



# Canadian Intellectual Property Office

## **THE REGISTRAR OF TRADEMARKS**

**Citation:** 2024 TMOB 009

**Date of Decision:** 2024-01-19

## **IN THE MATTER OF AN OPPOSITION**

**Opponent:** Miguel Torres S.A.

**Applicant:** Wines and Company Brokerage & Consulting, S.L.U.

**Application:** 1,865,161 for TORO BRAVO & Design

### **INTRODUCTION**

[1] Wines and Company Brokerage & Consulting, S.L.U. (the Applicant) has filed application No. 1,865,161 (the Application) to register the trademark TORO BRAVO & Design, shown below (the Mark). The Application is based on proposed use in association with “wines”:



**TORO BRAVO**

[2] Miguel Torres S.A. (the Opponent) opposes registration of the Mark. The opposition is primarily based on an allegation that the Mark is confusing with the Opponent's trademarks SANGRE DE TORO and GRAN SANGRE DE TORO, previously used and registered in association with wine. The Opponent also alleges prior use of these word trademarks together with a design of a bull, including as shown below:



[3] For the reasons that follow, the Application is refused.

#### **THE RECORD**

[4] The Application was filed on October 30, 2017, and was advertised for opposition purposes in the *Trademarks Journal* of July 17, 2019. On September 17, 2019, the Opponent filed a statement of opposition under section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The statement of opposition raises grounds of opposition based on registrability under section 12(1)(d), entitlement to register under section 16(1)(a), distinctiveness under section 2, and entitlement to use under section 38(2)(f) of the Act.

[5] The Applicant filed a counter statement denying the grounds of opposition.

[6] In support of the opposition, the Opponent filed certified copies of its registrations for the trademarks SANGRE DE TORO and GRAN SANGRE DE TORO. The Opponent also filed the affidavit of Caroline Leblanc, sworn August 27, 2020. At the time of swearing of her affidavit, Ms. Leblanc was employed by Vins Philippe Dandurand Ltée (Dandurand) as a brand ambassador for the Opponent. Ms. Leblanc was cross-examined on her affidavit and the transcript (with exhibits) forms part of the record. The Leblanc affidavit provides information on the Opponent's business, including the use and promotion of the Opponent's SANGRE DE TORO trademarks.

[7] In support of the Application, the Applicant filed the affidavit of Whitney Lewis (sworn August 26, 2021), an administrative assistant employed by the agent for the Applicant. Ms. Lewis conducted various searches of the Canadian trademarks database, including for registrations in Nice Classes 32 and 33 containing: the word TORO (and phonetic equivalents thereof); the word BULL; and a design of a bull (Exhibits A-C). Ms. Lewis also provided a number of dictionary definitions, including for the word BRAVO from *The Canadian Oxford Dictionary* (Exhibit D); the results of various web searches including a Wikipedia search for the word TORO (Exhibit F), and the results of a search for “Tinta de Toro” on the website *winegeeks.com* (Exhibit G).

[8] The Applicant also filed the affidavit of Alex Patinios (sworn August 19, 2021), President of Dionysus Wines & Spirits Ltd. (Dionysus), a wine and spirit import agency in Ontario. Dionysus provides import and agency services for the Ontario market for the Applicant and also works with the Applicant to develop wine brands including the subject TORO BRAVO & Design. Mr. Patinios provides information relating to the introduction and sale of the Applicant’s wines in association with the Mark. Information on the Canadian wine market, and in particular, the use of the word TORO and bull designs in association with wines, is also provided.

[9] In reply, the Opponent filed the affidavit of Mariola Grabinski (sworn July 21, 2022). Ms. Grabinski is an administrative assistant employed by the agent of the Opponent and attaches to her affidavit a copy of the decision in *Miguel Torres, SA v Vins Arterra Canada, division Québec, Inc*, 2021 TMOB 200 (Exhibit A).

[10] Both parties filed written representations and only the Applicant attended a hearing.

#### **LEGAL ONUS AND EVIDENTIAL BURDEN**

[11] The Opponent has the initial evidential burden to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. Once that burden is met, the Applicant bears the legal onus of establishing, on a balance of probabilities, that the particular grounds of opposition should not prevent the registration of the Mark [*John Labatt Ltd v Molson*

*Companies Ltd*, 1990 CanLII 11059 (FC), 30 CPR (3d) 293; *Dion Neckwear Ltd v Christian Dior, SA et al*, 2002 FCA 29, 20 CPR (4th) 155]. This means that if a determinate conclusion cannot be reached in favour of the Applicant after a consideration of all of the evidence, then the issue must be decided against the Applicant.

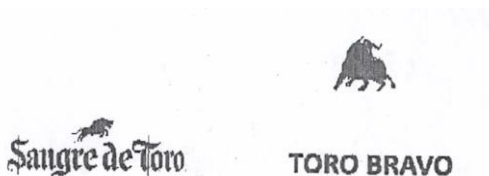
## **ANALYSIS OF THE GROUNDS OF OPPOSITION**

### ***Section 16(1)(a) ground of opposition***

[12] The section 16(1)(a) ground of opposition as reproduced from the statement of opposition alleges that:

...by virtue of Section 16(1)(a), the Applicant is not the person entitled to registration of the Mark covered under the Application, because at the date of filing of such application, namely October 30, 2017, it was confusing:

- i) with the Opponent's trademarks SANGRE DE TORO and GRAN SANGRE DE TORO, which had been previously used in Canada by the Opponent;
- ii) with the Opponent's trademarks SANGRE DE TORO and GRAN SANGRE DE TORO which had been used with the depiction of a bull, an example of which is below next to the applicant's application:



[13] Of the trademarks pleaded by the Opponent under this ground of opposition, I will focus on the composite mark shown above (and at paragraph 2 of this decision), consisting of the words SANGRE DE TORO underneath the design of a full side profile of a bull (SANGRE DE TORO composite mark), as I consider it to represent the Opponent's best case under this ground. If the Opponent does not succeed with respect to its pleading that there is a likelihood of confusion between the applied-for Mark and the Opponent's SANGRE DE TORO composite mark, it would not succeed with respect to the remaining trademarks pleaded under this ground.

