

IN THE MATTER OF AN OPPOSITION  
by L. Rose & Company Limited to  
application No. 565,867 for the  
trade-mark ROSE'S COUNTRY  
CLASSICS & Design filed by  
Dubowsky Investment Corp.

On July 11, 1987, the applicant, Dubowsky Investment Corp., filed an application to register the trade-mark ROSE'S COUNTRY CLASSICS & Design (illustrated below) based on use in Canada since February 1, 1986 for "jams, jellies, banana butter, party sugar and antipasto." The application was advertised for opposition purposes on January 3, 1990.

The opponent, L. Rose & Company Limited, filed a statement of opposition on February 5, 1990, a copy of which was forwarded to the applicant on February 20, 1990. The grounds of opposition include, among others, that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Trade-marks Act because it is confusing with the opponent's trade-mark ROSE'S registered under No. UCA50004 for "fruit beverages and non-alcoholic cordials; fruit squashes; marmalades and lime curd."

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of J. Douglas Brownridge, the Director of Marketing of the opponent's former registered user. The applicant did not file evidence. Only the opponent filed a written argument but no oral hearing was conducted.

As for the ground of opposition based on Section 12(1)(d) of the Act, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Finally, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

The opponent's trade-mark ROSE'S is inherently weak since the use of the possessive form suggests that the word is being used as either a surname or a given name. However, the opponent has evidenced extensive sales and advertising in Canada of lime cordial and lime juice in association with its registered mark. I am therefore able to conclude that its mark has become well known in Canada.

The applicant's trade-mark ROSE'S COUNTRY CLASSICS is also inherently weak since ROSE'S is the possessive form of either the surname Rose or the given name Rose and the words COUNTRY CLASSICS are laudatory. There is no evidence from the applicant and I must therefore conclude that its mark has not become known at all in Canada.

The length of time the marks have been in use clearly favors the opponent. The opponent's registration includes marmalades which are very similar to the applicant's wares of jams, jellies and banana butter which all appear to be sweetened spreads. I have no idea what party sugar is but, in the absence of evidence from the applicant, I must conclude that it, too, is some kind of sweetened spread similar to the other wares. The final item in the applicant's statement of wares is antipasto which would appear to differ somewhat from the opponent's wares although the term antipasto is sufficiently vague that it might cover hors d'oeuvre items including various spreads. In any event, the onus was on the applicant to differentiate the wares of the parties and the applicant has effectively done nothing in this opposition. The trades of the parties could clearly overlap, Mr. Brownridge having evidenced that the opponent's market consists of grocery stores and supermarkets throughout Canada.

As for Section 6(5) (e) of the Act, there is a fair degree of resemblance between the marks at issue in all respects. In fact, the dominant portion of the applicant's mark consists of the entirety of the opponent's registered mark.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the similarities between the wares, trades and marks of the parties, the reputation associated with the opponent's mark and the applicant's failure to take any active step in this opposition subsequent to filing its counter statement, I find that the applicant has failed to satisfy the burden on it to show that its mark is not confusing with the opponent's registered mark. The ground of opposition based on Section 12(1) (d) of the Act is therefore successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 31st DAY OF March, 1994.

David J. Martin,  
Member,  
Trade Marks Opposition Board.