

**IN THE MATTER OF AN OPPOSITION by Artel Inc. to  
application No. 789,449 for the trade-mark CUISINE DE  
FRANCE & Design filed by CUISINE DE FRANCE LIMITED**

On August 4, 1995, the applicant, CUISINE DE FRANCE LIMITED, filed an application to register the trade-mark CUISINE DE FRANCE & Design, a representation of which appears below, based on use and registration of the trade-mark in the Republic of Ireland and proposed use of the trade-mark in Canada in association with the following wares:

“Partially and fully prepared bakery products, namely, croissants, baguettes, bread, biscuits, cakes and pastries.”

The applicant disclaimed the right to the exclusive use of the words CUISINE and FRANCE apart from its trade-mark.



The present application was advertised for opposition purposes in the *Trade-marks Journal* of February 12, 1997 and the opponent, Artel Inc., filed a statement of opposition on April 14, 1997, a copy of which was forwarded to the applicant on April 23, 1997. The applicant served and filed a counter statement in response to the statement of opposition on August 13, 1997. The opponent submitted as its evidence the solemn affirmation of John P. Geminari while applicant filed as its evidence the affidavit of Rita Goedike. John P. Geminari was cross-examined on his solemn affirmation, the transcript of the cross-examination and the responses to undertakings given during the cross-examination forming part of the opposition record. Both the applicant and the opponent filed written arguments and both parties were represented at an oral hearing.

The following are the grounds of opposition asserted by the opponent in its statement of opposition:

- a) The present application does not conform to subsection 30(e) of the *Trade-marks Act* in that the applicant did not have the intention of using its trade-mark in Canada in association with the wares covered in the present application;
- b) The present application does not comply with subsection 30(i) of the *Trade-marks Act* in that the applicant could not have been satisfied that it was entitled to use the applied for trade-mark in Canada in association with the wares covered in the present application;

c) The applied for trade-mark is not registrable in view of paragraph 12(1)(d) of the *Trade-marks Act* in that the applicant's trade-mark is confusing with the opponent's registered trade-mark CUISIFRANCE & Design, registration No. 354,927;

d) The applicant is not the person entitled to registration of the applied for trade-mark in view of paragraphs 16(3)(a) and (b) of the *Trade-marks Act* in that, as of the filing date of the present application, that is, August 4, 1995, the applicant's trade-mark, in addition to not being registrable in view of paragraph 12(1)(d) of the *Act*, was confusing with the opponent's trade-mark previously used in Canada by the opponent and in respect of which an application for registration had been previously filed in Canada by the opponent, which trade-mark had not been abandoned by the opponent as of the date of advertisement of the present application, that is, as of February 12, 1997;

e) The applied for trade-mark is not distinctive as contemplated by section 2 of the *Trade-marks Act* in that it does not distinguish and was not adapted to distinguish the wares covered in the present application from wares in association with which the opponent has used its registered trade-mark CUISIFRANCE & Design, registration No. 354,927.

The first two grounds of opposition are based on subsections 30(e) and 30(i) of the *Trade-marks Act*. While the legal burden is on the applicant to show that its application complies with subsections 30(e) and 30(i) of the *Act*, there is an initial evidential burden on the opponent to adduce sufficient admissible evidence which, if believed, would support the truth of the allegations relating to the section 30 grounds [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330]. In the present case, no evidence has been furnished by the opponent to show that the applicant did not intend to use the trade-mark CUISINE DE FRANCE & Design in Canada, as claimed in its application. Thus, the subsection 30(e) ground is unsuccessful. Likewise, no evidence has been submitted by the opponent to show that the applicant could not have been satisfied that it was entitled to use its trade-mark CUISINE DE FRANCE & Design in Canada on the basis *inter alia* that it considered that its trade-mark is not confusing with the opponent's trade-mark. Moreover, to the extent that the subsection 30(i) ground is founded on allegations set forth in the remaining grounds of opposition, the success of this ground is contingent upon a finding that the applicant's trade-mark is not registrable or not distinctive, or that the applicant is not the person entitled to registration of the trade-mark CUISINE DE FRANCE & Design, as alleged in those grounds [see *Consumer Distributing Co. Ltd. v. Toy World Ltd.*, 30 C.P.R. (3d) 191, at p.195; and *Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R.(2d) 152, at p.155]. I will therefore consider the remaining grounds of opposition.