### The Opponent meets its initial burden

[14] To meet its initial burden, the Opponent must show that it had used its SANGRE DE TORO composite mark in Canada prior to October 30, 2017, which is the date of filing of the Application. Further, the Opponent must show that it had not abandoned its trademark at the date of advertisement of the Application, namely July 17, 2019. I find the Opponent meets its evidential burden for this ground in view of its evidence of the SANGRE DE TORO composite mark appearing on the Opponent's wine bottles for at least the years 2006 and 2011-2019, along with the Opponent's evidence of annual wine sales from 2010 to 2019 in Canada [Leblanc affidavit, paras 13, 17 and invoices at Exhibit B]. As an aside, I note that the SANGRE DE TORO composite mark also appears on images of the Opponent's wine captured in the Applicant's evidence, for example on printouts from the LCBO (Liquor Control Board of Ontario) website from August 2020 (Patinios affidavit, Ex C).

[15] In determining whether two trademarks are confusing, all the surrounding circumstances should be considered, including those listed in section 6(5) of the Act: the inherent distinctiveness of the trademarks and the extent to which they have become known; the length of time the trademarks have been in use; the nature of the goods, services or business; the nature of the trade; and the degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them. These criteria are not exhaustive and different weight will be given to each one in a context specific assessment [*Mattel, Inc v 3894207 Canada Inc*, 2006 SCC 22, 1 SCR 772 at para 54; *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23, 49 CPR (4th) 401]. I also refer to *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 49, where the Supreme Court of Canada states that section 6(5)(e), the resemblance between the trademarks, will often have the greatest effect on the confusion analysis.

[16] The test for confusion is assessed as a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees the applicant's trademark, at a time when they have no more than an imperfect recollection of the opponent's trademark, and do not pause to give the matter any detailed consideration or scrutiny, nor to

examine closely the similarities and differences between the marks [*Veuve Clicquot, supra*, at para 20].

Inherent distinctiveness of the trademarks and the extent to which they have become known

[17] The parties' trademarks possess a fair degree of inherent distinctiveness because they contain foreign phrases (TORO BRAVO and SANGRE DE TORO) that hold no meaning in English or French [*Bedessee Imports Ltd v Compania Topo Chico*, 2014 TMOB 200]. Both of the trademarks also feature a bull design.

[18] With respect to the Opponent's trademark, SANGRE DE TORO is a Spanish phrase that can be translated to mean "blood of the bull" or "bull's blood" (per the foreign character translation provided in the GRAN SANGRE DE TORO registration; see also the Spanish-English translation dictionary definitions provided in the Lewis affidavit, Exhibit D). Citing the Spanish-English and French-English definitions provided in the Lewis affidavit (Exhibits D, E), the Applicant submits that for a French speaker, the meaning of 'Sangre de Toro' would be obvious due to its similarity with the French phrase 'Sang de Taureau', which holds the same meaning. However, in my view, this assertion is insufficient to establish that the average English or French-speaking consumer of the Opponent's wine would be aware of the meanings of the foreign words and phrase SANGRE DE TORO [a similar approach was adopted in *Miguel Torres, SA v Vins Arterra Canada, division Quebec, Inc*, 2021 TMOB 22 at para 27]. If I am wrong, this would not change my finding that the Opponent's trademark is inherently distinctive, since "blood of the bull" (or similar translations) and a bull design are not descriptive of wine.

[19] With respect to the Mark, the foreign character translation provided for TORO BRAVO in the Application is "courageous bull". The Applicant provides Spanish-English translation definitions for TORO and BRAVO, as well as the definition for BRAVO in *The Canadian Oxford Dictionary* (2nd ed) and the *Petit Robert French Dictionary* (Lewis affidavit, para 5, Exhibit D), though no definition for TORO from these publications is included. In its written representations, the Applicant submits that the word TORO appears in English dictionaries and is defined as "a bull used in fighting" and that the

phrase TORO BRAVO also appears in English dictionaries and is defined as a “fighting bull”.

[20] The Registrar may take judicial notice of dictionary definitions [*Tradall SA v Devil's Martini Inc*, 2011 TMOB 65 at para 29] and I acknowledge that TORO and TORO BRAVO appear in some dictionaries, including the *Merriam-Webster Online Dictionary*, though not all. For instance, no entry for TORO or TORO BRAVO appears in *The Canadian Oxford Dictionary* (2nd ed). However, the inclusion of these words in some dictionaries does not necessarily indicate how extensively or commonly that meaning is known to consumers. Indeed, dictionaries contain entries for common, lesser known and even obscure words [*ATP Athletique et Therapeutique Pharma Inc and ATP Institute Pty Ltd*, 2023 TMOB 65 at para 78]. Accordingly, I do not consider the inclusion of the word TORO and/or the phrase TORO BRAVO in some English dictionaries to be determinative of whether the average Canadian consumer of the wine would know or be familiar with their meaning. At most, I am prepared to accept that the word BRAVO has entered into the English and French lexicon. Again, if I am wrong, this would not change my finding that the Mark is inherently distinctive since neither “courageous bull” nor a bull design is descriptive of wine.

