at that time. It received them subsequently, but forgot to include them in the file record. I granted the Applicant permission to file them at the hearing, since there was no objection raised by the Opponent.

[10] Also, during Mr. Crawford's cross-examination, reference was made to a more legible copy of the documents identified as exhibit CC-5 in the Crawford 1 affidavit. However, the documents used during the cross-examination were not filed with the stenographic notes of the cross-examination. At the hearing, I granted the Opponent permission to file a copy of these documents, given that the Applicant had not objected. When writing my decision, I used the more legible documents [exhibit CC-2 in Mr. Crawford's cross-examination] rather than exhibit CC-5 in the Crawford 1 affidavit.

[11] The grounds of opposition, the evidence and the written arguments are near-identical in both files. To facilitate writing and reading this decision, I will refer, unless indicated otherwise, to the:

- two registration applications in using the term the ‘application;’
- two opposition procedures in using the term ‘opposition;’ and
- Mark 1 and Mark 2 in using the term ‘Mark;’

[12] The Opponent is basing its opposition on prior use of the trade-marks CID and CID & Design. I will use the term CID to designate one or other of these marks.

[13] As I mentioned at the hearing, all of the facts discussed by the parties that are beyond their personal knowledge constitute inadmissible hearsay evidence. I am referring to information obtained at meetings involving individuals other than the parties concerning the business plans of one or other of the parties. Accordingly, the claims described in the second sentence of paragraph 15 of the Crawford 1 affidavit, paragraphs 18-22 of the Crawford 2 affidavit, paragraphs 42, 43, 46, 47 and 50 of the Lasnier 1 affidavit, and paragraphs 23 and 24 of the Lasnier 2 affidavit will be given no consideration whatsoever when making my decision.

[14] In general, the evidence shows that the process for selling cider in Quebec is regulated as follows: The producer, with the required authorizations, can sell traditional cider at its production site. If the alcoholic beverage, (cider, in our case) contains more than 7% alc./vol, the producer cannot sell it directly to retailers. The latter must place their orders with the Société des Alcools du Québec (SAQ). The producer sells its products to the SAQ. The Opponent's ciders displaying the CID mark are intended for food stores in Quebec. Accordingly, in our case, the SAQ refused to supply food stores wishing to purchase cider displaying the Opponent's CID mark. Therefore, the Opponent had to submit an application to the Régie des alcools des courses et des jeux du Québec (RAJQ) in order that its cider displaying the CID mark could be distributed to food stores in Quebec. For strategic reasons, the Opponent's CID mark was not offered for sale to consumers in SAQ branches during the Relevant Period.

[15] Lastly, as it appears on reading my decision, the latter is based on the credibility of the claims contained in the Crawford 1 and Crawford 2 affidavits. Mr. Crawford was cross-examined and I have read the transcript. Clearly, there are contradictions between his replies to the questions asked during his cross-examination and the claims contained in the said affidavits. As I will stress in greater detail, the sequence of filing the various items of evidence constitutes a major factor in making my decision.

The Opponent's key evidence (Crawford 1)

[16] Mr. Crawford is president and founder of the Opponent. It is a family business that has specialized in the production of ice cider since 2000. He signed this affidavit on October 7, 2011.

[17] Mr. Crawford states that the Opponent has used the CID mark since at least as early as April 4, 2010 in association with the cider. To support this claim, he filed two photos, one representing a bottle of still cider displaying the CID mark, having 11% alcohol content, and the other representing a bottle of sparkling cider displaying the CID mark, having an alcohol content of 11%.

[18] To support the date of first use of the CID mark of April 4, 2010, Mr. Crawford filed what he claims to be the invoice from this first sale. I stress that the documents filed in bundle for this purpose [exhibit CC-5 in the Crawford 1 affidavit] are two cash register receipts and a form listing the products that were covered by this sale. Nowhere on these documents is there reference to the CID mark, although such reference on these documents is not mandatory. I will have to decide whether the overall evidence shows use of the CID mark in association with the cider at the time of this sale.

[19] The Applicant vigorously contests the authenticity of this sale as demonstrated in its evidence and described in greater detail later in my decision.

[20] For the moment, I will limit my comments to the following facts: one of the products sold is a sparkling cider; the sale price was \$14.95; the total amount of the products sold in the sale and indicated on the form (\$89.70) does not agree exactly with the total of the amounts shown on the two cash register receipts (\$74.78 + \$14.95\$ = \$89.73); the individual amounts appearing on the cash register receipts do not correspond to the individual amounts appearing on the sale form, except for the amount of \$14.95, which seems to represent the sale price of the sparkling cider.

[21] Mr. Crawford then lists the various distribution channels for the Opponent's products, i.e.: the SAQ and other analogous commissions or corporations in the other Canadian provinces. The Opponent's CID ciders are also sold directly at the Opponent's store and in some public markets, and also under the IGA, Metro, Loblaws, Provigo and Maxi banners.

[22] Mr. Crawford mentions the recognition of the Opponent's products, but the information provided on the subject makes no reference to the Opponent's CID mark. The awards won by the Opponent concern the ice ciders SIGNATURE RÉSERVE SPÉCIALE, DOMAINE PINACLE, REFLET D'HIVER and COUREUR DES BOIS maple cream.

[23] Mr. Crawford claims that the Opponent's sales of cider displaying the CID mark amounted to \$26,000 since April 4, 2010 and stood at \$243,000 for 2011. In terms of bottles sold, this figure stands at 3,900 bottles in 2010 and 38,900 bottles in 2011.

