



THE REGISTRAR OF TRADE-MARKS  
LE REGISTRAIRE DES MARQUES DE COMMERCE

**Citation: 2015 TMOB 93**  
**Date of Decision: May 26, 2015**

**TRANSLATION**

**IN THE MATTER OF AN OPPOSITION  
by Constellation Brands Québec Inc.  
against application No. 1,545,286 for the  
trade-mark MADEMOISELLE & Design  
in the name of Julia Wine Inc.**

Translator's note: Original translated decision has been corrected so as to rectify incorrect meanings in section [3] and section [20].

Introduction

[1] Constellation Brands Québec Inc. (the Opponent) opposes registration of the trade-mark MADEMOISELLE & Design (reproduced below) (the Mark) covered by application No. 1,545,286 in the name of Julia Wine Inc. (the Applicant).



[2] This application, filed on September 27, 2011, is based on the projected use of the Mark in association with the following products: “non-alcoholic wines; wines” (hereinafter sometimes referred to as the Products).

[3] The Opponent bases its opposition on various grounds revolving around either the issue of compliance of the application with section 30 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act), or the issue of the likelihood of confusion between the Mark and the trade-marks ELLE and IMPERIAL & CROWN DESIGN covered by the registrations described in the appendix, owned by the Opponent or by Constellation Brands Canada Inc. (Constellation Canada), as the case may be, and having been used in Canada.

[4] Such as it will stem from my analysis, I consider there is reason to accept this opposition, without there being the need to rule on each ground of opposition.

#### The record

[5] The statement of opposition was filed on August 13, 2013.

[6] The Applicant filed a counter statement denying each of the grounds of opposition argued.

[7] In support of its opposition, the Opponent has filed, as main evidence, affidavits by Dominique Berberi, brand manager for the Opponent, sworn on February 28, 2014, and Steven Bolliger, executive vice-president of marketing at Constellation Canada, sworn on the same date.

The Opponent has further filed, as additional evidence, with the registrar's permission, certified copies of the registrations listed in the appendix.

[8] The Applicant, for its part, decided not to file any evidence.

[9] Neither party has filed a written argument. Only the Opponent was represented at the hearing held in this file, with the Applicant having ultimately decided to not attend the hearing.

#### The burden incumbent on the Parties

[10] It is initially for the Opponent to establish the well-foundedness of its opposition. However, the legal onus of showing that the Mark is registrable falls to the Applicant, according to the balance of probabilities [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) and *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

#### Analysis

##### Non-compliance of the application within the meaning of section 30(h) of the Act

[11] The Opponent argued that the application does not meet the requirements stipulated in section 30(h) of the Act since the application does not contain a design of the Mark, as well as the number, which can be prescribed, of the precise representations of the Mark.

[12] More specifically, the Opponent stated at the hearing that the Mark consists of a juxtaposition of two labels appearing on a bottle of wine, namely, the neck label and the main label affixed at the bottom of the bottle. Using various photographs of shelves of wine bottles filed as Exhibit DB-4 in support of Ms. Berberi's affidavit, which show, in particular, bottles of wine from third parties bearing the two types of label (neck label and main label) spaced apart, and furthermore submitting that the Registrar can readily see that such labels appear spaced apart on bottles of wine, the Opponent submits that the Applicant is clearly and obviously not intending to use the Mark as represented in the application and that the Mark design in the application is not an exact representation of the Mark.

[13] The *Three-dimensional Marks* Practice Notice published on December 6, 2000 states that, for two-dimensional marks applied to three-dimensional objects:

As a general principle, where an application is for a two-dimensional mark, the drawing of the mark should show the mark in isolation and should not show the mark as applied to a three-dimensional object. Where a better understanding of the mark would be achieved by submitting a drawing showing the mark applied to a three-dimensional object, such a drawing will be accepted by the Office provided that the applicant complies with the following requirements:

1. The three-dimensional object must be shown in dotted outline.
2. The application must contain a description of the mark that makes clear that the application covers the two-dimensional mark only.
3. The description of the mark must specifically state that the three-dimensional object shown in dotted outline in the drawing does not form part of the trademark.

Should the description or the drawing of the mark explicitly or implicitly indicate that the mark has, in whole or in part, a shape that is defined by the shape of a three-dimensional object, the mark will be considered to be a three-dimensional mark and must be identified as such in the description. The Office will not, however, object to a mark being identified as a two-dimensional mark merely because *the description includes a statement that the mark (whether it consists of one or more elements) is applied in a particular position (or positions) on a three-dimensional object*; such a statement is viewed as being merely a restriction on the scope of protection being claimed for a two-dimensional mark.

Where (in cases where the drawing shows a mark applied to a three-dimensional object) the Office has doubts about an applicant's statement that its mark is a two-dimensional mark, the Office may request the applicant to submit a drawing showing the mark in a flat two-dimensional state; if the mark cannot be shown in a flat two-dimensional state, the Office will consider the mark to be a three-dimensional mark.

[Emphasis added]

[14] In the present case, I agree with the Opponent that the latter has met its initial evidentiary burden.

[15] First note that I am not bound by the fact that this application has successfully passed the examination process by the Canadian Intellectual Property Office. In fact, decisions by the examination section are not enforceable and have no precedential value with respect to opposition proceedings. On the one hand, the examination section does not have access to the evidence that the parties file in opposition proceedings. Furthermore, the burden of proof which an applicant must meet at the examination stage is different than the one required as part of an

opposition [see in particular *Now Communications Inc v CHUM Ltd* (2003), 32 CPR (4th) 68 (TMOB)].

[16] In light of the evidence of record, the accuracy of the drawing of the Mark is seriously put into question in that the element of the Mark made up of the neck collar and the element consisting of the main label appear to consist of two separate labels meant to be placed at different locations on a bottle. However, the drawing of the Mark is presented as a whole. The application does not contain any description of the Mark indicating how the elements of the Mark are affixed, nor does it contain any three-dimensional object represented in dotted outline showing where said elements are positioned. In other words, the evidence filed by the Opponent raises serious questions as to whether a true juxtaposition of two elements is involved, regardless of how they are positioned.

[17] Given the complete lack of evidence or of any representations on the part of the Applicant in this respect, I believe that the Applicant has not established, according to the balance of probabilities, that the design of the Mark is in compliance with section 30(h) of the Act.

[18] Therefore, I am accepting the ground of opposition based on section 30(h) of the Act.

#### Other grounds of opposition

[19] Given my previous conclusion, and given that the Applicant has shown very little interest in these proceedings, I believe it is not necessary to examine the remaining grounds of opposition.

#### Decision



[20] Pursuant to the authority delegated to me under subsection 63(3) of the Act, I refuse the application under subsection 38(8) of the Act.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified translation  
Carole Biondic

Appendix

Mark	Reg. No.	Registration date	Products	Owner
ELLE	LMC827,112	June 26, 2012	<i>Wines</i> [vins]	Opponent
ELLE	LMC808,928	October 13, 2011	<i>Wines</i> [vins]	Opponent
IMPERIAL & CROWN DESIGN (according to the design reproduced below):    	LMC698,622	October 16, 2007	<i>Wines</i> [vins]	Constellation Canada