

**IN THE MATTER OF AN OPPOSITION by Venmar Ventilation
Inc. to application No. 663,020 for the trade-mark VENTMAX
filed by Nutech Energy Systems Inc.**

On July 26, 1990, the applicant, Nutech Energy Systems Inc., filed an application to register the trade-mark VENTMAX based upon proposed use of the trade-mark in Canada in association with “Residential/commercial ventilation appliances, namely air exchanger ventilator intended for connection to air duct system and related hardware and controls”.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of May 4, 1994 and the opponent, Venmar Ventilation Inc., filed a statement of opposition on June 30, 1994. The applicant served and filed a counter statement in which it denied the allegations of confusion between its trade-mark VENTMAX and the opponent's VENMAR trade-marks and the opponent's trade-name. The opponent filed as its evidence the affidavits of André Bédard and Lisa Cook while the applicant elected not to file any evidence. Both parties submitted written arguments and both were represented at an oral hearing.

The first ground of opposition is based on Subsection 30(i) of the *Trade-marks Act*, the opponent asserting that it has used the trade-mark VENMAR since May of 1978 and, as the applicant and the opponent carry on business in the same area and are generally aware of the products and trade-marks of their competitors, the applicant could not make the statement in the present application that it was satisfied that it was entitled to use the trade-mark VENTMAX in Canada in association with the wares covered in its application. While the legal burden is upon the applicant to show that its application complies with Subsection 30(i) of the *Trade-marks Act*, there is an initial evidentiary burden on the opponent in respect of its Section 30 ground [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330]. No evidence has been adduced by the opponent in support of its allegation that the applicant could not have been satisfied that it was entitled to use the trade-mark VENTMAX in Canada. Consequently, the opponent has failed to meet the evidentiary burden upon it in respect of this ground. In any event, even had the applicant been aware of the opponent's trade-mark VENMAR prior to filing the present application, such a fact would not have precluded the applicant from being satisfied that it was

entitled to use its trade-mark VENTMAX in Canada on the basis *inter alia* that its trade-mark is not confusing with the opponent's mark. Thus, the success of this ground is contingent upon a finding that the trade-marks at issue are confusing [see *Consumer Distributing Co. Ltd. v. Toy World Ltd.*, 30 C.P.R. (3d) 191, at p. 195; and *Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R. (2d) 152, at p. 155]. I will therefore consider the issue of the likelihood of confusion between the trade-marks of the parties in relation to the remaining grounds of opposition.

The second ground is based on Paragraph 12(1)(d) of the *Trade-marks Act*, the opponent alleging that the applicant's trade-mark VENTMAX is confusing with its registered trade-marks:

<u>Trade-mark</u>	<u>Registration No.</u>
VENMAR	251,161
VENMAR INC. & Design	346,399
VENMAR VENTILATION INC.	399,814
UNIVENT	294,662

In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue within the scope of Subsection 6(2) of the *Trade-marks Act*, the Registrar must have regard to all the surrounding circumstances including, but not limited to, those which are specifically enumerated in Subsection 6(5) of the Act. Further, the Registrar must bear in mind that the legal burden is upon the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks of the parties as of the date of my decision, the material date in relation to the Paragraph 12(1)(d) ground [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (F.C.A.)].

With respect to the inherent distinctiveness of the trade-marks at issue [*para. 6(5)(a)*], the applicant's trade-mark VENTMAX as applied to an air exchanger ventilator intended for connection to air duct system and related hardware and controls possesses some degree of inherent distinctiveness although the mark is suggestive of wares which are intended to provide maximum ventilation or air flow. Likewise, the opponent's registered trade-mark UNIVENT possesses a limited degree of inherent distinctiveness as applied to "systèmes de ventilation résidentielle, commerciale et industrielle" in view of the inherent weakness of the prefix VENT which is

suggestive of wares relating to ventilation or air flow. The opponent's registered trade-marks VENMAR, VENMAR INC. & Design and VENMAR VENTILATION INC. are inherently distinctive as applied to the wares and services covered in the opponent's registrations in that the mark VENMAR appears to be a coined word and therefore does not possess any apparent connotation in relation to the opponent's wares or services.

As no evidence has been furnished by the applicant, it must be assumed that its trade-mark VENTMAX has not become known to any extent in Canada. On the other hand, the opponent has submitted the affidavit of André Bédard, Vice-President, Sales/Marketing of the Venmar Hardware Division of the opponent, in support of its opposition. In his affidavit, Mr. Bédard states that the opponent commenced operations in the area of ventilation systems in 1976 and, as of the date of his affidavit [May 2, 1995], had become the largest manufacturer of equipment for use in residential, commercial and industrial air treatment in North America. According to Mr. Bédard, the opponent's sales in 1986 were more than \$8,000,000 and this amount increased annually to a level of \$40,000,000 in sales in 1994.

The applicant submitted that the opponent has not adduced evidence of labels or packaging bearing its registered trade-marks. However, the photocopies of invoices annexed to the Bédard affidavit show the manner of use of the opponent's trade-marks VENMAR and VENMAR VENTILATION INC. & Design in association with the wares identified in the invoices. In my view, the invoices bearing the opponent's trade-marks constitute evidence of use of the opponent's marks within the scope of Subsection 4(1) of the *Trade-marks Act*. In any event, and even if the invoices did not constitute use of the trade-marks VENMAR and VENMAR VENTILATION INC. & Design, they do constitute evidence showing that these marks have become known in Canada. Thus, the extent to which the trade-marks at issue have become known [*para. 6(5)(a)*] clearly favours the opponent. As well, the length of time the trade-marks at issue have been in use [*para. 6(5)(b)*] is a further factor weighing in the opponent's favour.

