

IN THE MATTER OF THREE OPPOSITIONS by  
Great Western Brewing Company Limited  
to application nos. 1070946; 113189; 1133023  
for the trade-marks RICKARD'S BREW HOUSE;  
RICKARD'S BREW HOUSE & Design; and  
RICKARD'S BREW HOUSE U & Design,  
respectively, filed by Molson Canada 2005

ApPLICATION No. 1070946 - RICKARD'S BREW HOUSE

On August 14, 2000, Molson Canada filed an application to register the trade-mark  
RICKARD'S BREWHOUSE (one word) based on proposed use in Canada in association with

wares

brewed alcoholic beverages namely, beer

servIces

the operation of a brewery, restaurant and pub.

Shortly after, the applicant requested leave to amend the application to read RICKARD'S  
BREW HOUSE (two words) on the basis that the amendment did not alter the distinctive  
character of the mark as permitted by Section 31 (b) of the *Trade-marks Regulations*. It appears  
from the file record that the amendment was recorded. However, the Examination Section of the  
Office required the applicant to disclaim the exclusive use of the words RICKARD'S and BREW  
with respect to the wares and RICKARD'S and BREW HOUSE in respect of the services. In  
this regard, the Examination Section considered that the component RICKARD is primarily  
merely a surname; that the component BREW is indicative of beer; and that the components  
BREW HOUSE are indicative of an establishment that makes and/or serves brewery products.

The Office requirement to disclaim the component RICKARD was withdrawn after the

Bxamination Section received submissions from the applicant that RICKARD would be viewed by most Canadians as a first name rather than as a surname. The applicant did however enter disclaimers for the components BREW and BREW HOUSE in the last amended application dated September 25, 2002.

The application was advertised for opposition purposes in the *Trade-marks Journal* issue dated November 6,2002, and was opposed by Great Western Brewing Company Limited on December 20, 2002. The Registrar forwarded a copy of the statement of opposition to the applicant, as required by Section 38(5) of the *Trade-marks Act*, on January 7,2003. The applicant responded by filing and serving a counter statement. The file record indicates that the subject application was assigned to the present applicant Molson Canada 2005 some time about April 2005.

The statement of opposition alleges one ground of opposition namely, that the applicant is not entitled to registration pursuant to Section 16(3)(a) of the *Trade-marks Act*. In this regard the opponent alleges that, at the date of filing the application, the applied for mark RICKARD'S BREW HOUSE was confusing with the opponent's mark BREWHOUSE used in Canada in association with beer since at least 1995.

The opponent's evidence consists of the affidavit of Ronald. S. Waldman, President of the opponent company. The applicant's evidence consists of the affidavits of Lori A. Ball, a manager with the applicant; Deborah Eatherley, law clerk; Hartmut Brueck, lawyer; and Marc

Roy, legal assistant. Mr. Waldman and Ms. Ball were cross-examined on their affidavit testimony, the transcripts thereof and answers to undertakings given at their cross-examinations forming part of the evidence of record (the written and oral testimony of the above affiants relate to each of the three opposition proceedings). Both parties submitted written arguments and both parties were represented at an oral hearing where the three oppositions were heard concurrently.

Opponent's Evidence

Mr. Waldman's affidavit testimony may be summarized as follows. The opponent has owned and operated a brewery in the city of Saskatoon, Saskatchewan since 1990. In the fall of 1995, the opponent commenced the manufacture and sale of two new beers under the brands BREWHOUSE (5% alcohol content) and BREWHOUSE LIGHT (4% alcohol content). The two brands have been sold in Saskatchewan, Manitoba and Alberta. BREWHOUSE and BREWHOUSE LIGHT brand beer sold in the three above mentioned provinces totalled 5.3 million litres and 2.2 million litres, respectively, from 1995 to April 2003. The products were sold in 14.4 million bottles, 5.6 million cans and 9,725 kegs. Total revenues generated were in excess of \$12 million. Paragraph 6 of Mr. Waldman's affidavit, shown below, explains how beer is sold in the three above mentioned provinces and how the quantity sold is recorded:

In each of Manitoba, Saskatchewan and Alberta, beer sales and distribution are a regulated industry. By law, Great Western must sell all of its beer for distribution in each province on consignment to a government-controlled liquor board (hereinafter generally called the "liquor board"), which then distributes it to private distributors who then distribute it in the province to the general public and to bars, hotels and restaurants and similar establishments within the province. No invoices are issued by Great Western to

the liquor board of each province. Instead, the liquor board and/or distributors provide sales reports showing the amount of beer it has distributed and sold on consignment for Great Western, and it pays Great Western in accordance with these reports for the beer sold in its province for the period covered by the sales report. Great Western has its own sales and marketing representatives, which solicit orders for BREWHOUSE brand beer and BREWHOUSE LIGHT beer from hotels, restaurants, sports organizations, university pubs and the like within the provinces concerned. However, the actual wholesale sales of beer are done through the liquor board and/or the private distributors in the province.

