

**IN THE MATTER OF AN OPPOSITION by
Cabel Hall Citrus Limited and Trout Hall Ltd.
to Application No. 1134316 for the Trade-mark
TROUTHALL filed by Robert
Latchman**

I The Proceedings

[1] On March 15, 2002 Robert Latchman (the «Applicant») filed an application to register the trade-mark TROUTHALL (the «Mark») in association with:

beverages namely, fruit juices, non-carbonated beverages containing tea extracts, carbonated non-alcoholic beverages (containing fruit juices and flavourings); syrup; drink crystals; canned fruits; dried fruits; preserved fruits; preserves; custard powder; fruit jellies; pudding; pudding mixes; cookies and crackers; baking powder and noodles (the “Ware”);

based on use in Canada since May 1992. The application was subsequently advertised on September 10, 2003 in the Trade-marks Journal for opposition purposes.

[2] On February 10, 2004 Cabel Hall Citrus Limited and Trout Hall Ltd. (the «Opponent») filed a Statement of Opposition. The Applicant served and filed on June 23, 2004 a counter statement denying each ground of opposition raised by the Opponent.

[3] The Opponent’s evidence consists of the affidavits of Ria Mykoo and Gordon K. G. Sharp while the Applicant filed the affidavit of Robert Latchman. The Opponent filed as reply evidence a second affidavit of Mr. Sharp. He was cross-examined on both of his affidavits and the transcript of his cross-examination is part of the record.

[4] Both parties filed written submissions and only the Applicant was represented at the oral hearing.

II The Statement of Opposition

[5] The grounds of opposition are as follow:

1. The Applicant is not the person entitled to registration of the Mark in view of s. 16(1)(a) and (b) of the *Trade-Marks Act*, R.S.C. 1985, c. T-13 (the “Act”) because at the date of alleged first use of the Mark it was confusing with the Opponent’s trade-mark TROUT HALL and trade-name Trout Hall Ltd. that had been previously used in Canada by the Opponent;
2. The Applicant’s Mark is not distinctive and does not actually distinguish nor is adapted to distinguish the Wares from the wares of the Opponent;
3. The Applicant’s Mark is not capable of being distinctive of the Applicant as the word TROUT HALL is a geographical location in Jamaica known for its fruit growing;
4. The Mark is not registrable in view of s. 12(1)(b) of the Act because the word TROUT HALL, whether depicted, written or sounded, is either clearly descriptive or deceptively misdescriptive in the English or French language of the place of origin of the Wares.

III General Principles Governing the Grounds of Opposition

[6] The legal burden is upon the Applicant to show that its application complies with the provisions of the Act, but there is however an initial evidential onus on the Opponent to establish the facts relied upon by it in support of each ground of opposition. Once this initial burden is met, the Applicant still has to prove, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R. (3d) 293 and *Wrangler Apparel Corp. v. The Timberland Company*, [2005] F.C. 722].

[7] The relevant dates vary from one ground of opposition to another. They are:

- Registrability of the Mark under s. 12(1)(b) of the Act: the filing date of the application (March 15, 2002); [See *Zorti Investments Inc. v. Party City Corporation* (2004), 36 C.P.R. (4th) 90; *Havana Club Holdings S.A. v. Bacardi & Company Limited*, (2004) 35 C.P.R. (4th) 541]
- Distinctiveness of the Mark: the filing date of the statement of opposition is generally accepted as the relevant date (February 10, 2004). [See *Andres Wines Ltd. and E & J Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and

Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc. (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)]

➤ Entitlement to the registration of the Mark when the application is based on use: the claimed date of first use (May 1992) [see s. 16(1) of the Act]

IV Ground of Opposition Improperly Pleaded

[8] The second ground of opposition merely states the language of the Act without providing any facts to support it. It is improperly pleaded and is therefore dismissed [see *Faber-Castell Canada Inc. v. Binney & Smith Inc.* (1991), 36 C.P.R. (3d) 388].

V Entitlement Ground of Opposition

[9] In order to succeed under this ground of opposition, the Opponent must adduce evidence of use of its trade-mark TROUT HALL or its trade-name Trout Hall Ltd. in Canada prior to the claimed date of first use mentioned in the application and was not abandoned at the advertisement date of the application [see s. 16(5) of the Act]. I shall therefore review the evidence on this issue.

[10] Mr. Sharp is a Chairman of Trout Hall Limited and a consultant to Cabel Hall Citrus Limited (“Cabel”). I should point out that throughout the file both the Opponent and Applicant make reference to Cable Hall Citrus Limited despite the notice given by the Opponent that the correct spelling is Cabel Hall Citrus Limited. I consider the reference on either part to Cable Citrus Limited to be a typo.