[24] Mr. Crawford states that the Opponent allocates an annual average promotional budget of approximately \$700,000 for advertising and promoting its products. However, there is no breakdown of this amount according to each of the Opponent's products and more specifically the cider sold in association with the CID mark.

[25] I will not summarize the content of the Crawford 1 affidavit, describing the facts related to the Applicant's knowledge of use of the CID mark by the Opponent. This knowledge was presented in greater detail in his cross-examination. However, it stems from

his cross-examination that the facts claimed by Mr. Crawford on the subject in his affidavit are not to his personal knowledge. Accordingly, this is hearsay evidence.

[26] Lastly Mr. Crawford explains that the parties are active in the same field and that the products and services related to the Applicant's Mark could be found by or offered to the same clientele. However, this latter point is admitted by the Applicant except in regard to some wares and services identified in paragraph 6 above.

[27] Cross-examination of Mr. Crawford on the Crawford 1 affidavit.

[28] Mr. Crawford was cross-examined on February 29, 2012. During his cross-examination, the following facts were established:

- In 2010, the CID ciders were sold primarily at the Opponent's store located in Frelighsburg, Quebec (pages 13 and 23);
- There was no advertising placed in newspapers in 2010 for the CID ciders (page 23).
- Food stores obtained CID cider from the SAQ and the Opponent has sold it to the SAQ since October 18, 2010. However, it is difficult for the Opponent to say since when precisely food stores had purchased CID cider from the SAQ (replies to the undertakings);
- Currently, CID ciders are sold only in food stores located in Quebec (page 33);
- Before selling the product in its store, the Opponent had not submitted an authorization request to the Régie des alcools des courses et des jeux du Québec (RAJQ) to sell this product at its production site (page 32);
- It was not until around May 30, 2011 [see exhibit CC-2 in the Crawford 1 affidavit] that the CID ciders began to be available in food stores (page 37).;
- The Opponent used a single design on its bottles and this is the one appearing on the photos of the Opponent's cider bottles appended to the Crawford 1 affidavit and illustrated below:



- (I must stress that Mr. Crawford referred to the CID & Design mark that was the subject, at the time of his cross-examination, of a registration application not filed by the Opponent until October 4, 2010) (pages 39-40);
- The first sale occurred on April 4, 2010 at the Opponent's store (page 40);

- The CID ciders are advertised on the website *www.selectionspinnacle.com* although no sales can be made via this site (pages 43-44);
- The alcohol content for this type of product has always been 11% (page 47);
- The CID name does not appear on the Opponent's products list form, since at the time in 2010 the Opponent was only selling a sparkling cider, i.e. the CID cider that appears on photo CC-1 in the Crawford 1 affidavit (page 56);
- The CID ciders have not been sold in the Opponent's store since being made available to food stores, i.e. starting May 2011 (page 65);
- The design appearing on the photos of the bottles of cider was designed externally (page 66);
- The back of the labels on the bottles appearing on the photos filed includes the mention Sélections Pinnacle (note that the back itself does not appear on the photos filed) (page 69);
- Several of the Opponent's employees, identified by Mr. Crawford, discussed among themselves the fact that the Applicant was aware that the Opponent was selling cider under the CID mark (pages 74-75);
- He had shown a bottle of CID cider to Michel Lasnier before July 2010 at a trade show held between April and July 2010, but was unable to recall its name.
- He named several trade shows and the period when he met with the Applicant's representatives after July 2010 to discuss the situation (pages 77-78, 81 and 90);
- The Opponent does not sell dinnerware or clothing, and does not sell its products via the Internet (page 93);
- The Opponent does not offer consultation or educational services (page 94);
- The CID ciders were sold at public markets in 2010 and at the Opponent's store before being made available to food stores by way of SAQ Alimentation (page 97).

[29] Lastly, during Mr. Crawford's cross-examination, his agent objected to the filing of the contract in which the Opponent retained the services of a third-party to design the CID & Design mark displayed on the cider bottles, the first sale of which dates back to April 4, 2010. If the contract for producing the label had been signed after April 4, 2010, this would raise serious doubts regarding the credibility of Mr. Crawford's testimony. Be that as it may, as it appears from my decision, it is the Applicant who provided clarification on the production of the label used by the Opponent. It was further to these clarifications that the Opponent filed in rebuttal an invoice in support of the Crawford 2 affidavit in order to prove the payment of fees to this outside firm and claimed for the first time the existence of a label designed in-house.

The Applicant's evidence (Lasnier 1)

[30] The affidavit by Marc-Antoine Lasnier was signed on September 13, 2012. He is the son of the Applicant's president, and who has been employed by the latter since 2003. He is manager of the cider division and master blender. He gives a brief history of the Applicant's activities going back to 1927. The Applicant has operated a cider production plant since 2003 and sells several alcoholic and non-alcoholic beverages made from apples. These products are distributed and marketed primarily in Quebec, but also in the other Canadian provinces.

[31] Mr. Lasnier states that the Applicant's products are or could be sold in the Applicant's store and in SAQ branches, food stores, convenience stores, public markets, trade shows and exhibitions, restaurants, bars and pubs. He claims that the Applicant holds a traditional production permit and an industrial cider production permit issued by the RAJQ. He explains the scope of each of these permits.

[32] Mr. Lasnier explains that the Applicant began to consider adopting the Mark on May 17, 2010. He states having found the name. At the time, he was not aware that third-parties were using this mark. He conducted a Google™ search and found no identical or similar mark used in Canada. Through the use of agents, searches were also conducted on certain databases, including specifically that of CIPO and nothing in conflict was identified.

