

IN THE MATTER OF AN OPPOSITION
by V& S Vin & Sprit Aktiebolag to
application No. 661,168 for the trade-mark
LES ABSOLUS filed by Raphael Maroquinerie Inc.

On June 29, 1990, the applicant, Raphael Maroquinerie Inc., filed an application to register the trade mark LES ABSOLUS, based on proposed use in Canada, for the following wares:

leather goods namely, handbags, coin purses, belts, suitcases, travel cases, jewelry cases, writing kits, agenda holders, telephone directories, memo holders, card holders, chequebook holders, credit card holders, key holders, briefcases, suit holders.

The subject application was advertised for opposition purposes in the Trade-marks Journal issue dated February 13, 1991. The opponent, V& S Vin & Sprit Aktiebolag (a company incorporated under the laws of Sweden and wholly owned by the Swedish Government), filed a statement of opposition on June 6, 1991, a copy of which was forwarded to the applicant on June 27, 1991. The applicant responded by filing and serving its counter statement. On March 31, 1994, the opponent was granted leave to amend its statement of opposition.

The first ground of opposition is that the application does not comply with Section 30(I) of the Trade-marks Act. The opponent alleges that the applicant could not have been satisfied that it was entitled to use the applied for mark LES ABSOLUS “having regard to the existence of the opponent’s . . . trade-marks which the opponent has used and made known extensively in Canada and around the world.” The trade-marks relied on by the opponent in respect of the first ground of opposition are ABSOLUT for liquor (regn. No. 273,537); ABSOLUT for distilled alcoholic beverages (regn. No. 284,706); ABSOLUT COUNTRY OF SWEDEN VODKA & Design for vodka (regn No. 379,908, illustrated below); ABSOLUT COUNTRY OF SWEDEN PEPPAR & Design for vodka (appln. No. 641,527, illustrated below); ABSOLUT COUNTRY OF SWEDEN CITRON

& Design for vodka (appln. No. 653,059, illustrated below); ABSOLUT REFLEXIONS for magazines (appln. No. 672,424).

The second ground of opposition is that the applied for mark LES ABSOLUS is not registrable, pursuant to Section 12(1)(d), because it is confusing with the opponent's above-mentioned registered trade-marks. The third ground of opposition is that the applicant is not entitled to registration, pursuant to Section 16(3)(a), in view of the opponent's prior use of its above mentioned marks. The fourth ground of opposition is that the applicant is not entitled to registration, pursuant to Section 16(3)(b), in view of the opponent's above mentioned trade-marks applications. The last ground of opposition is that the applied for mark is not distinctive within the meaning of Section 2 of the Act.

The opponent's evidence consists of the affidavits of Claes Andreasson, Area Director for North and South America for the opponent company; Keith McIntyre, Marketing Manager for Rémy Canada Inc. (parent company of the opponent's exclusive Canadian distributor namely, Sainsbury & Company Limited); and Giffin Thompson, Senior Vice-President, Canada, of the Audit Bureau of Circulations.

The applicant did not file any evidence in support of its application. Only the opponent filed a written argument and only the opponent was represented at an oral hearing.

Mr. Andreasson's evidence is that the opponent's ABSOLUT brands are the world's third largest selling brand of vodka, and the best selling imported brands in both the United States and Canada. Vodka under the mark ABSOLUT COUNTRY OF SWEDEN VODKA & Design was first sold in Canada in 1982. The volume of sales were 125,000 litres in 1984 rising steadily to 915,000 litres in 1990. Between January 1 and August 31, 1991, the opponent exported about 550,000 litres of its ABSOLUT brand of vodka from Sweden to Canada. Total sales of Vodka under the brand ABSOLUT COUNTRY OF SWEDEN VODKA & Design from 1988 to 1990 inclusive were about \$6.8 million, and sales from January to August, 1991 were about \$2 million. There were additional sales under other of the opponent's ABSOLUT brands.

Mr. Andreasson's testimony, corroborated by exhibit material attached to his affidavit, is that the opponent's marks are conspicuously displayed on all bottles of the opponent's vodka sold in Canada.

