

**IN THE MATTER OF AN OPPOSITION  
by Federated Foods Limited to application No.  
762,091 for the trade-mark SUNSHINE KIDS  
filed by Okanagan Dried Fruits Ltd. and subse-  
quently assigned to Sun-Rype Products Ltd.**

On August 19, 1994, Okanagan Dried Fruits Ltd. filed an application to register the trade-mark SUNSHINE KIDS for “fruit juice” based on proposed use in Canada. The application was advertised for opposition purposes on February 8, 1995. The application was assigned to Sun-Rype Products Ltd. and the assignment was recorded in the Trade-marks Office on April 28, 1995.

The opponent, Federated Foods Limited, filed a statement of opposition on April 10, 1995, a copy of which was forwarded to the applicant on June 9, 1995. The first ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Trade-marks Act because it is confusing with the following four registered trade-marks owned by the opponent:

<u>Reg. No.</u>	<u>Trade-mark</u>	<u>Wares</u>
TMDA54720	SUNSHINE	flour mixes for use in baking and also for skim milk powder
TMDA20675	SUNSHINE	alimentary pastes
199,414	SUNSHINE	[a long list of food products including “orange juice”]
437,041	SUNSHINE & Design	[various food products and disposable paper products]

The second ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3)(a) of the Act because, as of the applicant’s filing date, the applied for trade-mark was confusing with the trade-mark SUNSHINE previously used in Canada by the opponent in association with various food products and services. The third ground of opposition is one of prior entitlement based on the opponent’s previously filed application No. 752,787 for the trade-mark SUNSHINE FRESH & Design for a long list of food products including “orange juice.” The fourth ground is that the applied for trade-mark is not distinctive because it is confusing with the opponent’s trade-mark SUNSHINE.

**The applicant filed and served a counter statement. As its evidence, the opponent submitted an affidavit of its Director, Marketing and Sales, Rudy Ciotti. As its evidence, the applicant submitted (1) an affidavit of Gary Turner, the Category Manager of Beverages for Sun-Rype Products Ltd. and (2) a certified copy of registration No. 339,068 for the trade-mark SUNSHINE KIDS for fruit snacks and similar wares standing in the name of the applicant. Only the applicant filed a written argument and no oral hearing was conducted.**

**In his affidavit, Mr. Ciotti states that the opponent has sold fruit juices in association with the trade-mark SUNSHINE for many years. Three representative labels are appended as Exhibit C to his affidavit, the labels being for pineapple juice, apple juice and orange and grapefruit juice. A representation of the mark as used appears below.**



**In his affidavit, Mr. Ciotti provides sales figures for SUNSHINE fruit juices for the period 1991-1995 totalling in excess of \$5.3 million. No label for orange juice 'per se' was provided and Mr. Ciotti does not specifically attest to sales of orange juice.**

**In his affidavit, Mr. Turner states that Sun-Rype Products Ltd. has become one of the most recognized names in the non-alcoholic beverage industry in Western Canada. The advertising materials appended to Mr. Turner's affidavit illustrate that the applicant commonly uses its house mark SUN-RYPE on most of its products.**

**Mr. Turner also states that Sun-Rype Products Ltd. or its predecessor-in-title and present licensee Okanagan Dried Fruits Ltd. has sold fruit snacks in association with the**

trade-mark SUNSHINE KIDS since January of 1986, sales for the five-year period preceding Mr. Turner's affidavit being in excess of \$2.5 million.

According to Mr. Turner, in October of 1994, the applicant launched a new line of fruit juices under its trade-mark SUNSHINE KIDS. Sales of that product for the period 1994-1996 have been in excess of \$3.2 million. There have also been fairly substantial advertising expenditures for that product.

As for the first ground of opposition, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. 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.

I will first consider the opponent's trade-mark registered under No. 199,414. As for Section 6(5)(a) of the Act, the opponent's registered mark SUNSHINE is inherently distinctive although it has a slightly suggestive or laudatory connotation when used with the registered wares orange juice since it suggests that the product promotes good health or that it has a southern origin. Thus, the opponent's mark is not inherently strong. The opponent has failed to evidence any use of its registered mark for any of the registered wares including orange juice. Thus, I must conclude that it has not become known at all in Canada with those wares although the Ciotti affidavit shows that it has become known to some extent with other fruit juices.

The applicant's mark is inherently distinctive when used in association with fruit juices since the phrase SUNSHINE KIDS does not have any readily apparent suggestive or laudatory connotation in relation to those wares. Given the sales and advertising attested to by Mr.

Turner, I am able to conclude that the applicant's mark has become known to some extent in Western Canada.