[33] Subsequently, the Applicant gave a graphics artist a mandate to design a logo that was to eventually be the image of the Applicant's new products and corresponds to Mark 2. Everything was finalized on June 21, 2010 and the Applicant filed the sheets designed (exhibit MCL-3). Subsequently, on July 26, 2010, the Applicant filed a registration application for Mark 1. The application covered not only alcoholic beverages but also other products and services. The Applicant explains that a second application had been filed on the same day for Mark 2.

[34] Mr. Lasnier states that since fall 2010, the Applicant had begun using the Mark for the sale of alcoholic beverages in Quebec. He claims that the alcoholic beverages displaying the Mark had also been sold at the Applicant's store since December 2010. He filed bills for the sale of Wares as well as photos of certain Wares displaying the Mark. Also, in fall 2010, the

Applicant began using the Mark in association with dinnerware and clothing, and he filed photos of these items. He says that since September 2010, products displaying the Mark have been available at several points of sale in Quebec. In 2011, there were 400 points of sale in Quebec, and he filed a list of these points of sales, which includes IGA and Metro.

[35] Mr. Lasnier claims that the Applicant disbursed \$5,000 in 2010 and over \$50,000 in 2011 to promote products displaying the Mark. He filed samples of the advertising material. Since their launch in 2010, several of the Applicant's ciders displaying the Mark have won awards and he filed evidence of having received these awards.

[36] I intentionally omit describing the claims concerning the knowledge that the Applicant might have had of the Opponent's sales of products displaying the CID mark. All of these facts are based on hearsay evidence. However Mr. Lasnier states that it was in September 2011 that he first saw the Opponent's products displaying the CID mark.

[37] Mr. Lasnier states that it is impossible that the Opponent could have begun using the CID Mark on April 4, 2010, since the competition to design the Opponent's graphic design did not close until April 29, 2010, and he filed a copy of excerpts from the website of the organization that managed the competition [exhibit MCL-11]. Although the content of this site may constitute hearsay evidence, these facts have not been contested by the Opponent.

[38] Mr. Lasnier explains, that due to its 11% alcohol content, the Opponent's alcoholic beverages displaying the CID mark can only be sold to food stores, convenience stores and restaurants by way of the SAQ. Thanks to its traditional production permit, the Opponent could also sell them in its store but only after having submitted labels and samples of this new product to the RAJQ for analysis and subsequently receiving approval from the latter.

[39] Mr. Lasnier also claims that it is impossible that the Opponent could have promoted CID products on its 'slectionspinacle.com' website as of April 2010 since this domain name had not been reserved by the Opponent until August 17, 2010 and he filed the relevant documentation taken from excerpts of the 'Whois' registers relating to this domain name.

The Opponent's evidence in reply (Crawford 2)

[40] Mr. Crawford signed a second affidavit dated October 17, 2012 and it is entered in the file record as evidence in reply to the Applicant's evidence. I must stress that this affidavit was signed by Mr. Crawford over 7 months after his cross-examination.

[41] To employ the term used by the Applicant's agent during the hearing, the content of this affidavit is at the least 'surprising', given the claims in the Crawford 1 affidavit and the confirmations and clarifications provided by Mr. Crawford in full knowledge of the facts during his cross-examination. Moreover, it was Mr. Crawford himself who said that during his cross-examination: 'Well, there is not much in this affidavit, so yes, I'm, it's not hard to be familiar with it at all.' (page 13).

[42] However, in his second affidavit, Mr. Crawford filed a different version of certain major facts and added other information. Accordingly, he claims that the idea of developing and marketing new products for a still cider displaying the CID mark came to the Opponent in late 2009 [paragraph 4]. He claims that the Opponent decided to test the CID mark by selling the products in its store [paragraph 5]. The Opponent therefore created a label for this purpose and it filed a photo of the latter [paragraph 6]. The label filed bears no resemblance to the label appearing on the photos of bottles filed in support of his first affidavit. Furthermore, the label carries the following mentions: 'cidre tranquille', '9% alc./vol.' and 'domaine pinnacle'.

[43] Mr. Crawford explains that since the Opponent's CID products were favourably received by customers, he decided to produce and market them [paragraph 8]. Accordingly, the Opponent decided to launch a competition through the Internet '99designs' website to produce a design for its finished products displaying the CID mark [paragraph 9]. The Opponent received several visuals and selected and retained a number of them [paragraph 10]. The Opponent finalized its choice and the winner was paid on April 24, 2010 [paragraph 11].

[44] Mr. Crawford claims that on April 21, 2010, the Opponent discussed registering the CID mark with its agents and he filed a copy of an e-mail received from his agents dated June 7, 2010 [paragraphs 12 and 13]. I must stress that there is no reference in this e-mail to a meeting that apparently took place on April 21, 2010.

[45] Mr. Crawford claims that it was at this same time that the Opponent had begun to create a website for its CID products (*'selectionspinnacle'*) which was not registered until August 17, 2010 [paragraph 14]. This appears to contradict what he said during his cross-examination to the effect that from the outset (i.e. April 4, 2010), the Opponent wanted to disassociate the cider products displaying the CID mark from its other products by adopting the company name Sélections Pinnacle.