[21] At the hearing, the Applicant argued that the word TORO ought to be afforded a limited scope of protection because of its reference to Spain, the Toro Region and the grape variety, and that the image of a bull is also indicative of Spain. In support, the Applicant refers to materials including: a Wikipedia entry for “Toro, Zamora” identifying it as a town in Spain known as a wine-producing region (Exhibit F, Lewis affidavit); an excerpt from the website *winegeeks.com* (Exhibit G, Lewis affidavit) indicating that “Tinta de Toro” is a synonym for Tempranillo, a variety of wine grape grown in Spain; and a 2016 article from the publication “Wine Enthusiast” (Exhibit HH, Patinios affidavit) referring to the Toro region, “Tinta de Toro”, and Toro Denominacion de Origen. The Applicant also points to advertisements for Spanish wines incorporating the image of a bull, including a printout of an LCBO landing webpage for Spanish wines featuring a photograph of a large billboard featuring a bull in silhouette (Exhibit GG of the Patinios affidavit). The Applicant further notes Ms. Leblanc’s refusal, when cross-examined, to

answer whether she thought “the SAQ is using the bull in advertising generally as a symbol of Spain”. However, in my view, this evidence falls short of establishing that the average consumer of wines would attribute any of these meanings to the word TORO instead of perceiving it simply as a foreign word with no set meaning in English or French. As for the image of a bull, even if the bull is in fact the national animal of Spain, the evidence of record does not establish that the average consumer would be aware of this, nor am I prepared to take judicial notice of it.

[22] The strength of a trademark may be increased by means of it becoming known through promotion or use. To show the Opponent’s use and promotion of its trademarks, including the SANGRE DE TORO composite mark, the Opponent filed the Leblanc affidavit, which was subject to cross-examination. While the evidence could have been more fulsome, in particular by providing more evidence of the scope or reach of the promotional materials discussed below as well as information on advertising expenditures, based on a fair reading of the evidence, I am prepared to conclude that the SANGRE DE TORO composite mark has become known to at least some extent in Canada in association with the Opponent’s wine. Pertinent portions of Ms. Leblanc’s evidence are as follows:

- Ms. Leblanc states that SANGRE DE TORO-branded wine has been sold in Canada since June 1966 and, since that time, bottles of wine sold in Canada under the trademark SANGRE DE TORO have always shown the image of a bull alongside the trademark on the label (para 16). Ms. Leblanc characterizes the image of a bull and its association with the trademark SANGRE DE TORO as an integral part of the brand (para 16).
- Paragraph 17 of the Leblanc affidavit contains images of labelled wine bottles, under which are listed dates ranging from 2006 to 2019. The bottles are described as “prominently displaying the SANGRE DE TORO trademark with the image of a bull alongside the trademark on the label.” Ms. Leblanc states that these bottles are representative of the manner in which the Opponent sold its wines in Canada in the year listed under the image of each of the representative bottles.



- On cross-examination, Ms. Leblanc was presented with a picture of a bottle of SANGRE DE TORO wine from 2002 that did not include an image of a bull on the label. While Ms. Leblanc was unable to explain this inconsistency, I do not find that this necessarily undermines her evidence that the SANGRE DE TORO trademark appeared alongside the image of a bull on bottle labels for those years specifically cited in her affidavit (2006 to 2019). Rather, it would call into question the statement that SANGRE DE TORO has always appeared alongside a bull in Canada in earlier years, particularly since Ms. Leblanc did not look into the Opponent's labels prior to 2006 (cross Q45).
- Exhibit C is described as a collection of photographs from 2016 showing wine bottles prominently displaying the SANGRE DE TORO trademarks with the image of a bull. Ms. Leblanc states that the photographs are representative of the manner in which the Opponent's wines have been offered for sale to Canadians over the years (para 19). On cross-examination, Ms. Leblanc admitted that she did not take all of the photographs in Exhibit C nor did she know who took them. The Applicant takes the position that since Ms. Leblanc was unable to confirm who took the photos or where they were taken, these photos are inadmissible evidence of the manner in which this wine was and is marketed in Canada. However, there is no evidentiary requirement that an affiant personally take photographs which are attached to their affidavit [*Cascades Canada Inc v Wausau Paper Towel & Tissue LLC*, 2010 TMOB 176], and while Ms. Leblanc cannot confirm where these pictures were taken, based on her role as brand ambassador, I am prepared to accept that she is in a position to confirm that these photographs are representative of the way in which the Opponent's wine bottles displayed the SANGRE DE TORO composite mark and could be displayed in box packaging displaying the SANGRE DE TORO composite mark in Canadian stores since she has been in this role. Further, I note that one of the photographs includes SAQ signage.