The third ground is based on paragraph 12(1)(d) of the *Trade-marks Act*, the opponent

alleging that the trade-mark CUISINE DE FRANCE & Design is not registrable in that it is confusing with its registered trade-mark CUISIFRANCE & Design, registration No. 354,927. With respect to the third ground, the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between its trade-mark CUISINE DE FRANCE & Design and the opponent's registered trade-mark as of the date of decision, the material date with respect to the paragraph 12(1)(d) ground [see *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd. et al*, 37 C.P.R. (3d) 413 (F.C.A.)]. Further, in determining whether there would be a reasonable likelihood of confusion between the applicant's mark CUISINE DE FRANCE & Design and the opponent's registered trade-mark CUISIFRANCE & Design, the Registrar must have regard to all the surrounding circumstances including, but not limited to, those specifically enumerated in subsection 6(5) of the *Trade-marks Act*.

A representation of the opponent's registered trade-mark CUISIFRANCE & Design, registration No. 354,927, is set out below. Further, the opponent's registration for the trade-mark CUISIFRANCE & Design was the subject of section 45 proceedings which resulted in the statement of wares covered in the opponent's registration being amended. As a result, as of the date of my decision, the material date for considering the third ground, the opponent's registration covers: "Mets précuisinés".



Considering initially the inherent distinctiveness of the trade-marks at issue [para.6(5)(a)], the applicant's trade-mark CUISINE DE FRANCE & Design possesses some inherent distinctiveness when considered in its entirety even though the words CUISINE and FRANCE are descriptive when applied to bakery products and have been disclaimed by the applicant apart from its trade-mark. However, the design elements associated with the applicant's mark do add some measure of inherent distinctiveness to the trade-mark CUISINE DE FRANCE & Design. The opponent's registered trade-mark CUISIFRANCE & Design as applied to precooked meals possesses relatively little inherent distinctiveness in that it would, in my view, be perceived by the average

consumer as comprising a telescoping of the words CUISINE and FRANCE which are descriptive when applied to the opponent's precooked meals.

No evidence has been furnished by the applicant relating to its use of its trade-mark CUISINE DE FRANCE & Design in Canada. On the other hand, the Geminari affirmation attests to the opponent's use of its trade-mark CUISIFRANCE & Design in Canada in association with Italian meat sauce since 1995. However, from Mr. Geminari's affirmation, the opponent's sales of its Italian meat sauce in 1995 and 1996 were approximately \$14,000 while estimated sales in 1997 were \$10,000. In view of the opponent's limited use of its trade-mark CUISIFRANCE & Design, and assuming that Italian meat sauce qualifies as being a precooked meal as covered in the opponent's registration, the extent to which the trade-marks at issue have become known [para.6(5)(a)] and the length of time the marks have been in use [para.6(5)(b)] weigh only slightly in favour of the opponent in relation to the paragraph 12(1)(d) ground.

As for the nature of the wares [para.6(5)(c)] and the nature of the trade [para.6(5)(d)] of the parties, the applicant's "Partially and fully prepared bakery products, namely, croissants, baguettes, bread, biscuits, cakes and pastries" differ from the opponent's "Mets précuisinés" although the wares of both parties fall within the general category of food products and therefore might well be distributed through the same channels of trade. Nevertheless, I would not expect bakery products and precooked meals to be sold in the same area of a grocery store, supermarket or the like.