[46] Mr. Crawford states that the Opponent began to market the CID ciders with the new graphic illustrated in paragraph 28 above since at least as early as October 18, 2010 by way of SAQ Alimentation and through the Sobeys (IGA), Metro, Provigo/Maxi/Loblaws supermarket chains [paragraph 15]. This contradicts what he said under cross-examination when he stated that the CID products have always displayed the same label.

[47] Mr. Crawford claims that the Opponent holds all the necessary authorizations for the production and marketing of alcoholic beverages [paragraph 16]. Accordingly, he filed four different permits. However, I note that 'traditional cider production permit' does not include an issue date.

Additional evidence from the Applicant (Lasnier 2)

[48] Mr. Lasnier claims that the Opponent had never at any relevant date received the necessary authorizations for the sale, pursuant to its traditional production permit, of its CID ciders at its store. To prove this fact, the Applicant submitted an application on September 10, 2012 to the RAJQ for the latter to provide the approval requests submitted by the Opponent on this subject. On September 13, 2012, the RAJQ replied that they held no

documents concerning approval requests for the Opponent's CID mark ciders and Mr. Lasnier filed a copy of this letter (exhibit MCL-5).

[49] Mr. Lasnier states that it was impossible for the Opponent, pursuant to its industrial cider production permit, to have marketed the CID ciders by way of SAQ Alimentation before the date of opposition (March 25, 2011). In fact, in September 2012, the Applicant discovered the existence of legal and administrative procedures involving the Opponent and the SAQ that dated back to November 2010. This was a dispute before the RAJQ concerning a decision preventing the Opponent from marketing its alcoholic ciders pursuant to its traditional production permit and its industrial cider production permit.

[50] It was then that the Applicant requested, on September 17, 2012, certain documents from the RAJQ in relation to this matter. Mr. Lasnier filed all of the documents relating to this subject. I must stress that the fact that the authorizations or waivers had not been obtained did not, in fact, prevent the possibility that there may have been sales of traditional cider at the Opponent's production site. The first issue to resolve is whether I have evidence of these sales. If so, the second issue is: If they took place without approval from the regulatory authority; can they be held against the Applicant as part of this opposition?

[51] According to Mr. Lasnier, the claims contained in the Opponent's application to the RAJQ [exhibit MCL-7 in bundle] show that the Opponent could not have marketed its CID products before having filed its opposition (March 25, 2011) since at that time it had still not obtained approval from the RAJQ.

Analysis of the evidence and resulting conclusions

[52] From this evidence, I note that:

- There are contradictions between Mr. Crawford's cross-examination on his Crawford 1 affidavit and the content of his Crawford 2 affidavit;

- The Opponent waited over six months and after the filing of Mr. Lasnier's evidence (Lasnier 1), which raised certain anomalies in Mr. Crawford's version of the facts, before rectifying his version of the facts;
- This new version of the facts [paragraphs 4 to 15 in Crawford 2] filed as rebuttal evidence does not constitute rebuttal evidence within the meaning of section 43 of the *Trade-marks Regulations* (Regulations);
- The Opponent did not feel it necessary to cross-examine Mr. Lasnier.

i) rebuttal evidence by the Opponent

[53] Section 43 of the Regulations refers to 'evidence strictly confined to matters in reply'. The evidence in section 41 of the Regulations concerns the 'evidence on which [the Opponent] bases its case'. Accordingly, the Opponent must present all of the evidence it intends to use to prove the well-foundedness of its grounds of opposition. The broad majority of facts described in the Crawford 2 affidavit concern use of the CID mark by the Opponent before July 26, 2010 and therefore were related directly to the ground of opposition based on prior use of this mark. It cannot separate its evidence on the basis of what the Applicant could file as evidence [see *Halford v. Seed Hawk Inc* (2003), 24 CPR (4th) 220 (FC 1st inst)].

[54] In the current file, it is apparent that the Opponent filed an initial version of events that resulted in the sale of cider in association with the CID mark on April 4, 2010 as evidence under section 41 of the Regulations. The Applicant included in its evidence under section 42 facts contradicting the Opponent's version or raising serious doubts regarding the authenticity of the facts relating to the date of the Opponent's first use of the CID mark.

[55] The claims contained in paragraphs 4-15 of the Crawford 2 affidavit concern the date of the Opponent's first use of the CID trade-mark. These claims do not, properly speaking, constitute evidence 'strictly confined to matters in reply.' Rather, it is new evidence or additional evidence relating to the date of first use of its mark which required permission from the registrar before being entered in the file record.

[56] Accordingly, paragraphs 4-15 inclusively of the Crawford 2 affidavit will not be considered in this decision.

ii) Ground of opposition based on section 30(i) of the Act

[57] It is the Opponent who has the initial evidentiary burden concerning its grounds of opposition. First, under the ground of opposition based on section 30(i) of the Act, it had to show knowledge by the Applicant of the Opponent's business activities in relation to the marketing of the latter's CID ciders at the time of filing this registration application, i.e. July 26, 2010. However, all of the Opponent's evidence about this claimed knowledge by the Applicant of its competitor's business activities is based on hearsay evidence, with the exception of one event that I will comment on later.

[58] Mr. Crawford then identified in his cross-examination the Opponent's employees who discussed among themselves the fact that the Applicant knew that the Opponent had begun using the CID mark in association with cider. None of the main participants in the verbal discussions on this subject filed an affidavit. Where are the affidavits by Mr. Marino, Mr. Bérubé or an individual called Guy? Mr. Crawford identified them all during his cross-examination. Why were they unable to file an affidavit on these facts?