- The SANGRE DE TORO wines are sold across all Canadian provinces. They are sold to the provincial liquor control boards and then sold to Canadian consumers by provincially-owned and privately-owned liquor stores, and at grocery stores and restaurants (para 12).
- Annual Canadian sales generated by the sale of wines under the SANGRE DE TORO brand between 2010 and 2019 are provided, with total sales during this period exceeding \$12,860,000. With the exception of 2017, annual sales between 2010 and 2019 exceeded \$1,000,000 (para 13). Exhibit B is described as a representative sampling of invoices showing the sales of wines under SANGRE DE TORO in Canada (para 14); these invoices are dated between 2011 and 2019.
- Exhibit F is described as a technical sheet that is distributed to sales representatives in Canada, and Exhibit G contains copies of an annual magazine produced by the Opponent for the years 2011 to 2016 that is distributed “through the sales force and the liquor stores”. These materials include reference to wines bearing the SANGRE DE TORO composite mark. Ms. Leblanc submits that wines bearing the SANGRE DE TORO trademark have received reviews from several Canadian publications and online wine reviewing websites and have also been featured in promotional materials and flyers from liquor stores (para 25). Exhibit H contains various third-party reviews of the SANGRE DE TORO wine, and an excerpt from a SAQ flyer dated November 2015 advertising a sale for SANGRE DE TORO wines. The Opponent’s SANGRE DE TORO composite mark appears on the bottle labels shown in these materials.

[23] With respect to the Mark, the Application was filed on a proposed use basis. While the Patinios affidavit establishes that the Mark has been in use since January 2019, this use cannot be considered as it is after the material date for this ground of opposition.

[24] Accordingly, the first factor, which is a combination of inherent and acquired distinctiveness, favours the Opponent.

#### Length of time the trademarks have been in use

[25] As discussed above, the Opponent has established prior use of its SANGRE DE TORO composite mark (in particular showing sales figures dating back to 2010 and invoices since 2011) whereas the Application is based on proposed use.

[26] In *Pink Panther Beauty Corp v United Artists Corp*, 1998 CanLII 9052 (FCA), [1988] 3 FC 534, the Federal Court of Appeal confirmed that the length of time a trademark has been in use is a factor which must be given weight in assessing confusion:

The length of time that a mark has been used is obviously a factor which will contribute to confusion on behalf of the consumer in determining the origin of wares or services. A mark that has been in use a long time, versus one newly arrived on the scene, is presumed to have made a certain impression which must be given some weight. It is important to remember that "use" is a term defined by the Act and, therefore, has a special meaning.

[27] Accordingly, this factor favours the Opponent.

#### Nature of the goods, services or business; and nature of the trade

[28] Both of the parties' trademarks are for use in association with wine. There is also evidence that the parties' wines are sold in the same channels of trade, including the LCBO. The Applicant, seeking to distinguish the nature of the parties' channels of trade, submits that the parties' products are sold at different price points. However, the fact that the parties' goods are sold at different price points is not relevant to the issue of confusion [*Bagagerie SA v Bagagerie Willy Ltee* (1992), 45 CPR (3d) 503 (FCA) at 509-510]. In any event, since the Applicant's evidence of use falls after the material date, it does not factor into this analysis.

[29] Accordingly, these factors favour the Opponent.

#### Degree of resemblance

[30] When considering the degree of resemblance, the preferable approach is to determine whether there is an aspect of each trademark that is particularly striking or unique [*Masterpiece* at para 64].

[31] I find the combination of a bull design above the phrase SANGRE DE TORO to be the striking element of the Opponent's trademark.

[32] Similarly, for the Applicant's Mark, I consider the combination of a bull design above the phrase TORO BRAVO to comprise its striking element.

[33] There is some degree of resemblance between the parties' trademarks in appearance since they both feature a bull design. The designs are not the same in that the Applicant's bull appears to be, as described by the Applicant at the hearing, a "fighting bull coiled in anticipation of making a turn", while the Opponent's design depicts a leaping bull. Nonetheless, the designs are still fairly similar in their style (realistic full body design), scale and placement (positioned above the word elements of the marks). The word TORO also appears in both of the parties' marks, but its visual impact differs by the placement of the word in each mark – it appears first in the Applicant's TORO BRAVO but last in the Opponent's SANGRE DE TORO. These word elements in the parties' marks also appear in different fonts.

[34] Regarding the degree of resemblance in sound, both trademarks contain phrases comprising Spanish words including the word TORO. However, as noted by the Applicant, this element is sounded first in the Applicant's Mark but last in the Opponent's trademark. This reduces the impact of the shared word and the overall resemblance when sounded.

[35] Regarding the ideas suggested by the parties' trademarks, as noted above, I am unable to conclude that consumers of the parties' goods would recognize the distinct Spanish meanings attributable to the parties' marks, particularly as the evidence does not establish that the average consumer of the parties' wines (or a substantial portion of the parties' consumers) would be able to read and understand Spanish. The Applicant's Mark could be perceived as holding some laudatory connotation given that it contains the word BRAVO. The parties' marks would likely be considered to have some similarity in ideas suggested to the extent that they both feature a bull design and the word TORO (whether or not one would recognize that TORO means bull in English).

[36] While I recognize that there are differences between the parties' trademarks, when viewed in their totality, I still consider there to be some meaningful degree of resemblance between them, particularly in appearance and ideas suggested, due to the presence of a bull design in a similar presentation and placement in both of the parties' marks. The presence of the shared word TORO in the phrases of the parties' marks also contributes to the similarity between them, though less so given that this word appears in different positions in the parties' marks.

Surrounding circumstance – state of the register and state of the marketplace

[37] State of the register evidence favours an applicant when it can be shown that the presence of a common element in marks would cause consumers to pay more attention to the other features of the marks, and to distinguish between them by those other features [*McDowell v Laverana GmbH & Co KG*, 2017 FC 327 at para 42]. Inferences regarding the state of the marketplace may be drawn from such evidence in two situations: where a large number of relevant registrations are located; and/or where there is evidence of common use in the marketplace of relevant third party marks [*Kellogg Salada Canada Inc v Maximum Nutrition Ltd*, 1992 CanLII 14792 (FCA), 43 CPR (3d) 349; *McDowell v Laverana GmbH & Co KG*, *supra* at paras 41-46; and *Cie Gervais Danone v Astro Dairy Products Ltd*, 1999 CanLII 7656 (FC), 87 CPR (3d) 262 ].

