IN THE MATTER OF AN OPPOSITION by Sta-Rite Industries Inc. to application no. 692,304 for the mark STA-DRY filed by GSW Inc.

On October 24, 1991, the applicant, GSW Inc., filed an application to register the mark STA-DRY based on proposed use in Canada in association with the wares

submersible and utility pumps.

The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated May 27, 1992 and was opposed by Sta-Rite Industries Inc. on October 27, 1992. A copy of the statement of opposition was forwarded to the applicant on November 30, 1992. The applicant responded by filing and serving a counter statement.

Several grounds of opposition are raised in the statement of opposition, however, most of the grounds need not be considered because the opponent did not file evidence to support its pleadings. In the result, the sole remaining issue for decision is whether the applied for mark is not registrable, pursuant to paragraph 12(1)(b) of the *Trade-marks Act*, because it is clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. In this regard, the character or quality of a ware includes its purpose or primary function: see *Thomson Research Associated Ltd. v. Registrar of Trade Marks*, 67 C.P.R. (2d) 205 at p. 208 (F.C.T.D.); *S.C. Johnson & Son, Ltd. v. Marketing Int'l Ltd.*, 44 C.P.R. (2d) 16 at 24-26 (S.C.C.)

Paragraph 12(1)(b) reads as follows:

> (12)(1)Subject to section 13, a trademark is registrable if it is not
>
> ... ...
>
> (b) whether depicted, written or ***sounded,*** either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin; (emphasis added)

It is to be noted that the first component of the applied for mark is sounded as the word STAY.

That issue of whether the applied for mark STA-DRY, for use in association with the applicant's wares, offends paragraph 12(1)(b) is to be decided from the point of view of an everyday user of the wares considering the mark in its entirety, as opposed to carefully analysing and dissecting the mark into its component parts, and as a matter of first impression: see *Wool Bureau of Canada Ltd. v. Registrar of Trade-marks* (1978), 40 C.P.R. (2d) 25 at 27-28 (F.C.T.D.); *Atlantic Promotions Inc. v. Registrar of Trade-marks* (1984), 2 C.P.R. (3d) 183 at 188 (F.C.T.D.). The material time for considering the circumstances respecting a ground of opposition based on paragraph 12(1)(b) is as of the date of my decision: see *Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers* (1992) 41 C.P.R.(3d) 234 (F.C.A.).

The legal burden is on the applicant to establish that its mark is not clearly descriptive or deceptively misdescriptive. Ordinarily there is an evidential burden on the opponent to adduce sufficient evidence which, if believed, would support its allegation that the applied for mark offends the provisions of paragraph 12(1)(b). However, an opponent need not necessarily adduce evidence in a case such as this where the opponent's legal argument may be based entirely on the ordinary meaning of words. The presence of a legal burden on the applicant means that if a determinate conclusion cannot be reached after all the evidence is in and after the arguments are heard, then the issue must be decided against applicant: see *Joseph E. Seagram & Sons v. Seagram Real Estate Ltd.* (1984), 3 C.P.R.(3d) 325 at 329-330 (TMOB); *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 consists of the affidavit of Ian McMillan, student at law. Mr. McMillan's affidavit merely serves to introduce into evidence copies of pages from two dictionaries showing definitions for the words DRY and STAY. The applicant elected not to file any evidence. Only the opponent filed a written argument, however, both parties were represented at an oral hearing.

The word "dry," as evidenced by the opponent, means "free of moisture; not wet . . . depleted or devoid of water . . . drained away . . ." and the word "stay," as evidenced by the

opponent, means “to continue to be as specified, as to condition . . . stop, check . . . cease action . . .” In view of the above definitions, the opponent submits the following, at pp 2-3 of its written argument:

In my view the opponent has supported its case that the mark STA-DRY, when sounded, describes the function of, or the principal result achieved from using, the applicant’s wares, that is, that applicant’s wares provide the user with the means to keep moisture in check. The applicant’s arguments at the oral hearing were not persuasive nor do I consider that any of the jurisprudence cited by the applicant was applicable in the instant case.

In view of the above, I find that the applied for mark is clearly descriptive of the applicant’s wares. Accordingly, the subject application is refused.

DATED AT HULL, QUEBEC, THIS 18th DAY OF JUNE, 1998.

Myer Herzig,
Member,
Trade-marks Opposition Board