[59] Mr. Crawford mentioned in his cross-examination that he had met with Michel Lasnier at a trade show held between April 4, 2010 and July 26, 2010 (filing date of this registration application) and that he had shown him a bottle of the Opponent's cider displaying the CID mark. However, Mr. Crawford, regarding this event of capital importance, does not recall the location or the name of the trade show nor the date or month (pages 78 and 81) of this event. However, during the same cross-examination, Mr. Crawford was able to precisely identify two other meetings that he had had with Marc-Antoine Lasnier during which they discussed this case, i.e. the Mondial du Cidre (February 2011) and the annual meeting of the Association des cidriculteurs artisans du Québec (March 2011).

[60] It is accepted that there were sales of cider displaying the Opponent's CID mark before July 26, 2010, the majority of them having been made at its production site and in several public markets. These were therefore traditional sales. The first commercial sale (as opposed to traditional sale) was made on October 18, 2010 to SAQ Alimentation under circumstances that I will discuss a little later. Therefore, I cannot infer from these traditional sales alone that the Applicant knew at the time of filing its registration application that the Opponent had begun using the CID mark in association with cider.

[61] Given the absence of affidavits by the Opponent's employees, the absence of commercial sales before July 26, 2010 and the absence of details on this presumed meeting between Mr. Crawford and Michel Lasnier, I conclude that the Opponent has not met its initial evidentiary burden of proving that the Applicant knew that the Opponent had begun using the CID trade-mark in association with cider at the time of filing its registration application. Accordingly, the Opponent has not shown that the Applicant was aware of the Opponent's use of the CID trade-mark or was acting in bad faith when it declared on July 26, 2010 in its registration application that it was convinced of having the right to use the Mark in Canada in association with the Wares and Services.

[62] For all these reasons, I therefore reject the ground of opposition based on section 30(i) of the Act.

iii) Ground of opposition based on section 16(3) of the Act

[63] Under this ground of opposition, the Opponent had to show that it had used the CID mark prior to July 26, 2010 within the meaning of section 4(1) of the Act, in association with cider [see section 16(3) of the Act]. It is for this reason that the two parties focused on the facts relating to the evidence of the first sale by the Opponent that occurred on April 4, 2010, since this was the only sale brought into evidence having occurred before the Relevant Date.

[64] There appears to have been a sale on April 4, 2010 at the Opponent's production site, but was this a CID mark cider? The cash register receipt and the internal form, which contains the list of products sold by the Opponent in this transaction, makes no reference to the CID mark. I am aware that Mr. Crawford had stated in his cross-examination that the only sparkling cider (as opposed to the still cider) offered for sale by the Opponent at this time was in association with the CID mark. However, I have serious doubts regarding Mr. Crawford's version of the facts regarding this sale.

[65] First, Mr. Crawford states in his Crawford 1 affidavit that the bottle sold on April 4, 2010 was identical to the one illustrated on exhibit CC-1 appended to the said affidavit. In his cross-examination, he reiterated this statement while adding that the labels on the bottles shown in exhibit CC-1 were the only ones that the Opponent may have used since April 4, 2010. In his cross-examination, he added that the mention 'sélections pinnacle' appeared on the back of the bottles (that we do not see on the photos filed) since the Opponent wanted to distinguish the cider products displaying the CID mark from its other products, including ice ciders, which were sold under the company name 'domaine pinnacle'. Lastly, he confirmed in his cross-examination that the alcohol content of the CID mark cider had always been 11%.

[66] However, in his affidavit Lasnier 1, Mr. Lasnier, contradicts some of Mr. Crawford's claims. First of all, he filed documentation concerning a competition launched by the Opponent to design a label that we find on the bottles appearing on the photos CC-1. It appears from this documentation that this competition was not launched until April 23, 2010 [see exhibit MCL-11 in the Lasnier 1 affidavit]. It was therefore impossible for the Opponent to have sold cider on April 4, 2010 in bottles displaying the labels illustrated in exhibit CC-1. The work to design these labels had not yet started on April 4, 2010.

[67] Mr. Lasnier filed documentation [exhibit MCL-12 in Lasnier 1] showing that the domain name '*selectionspinnacle*' had not been created until August 17, 2010. Accordingly, the CID mark cider could not have been advertised on this website until after this date. In addition, the 'Sélections Pinnacle' company name did not come into effect until October 10,

2012, according to the excerpt from the Registre des entreprises filed as exhibit CC-4 in the Crawford 2 affidavit [see paragraph 17 in the Crawford 2 affidavit]. These documents contradict Mr. Crawford's statements to the effect that the CID mark cider had always been sold under the company name 'Sélections Pinnacle'.

[68] Mr. Crawford provided us with sales figures for cider displaying the CID mark in 2010, both in number of bottles and in dollars. However, he did not specify the amount for sales prior to July 26, 2010. The only evidence on file is the sale that occurred on April 4, 2010, which I have already commented on.

[69] I find that the Opponent has not met its initial evidentiary burden of proving use of the CID mark in association with cider before July 26, 2010.

[70] Should it be shown that I was wrong to exclude the content of paragraphs 4-15 in the Crawford 2 affidavit from the file record, even in considering them, I would arrive at the same conclusion and for following reasons:

[71] First, it was not until after filing of the Lasnier 1 affidavit that the Opponent tried to change tack by filing the Crawford 2 affidavit. Mr. Crawford then describes a sequence of events that are incompatible with his first version of the facts.