[38] As part of the Applicant's evidence, Ms. Lewis conducted a search for Canadian trademark registrations containing the word TORO in Nice Classes 32 and 33. Excluding registrations belonging to the Opponent, the search yielded only seven registrations (shown below) including the word TORO, owned by three different parties in association with wine:

Trademark	Owner	Goods
CONCHA Y TORO (TMA575,413)	Vina Concha Y Toro S.A. NVA	Wines
CONCHA Y TORO (TMA541,794)		
GRAN RESERVA CONCHA Y TORO & Design (TMA1038107; TMA1038105; TMA1032514)		Wines and sparkling wines

		
TORO	Grupo Osborne, SA	...alcoholic beverages, namely wine and brandy
TORO LOCO	Maison des Futailles	Wine

[39] The three GRAN RESERVA CONCHA Y TORO & Design registrations feature the same design, albeit with different colour claims, and include a design of a bull. I find these to be particularly relevant since they share both a design depicting a bull and phrasing including the word TORO, as with the parties' marks.

[40] Ms. Lewis also conducted searches for registrations containing 1) the word BULL, and 2) a design of a bull, both in Nice Classes 32 and 33. I do not consider the search results containing the word BULL to be significant in view of my finding that the average consumer of the parties' goods would not know the English meaning of the Spanish word TORO is bull, and given the greater relevance of marks combining the design of a bull with the word TORO, which are common to the subject trademarks. With respect to bull designs, Ms. Lewis' search for registrations including this element yielded 29 results (though two refer to bulldogs instead of bulls) in the name of 12 different parties. Some of these designs are for use in association with different goods such as non-alcoholic beverages or feature very different bull designs. For example the trademark ANGUS THE BULL & Design (TMA630,713) features a bull design integrated with the letter 'G' in the word ANGUS; in the trademark VINO VERMOUTH DELLA CASA MARTINI & Design (TMDA10126), the design of a bull is barely discernible within a coat of arms design; and TMA1080093 features only a bull's head. Notably, none of the results from the search for a design of a bull feature a bull design coupled with the word TORO (in a phrase or alone), a combination which I consider to be of greater relevance given it is common to both parties in this case.

[41] Regarding the state of the marketplace, through the Patinios affidavit, the Applicant points out wines with branding incorporating the word TORO, the English

word BULL, bull designs, and combinations thereof. To substantiate marketplace use, Mr. Patinios includes results of searches of the LCBO website (from 2020), photographs taken at LBCO stores (from 2020), screen captures from various provincial liquor boards including the SAQ, LCBO, Nova Scotia Liquor Corporation (NSLC), Alcool New Brunswick Liquor (ANBL), PEI Liquor Control Commission (all of which were captured/printed after the material date of October 30, 2017), printouts from various other websites, and sales figures obtained from the LCBO and British Columbia Liquor Distribution Branch (BCLDB). The Opponent, in its written representations, submits that much of this evidence ought to be disregarded as being inconclusive, unreliable or inadmissible as hearsay.

[42] While specific portions of this evidence are discussed below, as for screen captures/printouts displaying images of third-party wines on various provincial liquor board websites, given the official nature of these entities as government enterprises, I am generally prepared to accept that they can be relied on both as proof of the existence of these websites and as proof of the truth of their contents [a similar approach was adopted by the Registrar in *Arterra Wines Canada, Division Quebec, Inc v Lidl Stiftung & Co, KG*, 2022 TMOB 199]. That said, they do not establish the extent of any sales of the wines featured on these websites nor do they establish how long these products have appeared on the respective sites. I am also prepared to accept sales figures obtained by the Applicant from the LCBO and BCLDB given that they originate from an official source.

[43] At paragraph 100 of its written representations, the Applicant provides a table summarizing the “state of the marketplace at each of the material dates.” The portion of the table relating to this ground of opposition is reproduced below. Images of labels for all of the products cited in the table are provided in the Patinios affidavit:

Material date	Number of different wine brands and labels	Number of different owners
Entitlement Filing date Oct. 30, 2017	TOTAL=24 Toro Loco (1) Torrao (2) Concha Y Toro (17)	7

	Toro Terra D'Uro Finca La Rana (1) Bulls' Blood (1) Toro Elias Mora (1) Toro – San Roman (1)	
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[44] The TORO LOCO brand label (for which there is a registration for the word mark) displays the image of a bull in a realistic style above the words TORO LOCO in a similar manner to the parties' marks (shown at Ex. 6 to the Leblanc cross-examination). Mr. Patinios states that he is aware this product has been for sale in Canada for over a decade, that it has significant sales in Nova Scotia and Quebec, and that it is also available for sale in Newfoundland, Saskatchewan, Alberta, New Brunswick and Prince Edward Island (Patinios affidavit, para 19). In support, he attaches a screen capture from August 30, 2020, of the NSLC website showing a TORO LOCO branded wine bottle beside a bottle of the Opponent's wine displaying the SANGRE DE TORO composite mark. Also attached is a screenshot from the website of Maison des Futailles, the listed owner of the TORO LOCO registration; the screenshot appears to be dated March 23, 2016 and states "Toro Loco, the #1 Spanish wine in Canada!" (Exhibit I). Further, Ms. Leblanc (on cross-examination) acknowledged that she had seen the Toro Loco wine label before, and that she thought it was sold in grocery/convenience stores, at least in Quebec, though she does not know for how long (Q110).