The length of time the marks have been in use favors the opponent although not to any significant extent since the opponent only provided evidence of sales dating back to 1991. As for the wares and trades of the parties, it is the applicant's statement of wares and the opponent's statement of wares in registration No. 199,414 that govern: see Mr. Submarine Ltd. v. Amandista Investments Ltd. (1987), 19 C.P.R.(3d) 3 at 10-11 (F.C.A.), Henkel Kommanditgesellschaft v. Super Dragon (1986), 12 C.P.R.(3d) 110 at 112 (F.C.A.) and Miss Universe, Inc. v. Dale Bohna (1994), 58 C.P.R.(3d) 381 at 390-392 (F.C.A.). However, those statements must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties is useful: see the decision in McDonald's Corporation v. Coffee Hut Stores Ltd. (1996), 68 C.P.R.(3d) 168 at 169 (F.C.A.).

There is a direct overlap between the statements of wares. Registration No. 199,414 includes "orange juice" and the applicant's application is for "fruit juices." The trades of the parties would presumably be the same. In fact, the evidence shows that both parties sell fruit juices in packaging designed for the ordinary retail consumer, the applicant's packaging of choice to date being small cartons and the opponent's being large cans.

As for Section 6(5)(e) of the Act, I consider that there is a high degree of resemblance between the marks at issue in all respects. In fact, the applicant has appropriated the entirety of the opponent's registered mark as the first and dominant component of its mark. Furthermore, consumers might well view SUNSHINE KIDS fruit juices as the opponent's new line of SUNSHINE juice for children.

As an additional surrounding circumstance, I have considered that the opponent uses its mark for fruit juices in a particular design format as illustrated above. The applicant's evidence shows that it commonly uses its trade-mark SUNSHINE KIDS together with a design

version of its house mark SUN-RYPE which features a sun or sunburst design similar to that used by the opponent. This, in my view, enhances the likelihood that consumers will confuse the marks at issue.

The applicant submitted that an additional surrounding circumstance is the absence of incidents of actual confusion notwithstanding contemporaneous use of the two marks. Although the opponent has not evidenced use of its mark for the registered wares “orange juice”, it has shown fairly extensive use of that mark for other fruit juices. However, the absence of evidence of actual confusion is not surprising given the fact that the applicant’s sales to date have been restricted to Western Canada and the apparent fact that the opponent has little or no reputation in that part of the country. In this regard, notwithstanding Mr. Ciotti’s statement that the opponent’s fruit juices have been sold in all provinces, Mr. Turner was unaware of the opponent’s mark despite his eight years of experience in the non-alcoholic beverage industry.

In view of my conclusions above, and particularly in view of the resemblance between the wares, trades and marks of the parties, I find that the applicant has failed to satisfy the onus on it to show that its trade-mark is not confusing with the opponent’s registered mark SUNSHINE. Thus, the first ground based on registration No. 199,414 is successful. Given the differences between the applicant’s wares and those set out in the opponent’s other registrations, I find that the applicant’s mark is not confusing with any of those additional three registered marks.

As for the second ground of opposition, the opponent has evidenced use of its mark SUNSHINE for fruit juices prior to the applicant’s filing date and non-abandonment of that mark as of the applicant’s advertisement date. The second ground therefore remains to be decided on the issue of confusion as of the applicant’s filing date in accordance with the wording of Section 16(3) of the Act.

My conclusions above respecting the first ground of opposition are also applicable respecting the second ground. In fact, given the earlier material time, the opponent's case is even stronger since the applicant's mark had not acquired any reputation for fruit juices as of the filing of the present application. Thus, I find that the applicant's mark SUNSHINE KIDS is confusing with the opponent's previously used mark SUNSHINE and the second ground is also successful.

As for the third ground of opposition, the opponent's application No. 752,787 for the trade-mark SUNSHINE FRESH & Design was filed on April 25, 1994 which is prior to the applicant's filing date. Thus, the third ground remains to be decided on the issue of confusion between the opponent's mark SUNSHINE FRESH & Design and the applicant's mark SUNSHINE KIDS. The material time for considering the circumstances respecting that issue is as of the applicant's filing date.

Like the opponent's registration No. 199,414, the opponent's application covers a long list of wares including "orange juice." Thus, my findings respecting the first ground of opposition are generally applicable to the third ground. If anything, the applicant's case is weaker respecting the third ground since its mark had no acquired reputation as of the material time. I therefore find that the marks at issue were confusing as of the applicant's filing date and the third ground is successful.

As for the fourth ground of opposition, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Furthermore, the material time for considering the circumstances respecting this issue is as of the filing of the opposition (i.e. - April 10, 1995): see Re Andres Wines Ltd. and E. & J. Gallo Winery (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.) and Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.).

**The fourth ground essentially turns on the issue of confusion between the opponent's trade-mark SUNSHINE used for fruit juices and the applicant's mark SUNSHINE KIDS used for the same wares. Given my earlier findings, I find that the applicant's mark was confusing with the opponent's mark as of the filing of the opposition. Thus, the fourth ground is also successful.**

**In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application.**

**DATED AT HULL, QUEBEC, THIS 25th DAY OF NOVEMBER, 1998.**

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