[72] Mr. Crawford claims in his Crawford 2 affidavit that in late 2009 the Opponent thought up the idea of marketing new products for still cider. I note that Mr. Crawford does not mention sparkling cider whereas the first sale dated April 4, 2010 concerned sparkling cider according to the version of the facts provided during cross-examination on his Crawford 1 affidavit.

[73] Accordingly, it appears the Opponent decided to test its new products by selling them at its store. On March 22, 2010, the Opponent had a label designed in-house for these new products. Mr. Crawford filed a photo of this label [exhibit CC-1 in Crawford 2] but no documents were filed to support this date of March 22, 2010.

[74] However, label CC-1 in Crawford 2 displays the following:

- Cidre Tranquille-Still Cider
- Domaine Pinnacle
- 9% alc./vol.

[75] Although this label displays the mention 'CID', all of the inscriptions identified above are in contradiction with his first version of the facts. First, he had stated that the first bottle sold was 'sparkling cider'. Mr. Crawford has not filed a label for this type of cider. The mention 'Domaine Pinnacle' contradicts his statement to the effect that he wanted to dissociate cider displaying the CID mark from the Domaine Pinnacle company name. In addition, the reference to 9% alc./vol.' contradicts his statement to the effect that the CID mark cider had always had the same alcohol content, i.e.11%.

[76] Lastly, Mr. Crawford was clear in his cross-examination: the cider displaying the CID mark had always displayed the label appearing on the photos filed as exhibit CC-1 in the Crawford 1 affidavit. Never, in his cross-examination, did he refer to a label produced in-house that had been used for the traditional sales made at the cider production site. It was not until after filing of the Lasnier 1 affidavit, which called into question the authenticity of the use of the labels appearing on the photos CC-1 in the Crawford 1 affidavit that Mr. Crawford disclosed facts relating to the use of another label displaying the CID mark.

[77] Another fact which undermines Mr. Crawford's credibility is his statement in the Crawford 2 affidavit that the Opponent held all of the authorizations necessary to sell the CID mark products [paragraph 16 and exhibit CC-3 in support of the Crawford 2 affidavit]. However, Mr. Lasnier, in his Lasnier 2 affidavit, filed a copy of an application by the Opponent submitted to the RAJQ dated February 23, 2011 and amended March 28, 2011 [exhibit I-2 in Lasnier 2]. The Opponent's claims in this application contradict Mr. Crawford's statements. In paragraph 3 of this application, the Opponent claims:

[The Opponent] is specifically the holder of two alcohol permits, i.e. traditional cider permit and cider producer' permit and cannot sell its products in Quebec without approval from the SAQ....(my underlining)

[78] It appears from this request filed with the RAJQ that the Opponent had still not obtained approval from the SAQ to market its cider products displaying the CID mark.

[79] All of these anomalies, contradictions and clarifications after his cross-examination and the filing of documents by the Applicant raise serious doubt as to the authenticity of the facts surrounding the Opponent's first sale of cider in association with the CID mark presumed to have taken place on April 4, 2010. As the documentary evidence refers to this single sale prior to July 26, 2010, I find that the Opponent has not met its initial evidentiary burden of proving use of the CID mark before July 26, 2010.

[80] Therefore, for all these reasons I reject the ground of opposition under section 16(3) of the Act.

iv) ground of opposition based on section 2 of the Act (distinctiveness)

[81] It is generally accepted that the Relevant Date for analyzing this ground of opposition is the filing date of the statement of opposition (March 25, 2011) [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd and The Registrar of Trade Marks* (1991), 37 CPR (3d) 413 (FCA)].

[82] In the *Bojangles' International, LLC v. Bojangles Café Ltd* decision, 2006 FC 657, the federal court conducted an exhaustive analysis of the *Motel 6 Inc v. No.6 Motel Limited*, [1982]1 CF638 and *E & J Gallo Winery v. Andres Wines Ltd* [1976] 2 FC 3 decisions in order to determine the 'standard of evidence that must be met in order to prove that a trade-mark was sufficiently known to negate the distinctiveness of another trade-mark.' [Bojangles' *op.cit.* paragraph 24].

[83] I have to stress that the ground opposition as worded makes no reference to the reputation of the Opponent's CID mark. The latter had only recopied the wording found in section 2 under the definition of the term 'trade-mark'. The Applicant did not request details

on this ground of opposition. In such a case, I must take into account the evidence in the file record [see *Novopharm v. AstraZeneca AB et al* (2002), 21 CPR (4th) 289 (FCA)]. However, the Opponent's evidence is based solely on its sales of cider displaying the CID mark such as I will explain in greater detail below. In fact, the evidence of reputation concerns the Opponent's products displaying trade-marks other than the CID mark. There is no reference, in this portion of the Opponent's evidence to the reputation of these marks displaying the CID mark.

[84] It is important to distinguish the legal standard (the Opponent's mark must be known to some extent at least according to *Motel 6*) from the weight of evidence. However, the words 'important', 'significant' and 'sufficient' used in *Bojangles'* serve to qualify the reputation of the Opponent's mark, if this element is part of the evidence in the file record.

[85] Judge Noël so concluded in *Bojangles'* after having cited the relevant passages from the above-mentioned decisions:

A mark must be known to some extent at least to negate the established distinctiveness of another mark, and its reputation in Canada should be substantial, significant or sufficient. This is in compliance with case law. To require the mark's reputation to be 'substantial', 'significant' or 'sufficient' is not incompatible with the standard "to some extent at least", stated in the above-mentioned *Motel 6* decision, and neither is it contrary to the remarks made by the Federal Court of Appeal in the *Andres Wines* decision, in which the Court used the expression "very large number of tele-viewers [in Canada]" to describe the petitioner's evidence in regard to the advertising on television (see *Andres Wines*, paragraph 19). Lastly, I note that the Federal Court of Appeal made no changes to the standard stipulated by Judge Cullen in the above-mentioned *Bousquet v. Barmish Inc.*, decision (see *Bousquet v. Barmish Inc.*, [1993] FCA. No. 34).