In assessing the likelihood of confusion in relation to a Paragraph 12(1)(d) ground, the Registrar must consider the wares or services set forth in the applicant's application and in the

opponent's registrations since it is these wares and services which determine the respective monopolies being claimed by the parties in relation to their trade-marks. Thus, the applicant's air exchanger ventilator intended for connection to air duct system and related hardware appear to be identical to the "échangeurs d'air" covered in registration Nos. 251,161 and 399,815 and appear to overlap the wares identified as "systèmes de ventilation résidentielle, commerciale et industrielle" and "systèmes motorisés de ventilation résidentielle" covered in registration Nos. 294,662 and 346,399, respectively. With respect to the registered trade-mark VENMAR, I would note that registration No. 251,161 was amended October 29, 1993, subsequent to the filing date of the present application, to cover "échangeurs d'air". However, that does not preclude the consideration of these wares in relation to the Paragraph 12(1)(d) ground of opposition. As a result, there is an overlap in the respective wares of the parties [*para. 6(5)(c)*]. On the other hand, the remaining wares and the services covered in the opponent's registrations differ from the wares covered in the present application. With respect to the applicant's air exchangers, it would appear from the photocopies of the opponent's invoices that its air exchangers are fairly expensive and it might be inferred that the average consumer might therefore exercise more care when purchasing an air exchanger than in the case of less expensive wares. However, no evidence has been furnished by the applicant which would support that assumption.

As for Paragraph 6(5)(d) of the Act, the Registrar must also have regard to the channels of trade which the average person would consider as being normally associated with the wares covered in the present application and the wares and services covered in the opponent's registrations [*see Mr. Submarine Ltd. v. Amandista Investments Ltd.*, 19 C.P.R. (3d) 3, at pp. 10-12 (F.C.A.)]. Thus, absent any restriction in the statements of wares and services of the parties, the Registrar cannot take into consideration the fact that the opponent may only have provided certain of its wares through "hardware stores and renovation centres" [*see Henkel Kommanditgesellschaft Auf Aktien v. Super Dragon Import Export Inc.*, 2 C.P.R. (3d) 361, at p. 372 (F.C.T.D.), 12 C.P.R. (3d) 110, at p. 112 (F.C.A.); and *Miss Universe, Inc. v. Dale Bohna*, 58 C.P.R.(3d) 38, at pp. 390-392 (F.C.A.)]. While the applicant submitted in its written argument that the average consumer would give more consideration and thought to the purchase of an air exchanger than to "a typical roof vent or chimney cap", the applicant has ignored the fact that the opponent's registration for the trade-mark VENMAR

also covers air exchangers which are identical to the wares covered in its application. In any event, no evidence has been furnished by the applicant as to the manner in which the average consumer would purchase the wares of the parties. As a result, I have concluded that the channels of trade of the parties would or could overlap [*para. 6(5)(d)*].

There is some similarity in appearance and in sounding between the applicant's trade-mark VENTMAX and the opponent's registered trade-mark VENMAR although there is little similarity either in appearance or in sounding between the applicant's trade-mark and the opponent's registered trade-marks VENMAR INC. & Design, VENMAR VENTILATION INC. and UNIVENT. Further, there is no similarity in the ideas suggested by the applicant's trade-mark VENTMAX and the opponent's trade-marks VENMAR, VENMAR INC. & Design and VENMAR VENTILATION INC. On the other hand, the trade-marks VENTMAX and UNIVENT suggest the idea that the respective wares relate to ventilation or air flow. However, I do not consider that either party would be entitled to a monopoly in respect of such an idea as applied to the respective wares of the parties [see, in this regard, *APV Vent-Axia Ltd. v. Vendair Drummond Ltée*, 36 C.P.R. (3d) 64, at p. 67].

Considering that the air exchangers of the parties appear to be identical and could therefore travel through the same channels of trade, that the opponent's trade-mark VENMAR has been shown to have acquired a fair degree of notoriety in the area of ventilation systems and related equipment in Canada, and that there is some resemblance in appearance and in sounding between the applicant's trade-mark VENTMAX and the opponent's registered trade-mark VENMAR, and bearing in mind that the applicant has not adduced any evidence in support of its application, I have concluded that the applicant has failed to meet the legal burden upon it of establishing that there would be no reasonable likelihood of confusion between its trade-mark VENTMAX and the registered trade-mark VENMAR. Consequently, the applicant's trade-mark is not registrable in view of the provisions of Paragraph 12(1)(d) of the *Trade-marks Act*. I have therefore not considered the remaining grounds of opposition relied upon by the opponent in its statement of opposition.

Having been delegated by the Registrar of Trade-marks pursuant to Subsection 63(3) of the *Trade-marks Act*, I refuse the applicant's application pursuant to Subsection 38(8) of the *Trade-*

marks Act.

DATED AT HULL, QUEBEC THIS 31st DAY OF JULY, 1997.

G.W.Partington,
Chairman,
Trade Marks Opposition Board