

IN THE MATTER OF AN OPPOSITION by Bessey Foods Ltd. to
application No. 529,120 for the trade-mark PRESSI filed by Teisseire
France Société Anonyme

On September 27, 1984, the applicant, Teisseire France Société Anonyme, filed an application to register the trade-mark PRESSI based upon use of the trade-mark in Canada since May 1984 in association with "concentré de jus de fruits" and based upon use and registration of the trade-mark in France in association with the following wares:

"Extraits de viande et de poissons; lait, graisse comestible, conserves, pickles, moutarde, poivre, vinaigre, sauces, épices; gelée, confiture, fruits et légumes conservés, séchés et cuits; pâtes à tartiner; café, thé, cacao, succédanés du café nommément: extraits de plantes purifiées donnant un goût de café naturel; confiserie nommément: chocolat, pâtes de fruits, fruits confits, glaces comestibles; miel, sirop de mélasse; bière, ale et porter, eaux minérales et gazeuses et boissons non alcoolisées nommément: liqueurs douces, non alcoolisées, sirop et autres préparations pour faire des boissons nommément: extraits de fruits, de plantes, de légumes sous forme de liquide concentré et de poudre"

The applicant's application is also based upon proposed use of the trade-mark in Canada in association with the following wares:

"Gelée, confiture, fruits et légumes conservés, séchés et cuits; pâtes à tartiner, coulis; café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café, nommément: extraits de plantes purifiées donnant un goût de café naturel; farine et préparations faites de céréales nommément: mélange de céréales pour le petit déjeuner, pains, biscuits, gâteaux, pâtisserie ou confiserie, nommément: chocolat, pâtes de fruits, fruits confits, glaces comestibles; bonbons, miel, sirop de mélasse, levure, poudre pour faire lever; boissons non alcoolisées nommément: liqueurs douces, non alcoolisées, sirop et autres préparations pour faire des boissons nommément: extraits de fruits, de plantes, de légumes sous forme de liquide concentré et de poudre, extraits de viande et de poissons; lait, graisse comestible, conserves, pickles, moutarde, poivre, vinaigre, sauces, épices; bière, ale et porter, eaux minérales et gazeuses"

The applicant claimed priority based on its application filed in France on May 14, 1984.

The opponent, Bessey Foods Ltd., filed a statement of opposition On June 20, 1986. In its statement of opposition, the opponent alleged that the applicant's trade-mark is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in that the applicant's trade-mark is confusing with the opponent's registered trade-marks: BESSEY'S, registration No. 130,258; BESSEY'S ORANGE ROYALE, registration No. 217,121; and BESSEY'S GRAPE ROYALE registration No. 219,207, which have been previously used in Canada by the opponent. The opponent also relied upon its previously filed application for the trade-mark BESSEY'S ROYALE in challenging the applicant's entitlement to registration and the distinctiveness of the applicant's trade-mark. Finally, the opponent alleged that the applicant is not the person entitled to registration and that the applicant's trade-mark is not distinctive in that the applicant's trade-mark is confusing with the opponent's trade-marks BESSEY, BESSEY'S, BESSEY'S APPLE ROYALE, BESSEY'S GRAPE ROYALE, BESSEY'S ORANGE ROYALE, and the opponent's trade-name Bessey as previously used in Canada in association with a variety of foodstuffs and non-

alcoholic beverages.

The applicant served and filed a counter statement in which it denied the opponent's grounds of opposition.

The opponent filed as its evidence a document entitled STATUTORY DECLARATION and which includes the following:

"And I have made this Declaration conscientiously believing it to be true and accurate and knowing that it has the same force and effect as if made under oath by virtue of the Canada Evidence Act."

However, from the jurat, it appears that the document was sworn to by one Robert Cracower. Further, Mr. Cracower was cross-examined and the transcript of the cross-examination also appears to confirm that Mr. Cracower swore to the contents of the document. I have therefore considered the document to be an affidavit of Mr. Cracower. Further, the transcript of the Cracower cross-examination forms part of the record in this opposition.

The applicant filed as its evidence the statutory declaration of Chantal Bouchard and the affidavit of Serge Petit. However, Mr. Petit failed to make himself available for cross-examination on his affidavit and his affidavit was therefore deemed not to form part of the applicant's evidence in this opposition.

The opponent alone filed a written argument and neither party requested an oral hearing.

The opponent's first ground of opposition is based on Section 12(1)(d) of the Trade-marks Act, the opponent asserting that there would be a likelihood of confusion between the applicant's trade-mark PRESSI and its registered trade-marks BESSEY'S, BESSEY'S ORANGE ROYALE and BESSEY'S GRAPE ROYALE. The most relevant of the registered trade-marks relied upon by the opponent is its registered trade-mark BESSEY'S. As well, the determination of the issue of confusion between the applicant's trade-mark PRESSI and the opponent's trade-mark BESSEY'S will effectively decide the remaining issues in this opposition.

In determining whether there would be a reasonable likelihood of confusion between the trade-marks PRESSI and BESSEY'S as of the date of decision, the material time in respect of the ground of opposition based on Section 12(1)(d) of the Act (see Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks, F.C.A. No. A-263-89, dated June 24 1991, yet unreported), the Registrar must have regard to all the surrounding circumstances,

including those specifically set forth in Section 6(5) of the 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 between the trade-marks at issue as of the material date.

With respect to subsection 6(5)(a) of the Act, the applicant's trade-mark PRESSI is inherently distinctive. The opponent's registered trade-mark BESSEY'S possesses some inherent distinctiveness although its possessive form does suggest that the word "Bessey" has a significance either as a given name or a surname. However, there is no evidence of record in this opposition which would confirm that such is the case.

