TRADE-MARKS

REGISTRATION

Appeal from Federal Court decision (2018 FC 408) upholding Trademarks Opposition Board decision (2016 TMOB 30) rejecting appellant's opposition to trademark applications filed by respondent to register JAVELO, JAVELO & DESIGN — Appellant filing statements of opposition against JAVELO applications on grounds applications contrary to *Trade-marks Act*, R.S.C., 1985, c. T-13, ss. 2, 12(1)(d), 16(3)(a),(b), 30(b), 50 — Respondent filing counter statements — Board concluding JAVELO trademark not used in violation of Act, not leading to likelihood of confusion with appellant's JAVEX marks — Appellant appealing Board's decision before Federal Court — Appellant filing new evidence before Federal Court, including brand awareness surveys — Federal Court considering this evidence too cursory to allow for determination of extent of use or of marks' acquired distinctiveness — Refusing to consider surveys on basis impossible to assess reliability, relevance thereof — Finding reasonable Board's findings that JAVELO marks not improperly used prior to registration, not losing their distinctiveness due to their use by third parties — Finding no confusion between parties' marks — Concluding that both parties' marks possessing limited inherent distinctiveness — Fact same products associated with two marks at issue not sufficient, for Federal Court, to counterbalance low degree of resemblance — Whether Federal Court erring: in its approach to fresh evidence; in applying wrong legal test for confusion; in dismissing the appellant's other grounds of opposition — Federal Court not erring in its assessment of new evidence — Surveys not presented to Federal Court through qualified expert — When applying test for confusion, trier of fact must have regard to all surrounding circumstances, including those specifically enumerated in Act, s. 6(5) — Federal Court doing precisely that in present case — No error in Federal Court's statement that consumer "is not always hurried to the same extent" for valuable or niche market goods — Federal Court not making palpable, overriding error in assessing degree of resemblance between marks — Decision of Board due high degree of deference — Trademarks suggestive of product sold having limited inherent distinctiveness, thus having limited protection — Even small difference with such marks sufficient to diminish likelihood of confusion — Assessment of inherent distinctiveness cannot be limited to one of two official languages of Canada — Fact that unilingual francophone or bilingual consumer may not be confused by marks cannot cancel out likelihood of confusion for unilingual anglophone — No palpable, overriding error in *de novo* assessment performed by Federal Court with respect to acquired distinctiveness of appellant's marks — Rejection of appellant's ground of opposition based on Act, s. 12(1)(d) entirely warranted — Appeal dismissed.

THE CLOROX COMPANY OF CANADA, LTD. V. CHLORETEC S.E.C. (A-141-18, 2020 FCA 76, de Montigny J.A., reasons for judgment dated April 20, 2020, 25 pp.)