

IN THE MATTER OF AN OPPOSITION by
Teisseire France, une société anonyme, to application
No. 561,494 for the trade-mark Fruit Design filed by
Ault Foods Limited/ Les Aliments Ault Limitée

On April 23, 1986, the applicant, Ault Foods Limited/ Les Aliments Ault Limitée, filed an application to register the design trade-mark shown below based upon proposed use of the trade-mark in Canada in association with "fruit drinks".

The opponent, Teisseire France, une société anonyme, filed a statement of opposition on January 8, 1987. In its statement of opposition, the opponent alleged the following grounds of opposition:

- (a) that the applicant's application is not in compliance with Section 29 (now Section 30) of the Trade-marks Act in that, as of April 23, 1986, the applicant had already used its trade-mark in association with fruit drinks or, in the alternative, the applicant did not have the intention of using the mark in Canada, and finally that the applicant could not have been satisfied that it is entitled to use the trade-mark in Canada in association with fruit drinks;
- (b) that the applicant's trade-mark is not registrable in that, contrary to Section 12(1)(b) of the Trade-marks Act, the applicant's trade-mark is deceptively misdescriptive of the character or quality of fruit drinks or of the conditions of their production;
- (c) that the applicant is not the person entitled to registration of the trade-mark Fruit Design in that the applicant's trade-mark is confusing with one or the other of the opponent's PRESSI & Design trade-marks, represented below, which have been used and made known in Canada in association with fruit juice since at least as early as May 1984;

(d) that the applicant is not the person entitled to registration of its trade-mark in that, as of the filing date of the applicant's application, the applicant's trade-mark was confusing with the opponent's trade-mark application Nos. 529,121 and 529,118 for the trade-marks identified above as previously filed September 27, 1984 in Canada;

(e) that the applicant is not the person entitled to registration of the trade-mark Fruit Design in that the applicant's application is not in compliance with Section 29 (now Section 30) of the Trade-marks Act;

(f) that the applicant's trade-mark is not distinctive in that it is confusing with the opponent's design trade-marks identified above.

The applicant served and filed a counter statement in which it asserted that its trade-mark is registrable and distinctive, and that the applicant is the person entitled to its registration. Further, the applicant claimed that its application complies with Section 29 (now Section 30) of the Trade-marks Act.

The opponent filed as its evidence the affidavit of Serge Petit and certified copies of application Nos. 529,118 and 529,121 while the applicant filed as its evidence the affidavits of Holly Huard and Bradley F. Comeau. The applicant alone submitted a written argument and neither party requested an oral hearing.

With respect to the Section 30 grounds of opposition, there is an initial evidential burden on the opponent to prove the allegations being relied upon by it in respect of each of these grounds (see Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd., 3 C.P.R. (3d) 325, at pgs. 329-330). As no evidence has been adduced by the opponent in respect of these grounds, each of the Section 30 grounds of opposition has been rejected. Likewise, the Section 16 ground of opposition relating to the applicant's non-entitlement to registration which is based on the allegation that the applicant's application is not in compliance with Section 30 is also rejected.

The opponent next alleged that the applicant's trade-mark is deceptively misdescriptive of the character, quality or conditions of production of fruit drinks. In respect of this ground, the opponent in its statement of opposition alleged that "les marchandises sont décrites comme "fruit drinks", alors qu'il y en aurait plus d'un dans la boisson, ce qui est trompeur". The legal burden is on the applicant in respect of a Section 12(1)(b) ground of opposition. However, as in the case of the Section 30 grounds, there is an initial evidential burden on the opponent to prove the allegations being relied upon by it in respect of this ground. As no evidence has been adduced by the opponent

in respect of this ground, I have rejected the Section 12(1)(b) ground.

The opponent's remaining grounds of opposition are based on allegations of confusion between the applicant's trade-mark Fruit Design and the opponent's design trade-marks, representations of which appear above, as previously used and made known in Canada since May 1984 in association with fruit juice. Further, the opponent has relied upon its trade-mark applications filed in Canada for each of these trade-marks in challenging the applicant's entitlement to registration, as well as the distinctiveness of the applicant's mark.

With respect to the Section 16(3)(a) ground of opposition, there is a burden on the opponent in view of the provisions of Sections 16(5) and 17(1) of the Trade-marks Act to establish its prior use of its trade-marks in Canada in association with fruit juice, as well as non-abandonment of the trade-marks as of the date of advertisement for opposition purposes of the applicant's application (September 3, 1986). In this regard, and while the opponent has evidenced prior use in Canada of its trade-marks in association with concentrates for making fruit drinks which contain fruit juice, it has not evidenced use or making known in Canada prior to the filing date of the applicant's application of its design trade-marks in association with fruit juice which, in my view, differs from liquid fruit drink concentrates. Accordingly, the opponent has failed to meet the burden upon it in respect of its Section 16(3)(a) grounds which I have therefore rejected.

The opponent has also relied upon its two trade-mark applications, serial Nos. 529,118 and 529,121, for the design trade-marks appearing above, in challenging the applicant's entitlement to registration. In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue as of the filing date of the subject application (April 23, 1986), the material date in respect of the Section 16(3)(b) ground of opposition, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5) of the Trade-marks Act. Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks of the parties as of the material date.

As to the inherent distinctiveness of the trade-marks at issue, I consider that both the applicant's design trade-mark and the opponent's design trade-marks possess some measure of inherent distinctiveness even though the trade-marks at issue suggest that the respective wares of the parties have some type of fruit flavour associated with them.

The extent to which the trade-marks have become known and the length of use of the trade-marks favours the opponent in that the Petit affidavit establishes that the opponent's design trade-marks had become known to some extent in Canada in association with fruit drink concentrates containing fruit juice as a result of its sales and advertising of its concentrates in this country since 1982. On the other hand, the applicant's application is based upon proposed use of its design trade-mark in Canada.

The applicant's fruit drinks are closely related to the opponent's fruit juice concentrates covered in its trade-mark applications although the wares do differ. Further, and in the absence of any evidence to the contrary, I assume that the channels of trade associated with these wares would be overlapping and that fruit drinks and fruit juice concentrates might well be sold in close proximity to each other through the same retail outlets.

With respect to the degree of resemblance between the trade-marks at issue, I consider there to be no similarity in sounding of the trade-marks of the parties as the opponent's trade-marks would be identified by the trade-mark PRESSI while the applicant's trade-mark, being a design trade-mark, would not be sounded. As to the ideas suggested, both the applicant's trade-mark and the opponent's trade-marks suggest the idea that the respective wares of the parties have a fruit flavour. However, I do not consider that either party would be entitled to a monopoly in respect of such an idea as applied to fruit drinks and fruit juice concentrates. Further, as a matter of immediate impression and imperfect recollection, I find there to be little resemblance in the appearance of the trade-marks at issue when considered in their entireties. In this regard, both of the opponent's trade-marks are dominated by the trade-mark PRESSI and the caricature of a portion of an apple or a bunch of grapes having enlarged eyes which protrude beyond the representation of the apple and grapes respectively. On the other hand, no wording is associated with the applicant's design trade-mark and the caricature of what appears to be a strawberry in combination with the design of other fruits creates a different overall impression than do the opponent's trade-marks.

In view of the above, I have concluded that the applicant has discharged the burden upon it in respect of the issue of confusion and have therefore rejected the opponent's final ground of opposition based upon its trade-mark applications.

I reject the opponent's opposition pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 29th DAY OF JUNE 1990.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.