Promotion and advertising for the opponent's ABSOLUT marks in Canada include magazine advertisements and sponsorship of sporting events such as golf tournaments. Such advertising and promotion amounted to about \$3 million for the period 1986 to 1991 inclusive. Since at least as early as 1989, the opponent has run an ongoing series of full-page colour advertisements in various magazines circulated in Canada including *Canadian Home and Garden*, *City and Country Home*, *Cottage Life*, *Elle Quebec*, *Equinox*, *The Financial Post Magazine*, *Saturday Night*, *Toronto Magazine*, *Toronto Life Fashion*, *Vancouver*, and *Western Living*. Participants at golf tournaments sponsored by the opponent have received promotional items such as hand towels and golf shoe bags conspicuously displaying the mark ABSOLUT. Since about 1988, the opponent has distributed about 350 T-shirts annually bearing the mark ABSOLUT COUNTRY OF SWEDEN VODKA & Design at sporting events and at promotional

programs in licensed (for alcohol) premises. The opponent maintains an ongoing presence nationally in Canada in licensed establishments by distributing tent cards and posters, featuring the opponent's marks, for public display. The opponent also advertises at duty-free shops at Canada/U.S. border crossings in Ontario, in British Columbia, and at the duty-free store at Mirabel airport outside Montreal.

At paragraphs 19 and 20 of his affidavit, Mr. Andreasson testifies that

“An innovative feature of the promotion of V&S' vodkas in North America has been the commissioning of fashion designers to create garments and fashion accessories displaying V&S' various ABSOLUT trade-marks. In 1990, ten fashion designers were commissioned to create original dresses promoting ABSOLUTE vodkas and these garments were later publicized in a photographic feature entitled “Absolute Fashion” which appeared in the September 1990 issue of Elle magazine sold through out the United States and Canada . . . As a result of the extensive exposure of Canadians to V&S' family of ABSOLUT trade-marks, the word ABSOLUT has acquired a unique association with our products in Canada. This association now extends beyond alcoholic beverages to include clothing, fashion accessories and sporting goods . . . It would be easy for a Canadian to buy one of these [the applicant's] items in the mistaken belief that it has been produced in association with or under the approval of V&S.”

The foregoing testimony relates, of course, to the allegation in the statement of opposition that the applied for mark LES ABSOLUS is not distinctive of the applicant's wares. In this regard, in accordance with the usual rules of evidence, there is an evidential burden on the opponent to prove the facts inherent in the allegation that the applied for mark LES ABSOLUS is not distinctive of the applicant's wares. The presence of an evidential burden on a party with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist [see *Joseph E. Seagram & Sons v. Seagram Real Estate Ltd.* (1984), 3 C.P.R.(3d) 325 at 329-30 (TMOB), and see *John Labatt Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R.(3d)

293 at 297-300 (F.C.T.D.)). The opponent's evidence filed in this proceeding meets that burden.

The onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from those of the opponent, and others, throughout Canada [see *Muffin Houses Inc. v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R.(3d) 272 (TMOB)]. The presence of a legal burden means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant. The material time for considering the circumstances respecting the issue of distinctiveness is as of the filing of the opposition, in this case June 6, 1991 [see *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.); *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.)]. Further, I am permitted to take into account evidence of all the surrounding circumstances including, for example, the parties' sales and advertising under their respective marks up to the material date [see *Castle & Cooke, Inc. v. Popsicle Industries Ltd.* (1990), 30 C.P.R.(3d) 158 (TMOB)].

In the circumstances of this case, there is a high degree of resemblance between the applied for mark LES ABSOLUS and the opponent's mark ABSOLUT given the bilingual nature of Canada. The applicant's wares relate at least to a limited extent to the fashion industry and include various small articles often employed as promotional items. Further, the applicant has done nothing to counter the opponent's position, which has been supported by evidence, that the public might assume that the applicant's goods are approved, licensed, or sponsored by the opponent.

Considering the above, I find that the applicant has not met the legal onus on it to show that, on a balance of probabilities, its mark LES ABSOLUS is distinctive of its

wares. In other words, the opponent's evidence and arguments have made me at least doubt whether the mark LES ABSOLUS is distinctive of the applicant's wares and the applicant has done nothing to allay those doubts. As discussed earlier, such doubt must be resolved against the applicant. The opponent therefore succeeds on its ground of opposition alleging non-distinctiveness of the applied for mark [see *Glen-Warren Productions Ltd. v. Gertex Hosiery Ltd.* (1990), 29 C.P.R.(3d) 7 at 123 (F.C.T.D.)]. Accordingly, it is not necessary for me to consider the remaining grounds of opposition.

In view of the above, the applicant's application is refused.

DATED AT HULL, QUEBEC, THIS 22 DAY OF MARCH , 1996.

Myer Herzig,
Member,
Trade-marks Opposition Board