[11] He explains the history and relationship between Cabel and Trout Hall Limited. The latter is a trading and export company while Cabel owns the trade-marks assigned at one point and time by Citrus Company of Jamaica Limited.

[12] Originally it was a family business based on fruit produce namely oranges, grapefruit and other citrus fruits grown at the Trout Hall Estate located near May Pen Clarendon, Jamaica. He states that the trade-mark TROUT HALL has been in use in association with fresh fruits since 1934 in two countries namely, United Kingdom and Canada.

[13] The first canning facilities opened in Jamaica in 1936 and sales of canned fruits took place on or about 1938. There is however no allegation that sales took place in Canada of canned fruits in 1938 in association with the trade-mark TROUT HALL. He admits during his cross-examination that what has been referred to in his affidavit as exhibit GKS-1, described as a label, to substantiate an allegation of use since 1938, does not exist and that there was no such exhibit attached to his affidavit.

[14] He provides some information and documents on registrations obtained in foreign jurisdictions for the trade-mark TROUT HALL but there is no allegation of registrations obtained in Canada for that trade-mark.

[15] He alleges that the sale of fresh and canned fruits and juices in Canada under the trade-mark TROUT HALL stopped in 1978. In fact during his cross-examination he admitted that there has been no use of the trade-mark TROUT HALL in Canada between 1978 and 1992. He stated during his cross-examination that the trade-mark TROUT HALL was reintroduced in Canada in 1992 in association with fresh fruits but such use ended in 1997. Since then, he asserts that there has been use of the trade-name Trout Hall Ltd. He claimed that such trade-name appears on labels but the only one that might have been used is for Tangelos sold in association with the trade-mark UGLI. He filed a sample of a current label bearing the trade-mark UGLI. He was unable to produce any documents to substantiate the use of the trade-name Trout Hall Ltd. in Canada since 1997.

[16] He admitted during his cross-examination that the fresh fruits presently sold in Canada by the Opponent are in association with the trade-mark UGLI and not TROUT HALL. In fact he stated that the trade-mark TROUT HALL is not currently used in Canada. The Opponent's only activity in Canada is limited to the sale of tangelos under the trade-mark UGLI.

[17] I conclude, from such summary of the Opponent's evidence and the statements made during the cross-examination of Mr. Sharp, that the Opponent failed to meet its initial onus to prove that the trade-mark TROUT HALL has been used in Canada prior to 1992. In any event the Opponent had the additional burden to prove that it had not abandoned such use in Canada as of the advertisement date of the present application, namely September 10, 2003. If there

were evidence of use of the trade-mark TROUT HALL prior to 1992, such use ceased in Canada in 1997.

[18] As for the trade-name Trout Hall Ltd., there is no evidence of its use in Canada prior to May 1992 and there is no evidence that it was still in use in September 2003. All we have in the record is a label on which the trade-name Trout Hall Ltd. appears but we do not have evidence of sales in Canada of tangelos in association with the trade-mark UGLI where the packaging bore this label (exhibit GKS-7). In any event Mr. Sharp admitted during his cross-examination that the trade-mark UGLI was first used in Canada only in 1997, which is after the relevant date. For these reasons the Opponent failed to meet its initial onus. Consequently the first ground of opposition is dismissed.

VI Registrability of the Mark

[19] The Opponent is challenging the registrability of the Mark on the basis that the Mark is either clearly descriptive or deceptively misdescriptive of the place of origin of the Wares, the whole contrary to s. 12(1)(b) of the Act. The Applicant admitted that the Wares do not originate from Jamaica [see paragraph 14 of Mr. Latchman's affidavit]. Therefore the Mark cannot be clearly descriptive of the place of origin of the Wares. However could it be deceptively misdescriptive of the place of origin of the Wares? The leading case on this issue is *Atlantic Promotions Inc. v. Canada (Registrar of Trade-marks)* (1984), 2 C.P.R. (3d) 183 (F.C.T.D.). The concept of deceptively misdescriptive within the meaning of section 12(1)(b) has been defined by Mr. Justice Cattanach in the following terms:

By virtue of para. 26(1)(c) of the Unfair Competition Act registration was prima facie, denied to word marks that "were clearly descriptive or misdescriptive of the character or quality of the wares". The adverb "clearly" also modified the adjective "misdescriptive".

In para. 12(1)(b) of the Trade-marks Act the word "clearly" as modifying the word "misdescriptive" has been replaced by the word "deceptively" so that it now reads "deceptively misdescriptive". The change was deliberate.