The opponent's evidence establishes that its trade-mark BESSEY'S has become known in Canada in association with fruit and vegetable drinks, syrups and fruit juice concentrates with sales from 1977 to 1986 being of the order of \$40,000,000. The Cracower cross-examination and the undertakings furnished by the opponent establish that the applicant has used its trade-mark PRESSI in Canada in association with fruit drink concentrates such that the applicant's trade-mark PRESSI has become known to some extent in Canada. However, both the extent to which the trade-marks at issue have become known and the length of time the trade-marks have been in use favour the opponent in this opposition.

The applicant's wares, namely, its fruit juice concentrates, non-alcoholic liqueurs, syrups and other preparations for making beverages, mineral and soda water, as well as the applicant's jellies, tinned, dried and cooked fruit, are closely related to the opponent's wares covered in its registration which, as of the date of this decision, include "fruits, juice drinks of citrus and other fruits and combinations thereof; sweet cider, fruit juices". Certain wares were deleted from the opponent's registration pursuant to Section 44 (now Section 45) of the Trade-marks Act as of December 4, 1987 and are therefore of no relevance to the outcome of this opposition in view of the Park Avenue decision, referred to above. The remaining wares covered in the applicant's application are foodstuffs of various kinds which differ specifically from the opponent's non-alcoholic beverages and concentrates as covered in its registration and as sold by the opponent in Canada in association with the trade-mark BESSEY'S. Further, in the absence of any evidence to the contrary, I would conclude that the channels of trade associated with the wares of the parties would be overlapping.

As for the degree of resemblance between the trade-marks at issue, the applicant's trade-mark PRESSI, being inherently distinctive, does not possess any idea while the opponent's trade-mark BESSEY'S suggests the given name of a person. As such, the ideas suggested by the trade-marks at

issue differ. Further, the trade-marks bear relatively little similarity in appearance when considered as a matter of first impression and imperfect recollection.

With respect to the sounding of the trade-marks PRESSI and BESSEY'S, the applicant has relied upon the statutory declaration of Chantal Bouchard. While Ms. Bouchard does indicate that the average francophone would sound the words PRESSI and BESSEY differently, she does point out that the words PRESSI and BESSEY are not as distinguishable when sounded in English as they are when sounded in French. However, the declarant Bouchard has not qualified herself to give expert opinion evidence in respect of the pronunciation of the trade-marks at issue in the English language. In any event, the issue of confusion must be assessed from the point of view of the average bilingual Canadian. In this regard, I would note the following comments of the hearing officer in Les Vins La Salle Inc. v. Les Vignobles Chantecler Ltée, 6 C.P.R. (3d) 533, at pages 535 to 536:

In view of the above, I consider the trade-marks PRESSI and BESSEY'S might well be sounded in a similar manner by the average bilingual Canadian having a knowledge of both the English and French languages.

Having regard to the above and, in particular, to the similarity between the trade-marks PRESSI and BESSEY'S in sounding when considered as a matter of first impression and imperfect recollection, and bearing in mind that the applicant's fruit juice concentrate and non-alcoholic beverages overlap with the opponent's wares and would travel through the same channels of trade, I have concluded that the applicant has failed to discharge the legal burden upon it of establishing that there would be no reasonable likelihood of confusion between its trade-marks PRESSI as applied to "gelée, fruits conservés, séchés et cuits; concentré de jus de fruits; boissons non alcoolisées, nommément: liqueurs douces non alcoolisées, sirop et autres préparations pour faire des boissons nommément: extraits de fruits, de plantes, de légumes sous forme de liquide concentré et de poudre; eaux minérales et gazeuses" and the opponent's registered trade-mark BESSEY'S. On the other hand, I do not consider that there would be any likelihood of confusion between the opponent's trade-mark BESSEY'S and the applicant's trade-mark PRESSI as applied to the remaining wares covered in the applicant's application. In this regard, I would note the finding of the Federal Court, Trial Division in respect of there being authority to render a split decision in Produits Ménagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH, 10 C.P.R. (3d) 492.

In view of the above, I refuse the applicant's application in respect of: "concentré de jus de fruits; gelée, fruits conservés, séchés et cuits; boissons non alcoolisées nommément liqueurs douces, non alcoolisées, sirop et autres préparations pour faire des boissons nommément: extraits de fruits, de plantes, de légumes sous forme de liquide concentré et de poudre; eaux minérales et gazeuses" and otherwise reject the opponent's opposition to registration of the applicant's application in view of the provisions of Section 38(8) of the Trade-marks Act in respect of the following wares: "confiture, légumes conservés, séchés et cuits; pâtes à tartiner, coulis; café, thé, cacao, sucre, riz, tapioca, sagou, succédanés du café, nommément: extraits de plantes purifiées donnant un goût de café naturel; farine et préparations faites de céréales nommément: mélange de céréales pour le petit déjeuner, pains, biscuits, gâteaux, pâtisserie ou confiserie, nommément: chocolat, pâtes de fruits, fruits confits, glaces comestibles; bonbons, miel, sirop de mélasse, levure, poudre pour faire lever; lait, graisse comestible, conserves, pickles, moutarde, poivre, vinaigre, sauces, épices; bière, ale et porter".

DATED AT HULL, QUEBEC THIS 31ST DAY OF OCTOBER 1991.

G.W.Partington,

Chairman,
Trade Marks Opposition Board.