[45] Even if I were to accept Mr. Patinios' statement that the TORO LOCO brand has been sold in Canada for a decade and to give some weight to the statement that there have been "significant sales" in Nova Scotia and Quebec, I consider that there is insufficient evidence demonstrating that this product was sold or advertised in Canada on a scale such that consumers would be familiar with it. The printout from the Maison des Futailles website citing TORO LOCO as the #1 Spanish wine in Canada constitutes hearsay that cannot be relied upon as evidence of the truth of its contents. Ms. Leblanc's statement that she has seen the product label before does not assist in establishing how much the product was known to or consumed by consumers at the material (or any) date. The NSLC printout displaying the TORO LOCO product is dated August 30, 2020, which falls after the material date, but in any event, as noted above,



this type of printout does not establish the extent of any product sales nor does it establish how long it has been displayed on this website.

[46] I do not consider the remainder of the cited third-party wines to be particularly helpful to the Applicant. The TORRAO brand label shares a bull design with the parties' trademarks, but not the word TORO as part of a Spanish phrase. Further, the word TORRAO appears on product packaging with a striking "RR" letter arrangement which stands out in this trademark; this is not present in the parties' marks. In any event, I also find that the marketplace evidence relating to TORRAO branded wine does not significantly assist the Applicant as it is not clear the extent to which this product was known to consumers in Canada as of the material date for this ground.

[47] As for the 'Concha Y Toro' brand, the evidence (including photographs showing product labels and several years of product sales from the LCBO and BCLDB) shows that CONCHA Y TORO has a strong presence as a house brand in the marketplace. However, the product labels provided do not also feature a bull design. Notably, there is no marketplace evidence showing use of any of the registered GRAN RESERVA CONCHA Y TORO & Design marks, which feature a bull design.

[48] The remaining cited third-party marks look quite different from the parties' marks. For instance, the Toro Elias Mora and Toro – San Roman wine labels do not include a bull design, while the Toro Terra D'uro Finca La Rana includes a very different bull design, and the Bull's Blood label does not include the word TORO.

[49] As an aside, I note that the Applicant's evidence also includes reference to other third-party wines that I consider to be more relevant as they contain the combination of a bull design and phrasing including the word TORO, namely Bodega Toro Centenario, Il Toro, Toro de Piedra, and Pata Negra Roble Toro. While the evidence indicates that there is at least some commercial co-existence of these third-party marks, it falls after the material date for this ground of opposition. Indeed, the Applicant in its summary table (in its written representations) indicates that these third-party products come into play as of the material date for the 12(1)(d) ground.

[50] Overall, I do not consider this surrounding circumstance to significantly assist the Applicant as of the material date for this ground.

Conclusion on the section 16(1)(a) ground

[51] Having considered all of the surrounding circumstances in this case, I find the probability of confusion between the Mark and the Opponent's SANGRE DE TORO composite mark to be evenly balanced between a finding of confusion and no confusion. As the onus is on the Applicant to demonstrate on a balance of probabilities that there is no reasonable likelihood of confusion between the marks, I must therefore find against the Applicant.

[52] I have reached this conclusion because when considered in their totality, given the combination of the word TORO in the Spanish phrases in the parties' marks and a similar bull design (particularly in style and placement), there is some degree of resemblance between the parties' trademarks, particularly in appearance. While the Applicant has provided some marketplace evidence of third-party wine labels sharing these two elements, it is difficult to assess to what extent they were in the marketplace as of the material date for this ground of opposition. In reaching this decision, I have also considered the extent known and length of time in use of the Opponent's trademark, the overlap in the goods and the potential for overlap in the channels of trade.

[53] Accordingly, the section 16(1)(a) ground of opposition is successful.

***Section 12(1)(d) ground of opposition***

[54] The Opponent has pleaded that the Mark is not registrable because, contrary to section 12(1)(d) of the Act, the Mark is confusing with the Opponent's registrations for the trademarks SANGRE DE TORO (TMA164,805) and GRAN SANGRE DE TORO (TMA691,500) both of which are in association with wine.

[55] The material date for this ground of opposition is the date of my decision [*Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)].

[56] I have exercised my discretion to check the Register and confirm that these registrations are extant [*Quaker Oats Co Ltd of Canada v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. The Opponent has therefore met its initial evidential burden for this ground of opposition. As a result, the Applicant bears the legal burden of demonstrating on a balance of probabilities that there is no likelihood of confusion between the Mark and any of the Opponent's registered trademarks.

[57] In considering the issue of confusion, I will focus on the Opponent's registration No. TMA164,805 for SANGRE DE TORO because I consider this trademark to represent the Opponent's strongest case under this ground. If the Opponent does not succeed with respect to its pleading that there is a likelihood of confusion between the Mark and this registration, it would not succeed with respect to the GRAN SANGRE DE TORO registration.

[58] In this analysis, I have considered the use of the SANGRE DE TORO composite mark to constitute use of the SANGRE DE TORO word mark.

[59] Regarding the inherent distinctiveness of the parties' trademarks, similar to my analysis under the section 16 ground of opposition, I consider both trademarks to be inherently distinctive as they would be perceived by the average consumer of the goods to be made up of foreign words/phrases. However, the Applicant's Mark also includes a design element which increases its overall inherent distinctiveness. As for the extent to which the marks have become known, given the later material date, evidence of the Applicant's use of the Mark, which began in January 2019, can be taken into account. In this regard, pertinent portions of the Patinios affidavit are as follows:

- Exhibit A contains an LCBO New Product Circular sent to LCBO stores announcing the launch of TORO BRAVO wine. The listed release date for the product is January 15, 2019.
- Exhibit CC contains LCBO monthly sales data (actual cases sold) for TORO BRAVO wines from January to December for 2019, 2020, and part of 2021. Dionysus buys the LCBO's sales report data annually and the information provided in this exhibit is from those reports (para 79).