Many words may be "clearly misdescriptive" of the wares with which they are used in association but are not necessarily "deceptively misdescriptive".

In my view the proper test to be applied to the determination as to whether a trade-mark in its entirety is deceptively misdescriptive must be whether the general public in Canada would be misled into the belief that the product with which the trade-mark is associated had its origin the place of a geographic name in the trade-mark.

Whether a trade-mark is deceptively misdescriptive is as much a question of fact as is whether one trade-mark is confusing with another.
[See also *T.G. Bright & Co. v. Canada (Registrar of Trade-marks)* (1985), 4 C.P.R. (3d) 64 (Fed. T.D.)] (my underlines)

[20] Applying the test in *Atlantic Promotions*, I have to determine if the general public in Canada would be misled into the belief (or deceived) that the Wares originate from Trout Hall, Jamaica. In order to reach such conclusion, firstly there has to be some evidence that the average Canadian would associate the Mark with a location in Jamaica of the same name. Secondly, Canadians would know that such location produces fruits. I do not consider the fact that the Mark is written in one word, as opposed to two words for the location, to be an important factor.

[21] Mr. Sharp filed, as an exhibit, a portion of a map of Jamaica wherein Trout Hall is identified as a location in Jamaica [see exhibit GKS-6 to his affidavit sworn on January 19, 2005]. There are identified, on that portion of the map, some points of interest and a description of those but there is no information on Trout Hall at the bottom of the document filed. We have no information on the origin of the map and the other documents annexed thereto. At best, all I can conclude from the documents filed as exhibit GKS-6 is that there exists a location called Trout Hall in Jamaica.

[22] I reproduce what can be considered as relevant sections of Mr. Sharp's affidavit on this issue:

12. Due to the long association with Jamaica, within the immigrant customers based now in Canada which are still reliant on products such as limes, papaya and mangoes from West Indies, the name TROUT HALL would indicate goods produced on the Trout Hall Estate and therefore is associated with my company.

13. I therefore assert that having regard the long and extensive use of TROUT HALL, the reputation that my company has for producing quality fruits and the

limited market for products such as mangoes, the name TROUT HALL is and continues to be associated with my company and the only reason that the applicant could or would have adopted TROUTHALL is to trade on our reputation and residual rights established in Canada.

[23] During his cross-examination he confirmed that the association created by the use of the Mark would be with his company (presumably Trout Hall Limited) and its products as opposed to a location in Jamaica. He went on to admit that people might not associate the words Trout Hall with products originating from Jamaica [see page 28 of his cross-examination].

[24] Ms. Mykoo has been an articling student with the Opponent's agent firm. She conducted a search on the Internet on January 20, 2005 and visited the Statistics Canada website in an effort to determine the number of Jamaican immigrants in Canada. The information comes from the 2001 Census. There would be over 120,000 Jamaican immigrants living in Canada. The data appears in the website of Canada's national statistical agency. It is an official website within the meaning of the wording used by Madam Justice Tremblay-Lamer in *ITV Technologies Inc. v. Wic Television Ltd.* (2003), 29 C.P.R. (4th) 182 and as such I consider the extracts filed as admissible evidence. However all that it does establish is the Jamaican immigrants population in Canada in 2001.

[25] She also contacted the Jamaican Information Service and reports the information provided to her. Such information constitutes inadmissible hearsay evidence.

[26] In summary, no evidence has been provided to show that Jamaican immigrants now living in Canada nor Canadians would associate Trout Hall with a location in Jamaica known as an area where citrus fruits are grown.

[27] As for the content of Mr. Sharp's affidavit sworn on May 23, 2006, I do not consider such evidence proper evidence in reply. In this regard paragraphs 3 to 19 are not reply allegations and discuss the prior use of the Opponent's trade-mark TROUT HALL from 1934 to 1997. Such evidence should have been part of the Opponent's evidence under rule 41 and as such it

will not be considered. In any event those allegations do not address the issue of the Mark being deceptively misdescriptive.

[28] Applying the test set forth in *Atlantic*, the evidence summarized above does not enable me to conclude that the Mark would be deceptively misdescriptive of the place of origin of the Wares. The fourth ground of opposition is dismissed.

VII Distinctiveness

[29] The third ground of opposition is also based on the descriptiveness of the place of origin of the Wares. For the same reasons detailed under the analysis of the registrability of the Mark, I am also dismissing this ground of opposition.

VIII Conclusion

[30] Having been delegated authority by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the Opponent's opposition pursuant to s. 38(8) of the Act.

DATED IN BOUCHERVILLE, QUEBEC, THIS 11th DAY OF MAY 2009.

Jean Carrière,
Member of the Trade-marks Opposition Board