With respect to the degree of resemblance [para.6(5)(e)] between the trade-marks at issue, the applicant's trade-mark CUISINE DE FRANCE & Design and the opponent's trade-mark CUISIFRANCE & Design bear some degree of similarity in appearance and are similar in sounding. Moreover, when considered in their entirety, the marks bear some similarity in ideas suggested to the extent that both marks might well be perceived as suggesting that the wares of the parties are of a quality that one would find in France.

Having regard to the foregoing, and considering that the opponent's trade-mark CUISIFRANCE & Design as applied to precooked meals possesses relatively little inherent

distinctiveness and therefore is a weak mark which is not entitled to a broad ambit of protection, and considering further that the opponent's mark has not been shown to have acquired any significant measure of a reputation in Canada and that the wares of the parties differ, I find that even though there may be a potential overlap in the channels of trade of the parties, there would be no reasonable likelihood of confusion between the trade-marks at issue. I have therefore rejected the third ground of opposition.

The fourth ground relates to the applicant's entitlement to registration, the opponent alleging that the applicant's trade-mark was confusing as of the filing date of the present application with the opponent's trade-mark which had been previously used in Canada by the opponent and in respect of which an application for registration had been previously filed in Canada. As the opponent's application for registration of the trade-mark CUISIFRANCE & Design proceeded to registration on April 21, 1989 and therefore was not pending as of the date of advertisement of the present application, the opponent has not met the requirements of subsection 16(4) of the *Trade-marks Act* in relation to its paragraph 16(3)(b) ground. Thus, the paragraph 16(3)(b) ground is unsuccessful.

As for the opponent's alleged prior use of its trade-mark, the Geminari affirmation establishes that the opponent used the trade-mark CUISIFRANCE & Design in Canada in association with Italian meat sauce in 1995 but does not establish that such use occurred prior to August 4, 1995, the filing date of the present application. The opponent has therefore failed to establish its alleged prior use of its trade-mark CUISIFRANCE & Design in Canada. As a result, this aspect of the fourth ground is also unsuccessful.

The final ground relates to the alleged non-distinctiveness of the applicant's trade-mark in view of the opponent's use of its registered trade-mark CUISIFRANCE & Design in Canada. The material time for considering the non-distinctiveness ground is the date of the opposition, that is, April 14, 1997 [see *Re Andres Wines Ltd. and E.&J. Gallo Winery*, 25 C.P.R. (2d) 126 (F.C.A.), at p.130; *Park Avenue Furniture Corp. v. Wickes/ Simmons Bedding Ltd.*, 37 C.P.R.(3d) 412 (F.C.A.), at p. 424; and *Molson Breweries, a Partnership v. Labatt Brewing Company Limited*, 82 C.P.R. (3d) 1, at p.15)]. Further, while the legal burden is on the applicant to show that its trade-

mark CUISINE DE FRANCE & Design is adapted to distinguish or actually distinguishes its wares from the wares of the opponent, there is an initial evidential burden on the opponent to prove the allegations of fact in support of its non-distinctiveness ground [see *Clarco Communications Ltd. v. Sassy Publishers Inc.*, 54 C.P.R.(3d) 418 (F.C.T.D.), at p.431].

In the present case, the Geminari affirmation shows that the opponent has used the trade-mark CUISIFRANCE & Design in Canada in association with Italian meat sauce prior to the date of opposition. Thus, the legal burden is on the applicant to satisfy the Registrar that its mark was distinctive as of the material date. However, having concluded that there would be no reasonable likelihood of confusion between the trade-marks at issue, I am satisfied that the applicant has met the legal burden on it in relation to this ground. I have therefore dismissed the final ground of opposition.

Having been delegated authority by the Registrar of Trade-marks pursuant to subsection 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC, THIS 27<sup>th</sup> DAY OF NOVEMBER, 2000.

G.W.Partington,  
Chairperson,  
Trade-marks Opposition Board.