

IN THE MATTER OF AN OPPOSITION
by William V. Wilkinson, trading
as Wilrep Canada to application
No. 579,409 for the trade-mark
VINTNER'S CHOICE filed by Ridout
Wines Limited/Les Vins Ridout Limitee

On March 5, 1987, the applicant, Ridout Wines Limited/Les Vins Ridout Limitee, filed an application to register the trade-mark VINTNER'S CHOICE based on proposed use in Canada with "wines." The application was amended to include a disclaimer to the word VINTNER'S and was subsequently advertised for opposition purposes on December 16, 1987.

The opponent, William V. Wilkinson, trading as Wilrep Canada, filed a statement of opposition on April 18, 1988, a copy of which was forwarded to the applicant on April 29, 1988. 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 VINTNERS CHOICE registered under No. 316,484 for "bottle pouring spouts."

The applicant filed and served a counter statement. As his evidence, the opponent filed the affidavit of William V. Wilkinson. As its evidence, the applicant filed the affidavits of Ron Wood, David Hurdon, D. Cameron Emmons, John Hall and Herb McPhail. Only the applicant filed a written argument and 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 as of the date of my decision: see the unreported opposition decision in The Conde Nast Publications Inc. v. The Canadian Federation of Independent Grocers (S.N. 584,296; July 31, 1991). 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.

Neither of the trade-marks at issue is inherently strong, each having a somewhat laudatory connotation in relation to the respective wares. VINTNER'S CHOICE suggests that the applicant's wine is the one favored by wine makers. VINTNERS CHOICE suggests the same thing in relation to the opponent's pouring spouts.

The opponent has evidenced some minor sales of his product in Ontario and Quebec for the period 1985 to 1988. Thus, I can conclude that the opponent's mark has become known to a very limited extent in those two provinces.

The applicant has evidenced sales of its VINTNER'S CHOICE wine in many parts of Canada for the years 1987 and 1988 totalling almost \$1.5 million. There has also been some advertising of the mark in Ontario and British Columbia. Thus, I can conclude that the applicant's mark has become known to some extent throughout much of Canada.

The length of time the marks have been in use favors the opponent but this is not a circumstance of any significance in this case. The wares of the parties are different, wine being different in nature from a pouring spout. However, the wares of the parties are related in that the opponent's bottle pouring spout would be used with a bottle of

wine. The applicant submitted that this relationship does not apply in the present case since its VINTNER'S CHOICE wine is sold in cartons rather than in bottles. However, the statement of wares in the applicant's application contains no such restriction and it is the description in the statement of wares that governs: see the decisions in Mr. Submarine Ltd. v. Amandista Investments Ltd. (1987), 19 C.P.R. (3d) 3 at 10-11 (F.C.A.) and Henkel Kommanditgesellschaft v. Super Dragon (1986), 12 C.P.R. (3d) 110 at 112 (F.C.A.).

The evidence establishes that there is some overlap in the trades of the parties. Mr. Hurdon states that he was Retail Store Operations Manager for the applicant and that one of his responsibilities was the "non-wine inventory" sold through the applicant's retail wine outlets. Among the "wine-related" products Mr. Hurdon considered for sale through the applicant's retail outlets were wine glasses, corkscrews and pouring spouts. In fact, the opponent himself met with Mr. Hurdon with a view to selling his pouring spout through the applicant's retail outlets (see paragraph 10 of the Wilkinson affidavit and paragraph 4 of the Hurdon affidavit). There is also some evidence in the Wilkinson affidavit that the opponent's VINTNERS CHOICE pouring spout has been sold through government operated liquor stores in the province of Quebec.

As for Section 6(5) (e) of the Act, the marks at issue are virtually identical in all respects.

The applicant contends that the McPhail affidavit establishes that the word VINTNER'S or VINTNERS is common to the wine trade and that this fact should limit the scope of protection accorded to the opponent's registration to "bottle pouring spouts" only. However, the McPhail affidavit only evidences two pending applications and two registrations for trade-marks incorporating the word VINTNER'S or VINTNERS for wine. In the absence of evidence of use, the existence of two registrations and two applications is far from sufficient to allow me to infer that any of those marks have been used to any significant extent. Mr. Wood, in his affidavit, states that he is aware of a wine being sold under one of these third party marks (VINTNER'S SELECT) but he was unable to indicate the extent of sales in Canada in association with that mark. Thus, I am unable to conclude that consumers are used to seeing such marks in the marketplace and would therefore be more likely to discriminate one from another: see the opposition decision in Molson Cos. Ltd. v. Oland Breweries Ltd. (1988), 20 C.P.R. (3d) 270 at 274-275.

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 virtual identity between the marks, the relationship between the wares and the potential overlap between the trades of the parties, I find that I am left in a state of doubt respecting the issue of confusion between the two marks. Since the onus or legal burden is on the applicant to show no reasonable likelihood of confusion, I must resolve that doubt against the applicant. The ground of opposition based on Section 12(1) (d) 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 29th DAY OF November, 1991.

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