[86] I must therefore analyze all of the evidence filed by referring to the facts that occurred prior to March 25, 2011. I have already discussed the sale of April 4, 2010. I will therefore focus on other events that occurred between April 4, 2010 and March 25, 2011 in order to determine whether the Opponent had met its burden of proving that its CID trade-mark was known on March 25, 2011, at least to some extent.

[87] In his Crawford 1 affidavit, Mr. Crawford claims that in 2010 the Opponent sold 3,900 bottles of cider displaying the CID mark. However, in his cross-examination, Mr. Crawford filed a bill dated October 18, 2010 issued to the SAQ [exhibit U-2 in Mr. Crawford's cross-examination] for the sale of 1,248 bottles of cider displaying the CID mark. At the hearing, the Opponent's agent conceded that it was an issue of a single sale by the Opponent of cider displaying the CID mark to SAQ Alimentation entered into evidence and having been made during the Relevant Period, i.e. between April 4, 2010 and March 25, 2011. I will comment in greater detail below on this single sale to the SAQ.

[88] If I deduct the number of bottles sold to SAQ Alimentation, i.e. 1,248, from the number of bottles sold in 2010, i.e. 3,900, I arrive at a total of 2,652 bottles sold at the Opponent's production site in Frelighsburg during 2010.

[89] However, if I take the total amount of sales in 2010 and then deduct the amount of the bill issued to the SAQ, i.e. approximately \$8,730 excluding taxes, I arrive at total sales of approximately \$17,300. However, according to the in-house document filed by Mr. Crawford as exhibit CC-5, we know that the CID still cider was sold at the Opponent's store for \$12,95 per unit and the sparkling cider for \$14.95 per unit. In using the scenario most favourable to the Opponent, i.e. the unit price of \$12,95, I arrive at a total number of 1,330 bottles of cider displaying the CID mark sold at its store.

[90] Although the Opponent may have suggested at the hearing a total number of 2,652 bottles in traditional sales (i.e. the difference between the total number of bottles sold less the bottles sold to the SAQ 3,900-1,248), I cannot accept it. Based on the sales figures provided by Mr. Crawford, I arrive at a total of 1,330 bottles in traditional sales. The difference is too large to grant any credibility to the figures provided by Mr. Crawford.

[91] Can I justify this gap of approximately 1,320 bottles (2,652 – 1,330) by the sales made in public markets? Mr. Crawford stated that the products displaying the Opponent's CID mark were indeed sold in some public markets. However, in his cross-examination, he stated that the Opponent had not sold large quantities at these locations ('We didn't sell that very much at

those' [question 523]). Accordingly, I cannot attribute this shortfall of approximately 1,300 bottles (i.e. one-third of the total number of bottles sold in 2010) to sales that may have been made at public markets and for which we have no information.

[92] Mr. Crawford provided no information on the Opponent's sales in 2011 up to the relevant date (March 25, 2011). All we have are the sales figures in the number of bottles and in dollars for the whole of 2011. The sales amounts for 2011 have not been broken down by month. All of the sales could have taken place after March 25, 2011. Moreover, such as was shown earlier, the Opponent had still not received approval at this date from the SAQ to sell its ciders displaying the CID mark.

[93] Regarding the promotion of cider displaying the Opponent's CID mark, Mr. Crawford claims in his Crawford 1 affidavit that the Opponent had an approximate average annual promotional budget of CAD\$700,000. However, he admitted in his cross-examination that this budget covered all of the Opponent's products. We therefore have no information concerning the CID ciders alone. Mr. Crawford also mentioned in his cross-examination that the promotion in 2010 was limited to brochures at the Opponent's store and promotional display racks. None of these documents was filed. There had been no newspaper advertising of the Opponent's CID ciders.

[94] Regarding promotional activities in 2011, Mr. Crawford stated in his cross-examination that the Opponent's CID ciders were listed in the Sobeys IGA, Metro, Provigo Maxi Loblaws supermarket chains, without specifying what he actually meant by 'listed'. An information newsletter for food store retailers had indeed been produced, but was dated May 30, 2011, i.e. after the relevant date.

[95] The Applicant argues that the sale to SAQ Alimentation of approximately 1,250 bottles of cider displaying the CID mark from October 18, 2010 does not constitute a sale in the normal course of business and cannot therefore be used by the Opponent to prove that the Opponent's CID mark was known to the public on March 25, 2011.

[96] The Applicant argues that the evidence shows that these bottles could not be found on the shelves of the businesses identified above, since the Opponent had still not, as at March 25, 2011, obtained approval from the SAQ to market cider displaying the CID mark [see application identified as I-5 included in exhibit MCL-7 in the Lasnier 2 affidavit]. It is clear from exhibit I-6 that on February 23, 2011, the SAQ refused the marketing of ciders displaying the CID mark. I also noted that the Opponent had filed a motion to dismiss, dated March 30, 2011 as part of its dispute with the RAJQ [see exhibit I-6 in the Lasnier 2 affidavit].