- The TORO BRAVO sales launch was “very successful” and at the LCBO annual awards in summer 2019, the LCBO awarded the TORO BRAVO red “Best New Wine Product Launch” (para 80). Mr. Patinios states that in 2019, there were sales of TORO BRAVO wine in excess of 3300 cases in Manitoba (commencing in May) with sales in excess of 1000 cases by the end of August 2019, and that there were also TORO BRAVO wine sales in Alberta, British Columbia and Prince Edward Island (though further information on the amount of sales is not provided).
- I note that according to Exhibit CC, for the TORO BRAVO Tempranillo Merlot product, the total number of cases sold in Ontario exceeded 100,000 cases annually in 2019 and 2020.
- Exhibit CC also contains LCBO sales data (actual cases sold) for the Opponent’s SANGRE DE TORO wines for 2019, 2020, and an LCBO sales chart of the Opponent’s SANGRE DE TORO wines from 2011 to 2019. Considering the source of this evidence, and in the absence of cross-examination or evidence to the contrary from the Opponent, I am prepared to accept it. This data indicates that sales of cases of the Opponent’s SANGRE DE TORO wines have consistently been much lower than that of TORO BRAVO wines, reflecting roughly 1/10 of the volume of the Applicant’s TORO BRAVO wine sold in the LCBO alone (in 2019 and 2020).
- The Applicant’s TORO BRAVO wines were launched at \$7.95 retail so are considered “standard priced” while the Opponent’s SANGRE DE TORO wines retail from \$13.95 and up so are defined as “premium” by the LCBO and treated as a separate category (para 87).
- Mr. Patinios states that TORO BRAVO was the #1 selling Spanish wine in Ontario from the day it hit shelves to the present in large part due to an article in the *Toronto Star* dated January 24, 2019 by Carolyn Evans Hammond, where she gave Toro Bravo a 96 point score. Mr. Patinios states that such a high point score is rare for a wine in the standard (value) priced category, and that consumers were attracted to TORO BRAVO and wanted to buy it because it was standard priced with a premium score for quality (para 84).

- Exhibit EE is a copy of the above referenced *Toronto Star* article from January 24, 2019 titled “This red wine under \$8 is so good it will clear off LCBO shelves”.
- Exhibit FF consists of six additional articles located online dated between January 2019 and October 2020 referencing the TORO BRAVO brand. Three of the articles are from the *Toronto Star* and one is from the *Globe and Mail*. While no evidence as to the scope of circulation of these articles are provided, I am prepared to take judicial notice of the fact that the *Toronto Star* and *The Globe and Mail* have wide circulation in Canada [*Milliken & Co v Keystone Industries (1970) Ltd* (1986), 12 CPR (3d) 166 (TMOB) at 168-169].

[60] I do not find the evidence of acquired distinctiveness to significantly favour one party over the other. The Opponent’s evidence (in particular providing ten years of sales and representative invoices) shows several years of sustained sales of wine associated with the SANGRE DE TORO trademark and some promotional activity (of which the extent is not readily discernible), while the Applicant’s evidence shows that it entered the market much later but since that time experienced very high sales and laudatory reviews appearing in two publications with wide circulation in Canada.

[61] On balance, I find that the first factor, which is a combination of inherent and acquired distinctiveness, favours the Applicant, albeit only slightly.

[62] With respect to the length of time the trademarks have been in use, this factor favours the Opponent. Both the nature of the goods and trade also favour the Opponent since both parties sell wines which can, at least in Ontario, be found in the same stores. I do not consider the fact that the wines associated with the Mark are offered at a lower price point to affect this finding.

[63] In assessing the degree of resemblance, I note that the Opponent’s registration consists solely of the phrase SANGRE DE TORO. I consider the striking element of the Opponent’s mark to be the phrase SANGRE DE TORO in its entirety. With respect to the ideas suggested by the parties’ marks, for the reasons set out in my analysis of the

section 6(5)(a) factor under the section 16 ground, I am unable to conclude that consumers would recognize the distinct Spanish meanings attributable to the parties' marks. Rather, the average consumer would view the parties' marks as foreign phrases with no particular or identifiable meaning.

[64] When sounded, there is not a very high degree of resemblance between the parties' marks since, as noted above, the sole common element is TORO which appears as the first word in the Applicant's Mark (TORO BRAVO), but as the last word in the Opponent's trademark (SANGRE DE TORO), reducing the impact of the shared element. Similarly, there is not a very high degree of resemblance in appearance between the parties' marks. Accordingly, this factor favours the Applicant.

[65] The Opponent submits that while its registration covers only the words SANGRE DE TORO, the evidence clearly shows that the Opponent has used its trademark in combination with the representation of a bull. As the Opponent's evidence does show many years of consistent use of the SANGRE DE TORO mark in close association with the bull design I consider this to be a relevant surrounding circumstance assisting the Opponent to a limited extent. However, if I am wrong in making this finding, I note that it does not affect my ultimate conclusion on this ground of opposition.

[66] Another surrounding circumstance to consider under this ground is the state of the marketplace. In view of the later material date for this ground of opposition, I find that the Applicant's evidence of the state of the marketplace assists the Applicant insofar as it establishes that there is clearly some commercial use of third-party marks sharing the word TORO, as well as the word TORO and a bull design, in association with wines. I make this finding notwithstanding that the evidence does not establish the extent of use of all of the cited third-party marks, and that the jurisprudence relating to the state of the register and marketplace generally points to a higher number of marks required in order to draw inferences as to the state of the register and marketplace.

[67] A final surrounding circumstance to be considered in this analysis is the allegation of actual instances of confusion between the parties' marks. The Opponent

takes the position that its evidence shows actual confusion. To this end, pertinent paragraphs of the Leblanc affidavit are reproduced below. Ms. Leblanc attests that:

27. After the launch of the TORO BRAVO wine in Canada, in May of 2019, I visited a couple of LCBO stores in Toronto to promote the Sangre de Toro Tempranillo wine. During my visit to the LCBO located at 1230 Dundas Street West, where we did wine tasting with 9 employees as well as during my visit to the LCBO located at 10 Scrivener Square, one of the most important LCBO store(s) and where we did wine tasting with 20 employees, I had discussions with several employees who thought that TORO BRAVO is a brand produced by Miguel Torres.

28. While I stated that TORO BRAVO is not a brand produced by Miguel Torres, I really got worried about the impact of the TORO BRAVO brand on the SANGRE DE TORO brand and reputation. If employees of the LCBO who are generally familiar with the wine industry believed the TORO BRAVO wine to be a brand produced by Miguel Torres, it is more than likely that the general public, who knows generally even less about the wine industry, would be equally misled, if not more so.

29. The level of sales for the Sangre de Toro Tempranillo, Rose and Verdejo, further confirms my opinion that the public is associating the TORO BRAVO wine with Miguel Torres. In the wine business when you offer to the public a new wine listing that complements the wines that you are already selling with different grape varieties and wine colors, a wine producer (will) rarely lose sales or stay at the same level as the original offering. In this case, sales were very low and well beneath the original Sangre de Toro wine, which is very unusual.

30. The fact that the TORO BRAVO wine was launched almost at the same time as the Toro Tempranillo, Rose and Verdejo, and that it was offered for sale at a much lower price point most likely led consumers to believe that this is a new offering from Miguel Torres given the prominent display of the image of a bull on the TORO BRAVO wine label...

[68] The Applicant submits that Ms. Leblanc's evidence is inadmissible as the thoughts of the unnamed LCBO employees comprise hearsay, and I agree. In any event, this alleged instance of confusion is not sufficiently detailed nor does it even appear to refer to an alleged instance of confusion by a consumer of the goods. Further, while Ms. Leblanc provides her personal opinion on the alleged likelihood of confusion between the Mark and the Opponent's SANGRE DE TORO trademark, I have disregarded these parts of her evidence as ultimately it is up to the trier of fact to make this determination. Similarly, I have disregarded Ms. Leblanc's theory as to the reason for low sales of the Opponent's wines subsequent to the release of the Applicant's TORO BRAVO & Design wine in January 2019. It is also worth noting that, according to

the LCBO data attached to the Patinios affidavit (Exhibit CC), the Opponent's SANGRE DE TORO wines (considering all of the types of wine sold under the banner *i.e.*, tempranillo, garnacha, verdejo) have consistently sold in much lower quantities of cases (under 10,000) annually at the LCBO since 2011.

Conclusion on the section 12(1)(d) ground

[69] Having considered all of the surrounding circumstances, I find that the Applicant has satisfied its legal burden to show that there is no reasonable likelihood of confusion between the parties' trademarks under this ground of opposition. In particular, the evidence of use of the Applicant's Mark starting January 2019, the degree of resemblance, and the state of the marketplace evidence help to shift the balance in favour of the Applicant.

[70] Accordingly, the section 12(1)(d) ground of opposition is rejected.

**Section 38(2)(f) ground of opposition**

[71] The Opponent has pleaded that at the filing date of the application, the Applicant was not entitled to use the Mark in Canada in association with the goods applied for, namely wines, based on the Opponent's earlier rights in the trademarks SANGRE DE TORO and GRAN SANGRE DE TORO, which had been used and registered well before the Applicant's application, and which had also been used with the depiction of a bull.

[72] Section 38(2)(f) of the Act addresses an applicant's entitlement to use its trademark (*ie*, per relevant federal legislation or other legal obligations) as opposed to an applicant's entitlement to register its trademark (relative to another's trademark, pursuant to section 16 of the Act). In my view, merely pleading that an applied-for trademark was confusing with a previously used or registered trademark is not a fact that can support a section 38(2)(f) ground of opposition [see *DCK Concessions Ltd v Hong Xia Zhang*, 2022 TMOB 200 and *Smarte Carte, Inc v Sandals Resorts International 2000 Inc*, 2023 TMOB 67 for similar findings]. Accordingly, this ground of opposition is rejected.



**REMAINING GROUND OF OPPOSITION**

[73] As I have addressed three grounds of opposition and I have decided one of them in favour of the Opponent, I will not consider the ground of opposition based on distinctiveness.

**DISPOSITION**

[74] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I refuse the Application pursuant to section 38(12) of the Act.

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Jennifer Galeano  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

# Appearances and Agents of Record

**HEARING DATE:** 2023-09-19

## **APPEARANCES**

**For the Opponent:** No one appearing

**For the Applicant:** Adam Tracey

## **AGENTS OF RECORD**

**For the Opponent:** Aventus IP Law LLP

**For the Applicant:** Moffat & Co.