[97] Accordingly, on March 25, 2011, the Opponent was still in dispute with the SAQ which was refusing to sell the Opponent's CID ciders to various food stores. However, we know that on May 30, 2011, the SAQ advertised new products, which included the Opponent's cider displaying the CID mark. The evidence shows that this ad [exhibit CC-2 in Crawford 1] was intended for SAQ Alimentation customers, i.e. various merchants in the food store domain. We do not know the exact date on which the SAQ agreed to sell the Opponent's ciders displaying the CID mark, but, as previously shown, these sales began after March 25, 2011. Accordingly, the bottles of cider displaying the CID mark sold to SAQ Alimentation on October 18, 2010 were not found on the shelves of various food stores until after March 25, 2011. There had therefore been no sales to consumers prior to March 25, 2011.

[98] Aside from consumers who had gone to the Opponent's production site to purchase bottles of cider displaying the CID mark, the general public had had no contact with the Opponent's CID products prior to the relevant date. According to the Applicant, the fact of there having been no evidence of the sale of the Opponent's products displaying CID mark by a food store to consumers would prove fatal to the Opponent. In fact, the Opponent would not have been able to show that as at March 25, 2011, its CID mark was known to the public, to some extent at least.

[99] Conversely, the Opponent sustains that this sale by the Opponent to SAQ Alimentation can serve to show that its mark was known, since it had been made in the normal course of its business. In fact, according to the Opponent, this sale was the second step that would ultimately lead to a sale to consumers. The first step would be a visit to the food store chains

by the Opponent's representatives (however, there is no evidence on file that such visits took place) to offer them cider displaying the CID mark. The second step would be to supply this product to SAQ Alimentation so the latter could sell to food stores the quantities of cider that the latter might want to purchase. Lastly, once on the food store shelves, the Opponent's products displaying the CID mark would be available for sale to consumers.

[100] Even if I were to accept the fact that this single sale on October 18, 2010 to the SAQ could serve the Opponent's case, I find that the evidence of this single sale is clearly insufficient to conclude that the Opponent's CID mark was known to some extent.

[101] In *Masterpiece Inc v. Alavida Lifestyles Inc* 2011 SCC 27, the Supreme Court of Canada clearly indicated that the issue of confusion is to know whether, based on a first impression, a casual consumer somewhat in a hurry who sees the Applicant's mark while having an imperfect recollection of the Opponent's trade-mark would actually be confused.

[102] However, the ground of opposition, as argued by the Opponent, supposes that there was a risk of confusion on the relevant date between its CID mark and Mark. This leads to the presumption that the consumer could not distinguish the Wares and Services from the Opponent's products. The ultimate test is with consumers and not the SAQ, which is an expert in this field. Accordingly, it is the consumer having a vague knowledge of products displaying the CID mark who ultimately had to determine whether the Wares and Services came from the same source as the Opponent's CID products. Since we are referring to the consumer, the Opponent had the initial evidentiary burden of proving that its CID mark was known to Canadian consumers on the relevant date.

[103] In the circumstances, I can grant no weight whatsoever to this single sale to SAQ Alimentation made on October 18, 2010, since I do not have evidence that these products were distributed before the relevant date to various food stores and thereby be ultimately available for sale to consumers.

[104] There remains, therefore, only the traditional sales made in 2010 by the Opponent at its production site. However, as previously explained, there exists a serious doubt regarding the authenticity of the figures provided by Mr. Crawford concerning these sales. This must be interpreted to the detriment of the Opponent. Being unable to assign precise figures to these sales, I cannot conclude that the Opponent had met its initial evidentiary burden on the sole basis of its traditional sales.

[105] Based on the admissible evidence overall, I conclude that the Opponent has not met its initial evidentiary burden of showing that on the relevant date its CID mark was known to some extent at least such that the Mark could not serve to distinguish the Wares and Services from the Opponent's products displaying the CID mark.

[106] I therefore reject the ground of opposition based on the absence of distinctiveness of the Mark.

Disposal

[107] Given the powers delegated to me by the Registrar of Trade-marks pursuant to the provisions of section 63(3) of the Act, I reject the oppositions to registration applications Nos. 1,490,127 and 1,490,128 for the CID and CID & Design trade-marks, the whole as per the provisions of section 38(8) of the Act.

Jean Carrière
Member of the Trade-marks Opposition Board
Canadian Intellectual Property Office

Traduction certifiée conforme
Alan Vickers

Appendix A

The grounds of opposition can be summarized as follows:

1. The registration application does not comply with the requirements of section 30(i) of the *Trade-marks Act*, RSC 1985, ch T-13 («Act») in that the Applicant and the Opponent are both active in the same field, specifically the production and sale of cider and alcoholic beverages made from apples. Accordingly, each party is familiar with the other party's products, services and trade-marks. The Opponent has therefore used the CID and CID & Design trade-marks since as early as April 4, 2010 in association with cider. Given this fact, the Applicant could not and still cannot make the declaration stipulated in paragraph 30(i) since it could and still cannot be persuaded that it is entitled to use the Mark in Canada in association with the Wares and Services, given that at the time of filing the application, the Applicant was aware of the Opponent's use of the CID and CID Logo marks;
2. The Applicant is not the person entitled to register the Mark pursuant to the provisions of section 16(3)(a) of the Act, since on the filing date of the application, the Mark created confusion with at least one trade-mark previously used or displayed in Canada, i.e. the marks mentioned above.
3. The Mark is not distinctive within the meaning of section 2 of the Act, since the Mark cannot be truly distinguished and is not suitable to distinguish the Applicant's Wares and Services from those of the Opponent.