Exhibit material attached to Mr. Waldman's affidavit shows that the opponent's marks are prominently displayed on labels and caps for bottled beer, on cans of beer, on beer cartons and on coasters distributed to bars, pubs and restaurants as point of sale advertising. Advertising expenses for the period 1995 to April 2003 totalled \$160,000 for television; \$238,000 for radio and newsprint; \$413,000 for point of sale materials and \$242,000 for product promotion. The opponent's position with respect to its mark is set out in paragraph 25 of Mr. Walden's affidavit, shown below:

By reason of the widespread sales and advertising aforesaid, the word BREWHOUSE has become well-known as identifying Great Western's BREWHOUSE brand beer and the words BREWHOUSE LIGHT have become well-known as identifying Great Western's BREWHOUSE LIGHT brand beer in Canada, and particularly in the provinces of Manitoba, Saskatchewan and Alberta. Further, when BREWHOUSE or BREWHOUSE LIGHT beer is ordered in restaurants, bars or hotels, the person ordering will typically ask for a "BREWHOUSE" or "BREWHOUSE LIGHT" beer (depending whether a pilsener beer or a light beer is desired).

Mr. Walden's oral testimony on cross-examination is direct, comprehensive and consistent with his affidavit evidence.

*Applicant's Evidence*

*Lori Ball*

Ms. Ball's affidavit evidence may be summarized as follows. The applicant operates two breweries in association with the three RICKARD'S marks that are the subject of these proceedings. One brewery is located at the Air Canada Centre in Toronto and the other is located at General Motors Place in Vancouver. Excerpts from Exhibit B of the affidavit, shown below, explain the nature of the breweries:

Sports and entertainment fans are celebrating this season with the recent opening of North America's first arena-operating three-level micro brewery - Rickard's Brew House at General Motors Place.

Rickard's Brew House is a unique facility that celebrates the partnership between Molson and Orca Bay Sports & Entertainment. With all brewing operations open to public view, fans attending events at General Motors Place will now be able to see the quality, care and passion that are the key ingredients in the brewing process.

Specialty craft beers will be produced at Rickard's Brew House on a rotating basis, under the careful supervision of brewmaster Kerry Scarsbrook and on-site brewer Justin Vickaryous. Visitors will be able to enjoy the craft beers throughout the year on each of the three Rickard's Brew House levels. Free public tours of the facility are available every Wednesday at 10:00 a.m. and can be arranged by contacting the Rickard's Brew House at (604) 899-7806. (Tours are subject to availability and may change without notice.)

The multi-level micro brewery features three distinct areas allowing arena access to each of the steps of the brewing process ..

Brew House Grill (Level 400) - is the brewing facility where the brewer's mash forms and wort is boiled and infused with hops.

Brew House Malt Room (Level 300) - is where the malt crushing and fermentation occurs.

Brew House Cooperage (Level 1 00) - is where the kegging takes place.

The RICKARD'S BREW HOUSE at General Motors Place opened in October 2002 and produces RICKARD'S HONEY BROWN brand of beer. The beer is sold only at licensed facilities within General Motors Place. From 2000 to 2005, about 570 hectolitres of beer were sold representing sales revenues of about \$90,000. The brewery at the Air Canada Centre produced in excess of 400 hectolitres of RICKARD'S brands of beer for the period 2003 - 2004 inclusive, representing sales revenues in excess of \$185,000. The beer is sold only at licensed facilities within the Air Canada Centre. Exhibits attached to Ms. Ball's affidavit show that the phrase RICKARD'S BREW HOUSE and the mark RICKARD'S BREW HOUSE & Design are prominently featured on the exterior and in the interior of the breweries. The applicant has also licensed the Ottawa Senators Hockey Club to use the mark RICKARD'S PUB for a licensed establishment at the Core! Centre in Ottawa. Several million patrons have attended at the RICKARD'S BREW HOUSE at General Motors Place, the Air Canada Centre and the RICKARD'S PUB at the Core! Centre.

The marks RICKARD'S BREW HOUSE & Design and RICKARD'S BREW HOUSE U & Design are illustrated below:



The mark RICKARD'S BREW HOUSE & Design appeared prominently on 12-pack cartons featuring a selection of RICKARD'S brands of beer. Sales of the 12-pack commenced in 2001 and continued until 2003 when the packaging was changed. Sales of beer in the 12-pack cartons featuring the mark RICKARD'S BREW HOUSE & Design were in excess of 4,000 hectolitres in Alberta and Ontario. Advertising featuring the mark appeared in various Canadian newspapers in 2001 and 2002.

The applicant began to use its mark RICKARD'S BREW HOUSE U & Design in 2001 in association with a brewing course for tavern owners. Various promotional items featuring the mark, including clothing and posters, have been distributed to tavern owners attending the course.

The applicant has been selling various brands of beer under its house mark RICKARD'S since 1983. Current brands include RICKARD'S RED (since 1983); RICKARD'S TRADITIONAL PALE ALE; RICKARD'S INDIA PALE ALE; and RICKARD'S HONEY BROWN. Various bottle labels and their dates of use are shown in Exhibit K of Ms. Ball's

affidavit. Sales of RICKARD'S brands of beer in Alberta were in excess of 35,000 hectolitres (equivalent to 10.2 million bottles of 341 ml) from 1991 to 1995. Sales in Saskatchewan were in excess of 5,600 hectolitres (equivalent to 1.6 million bottles) from 1993 to 1995 and in Manitoba were in excess of 3,800 hectolitres (equivalent to 1.1 million bottles) from 1994 to 1995. Sales in Canada of various RICKARD'S brand of beer were in excess of 20,000 hectolitres in 1991, rising steadily to 120,000 hectolitres in 1996. Sales averaged 150,000 hectolitres from 1998 to 2002 and averaged 200,000 hectolitres from 2003 to 2005. Since 1995, the applicant has sold the equivalent of 439 million bottles of its RICKARD'S brands of beer.

Ms. Ball's oral testimony on cross-examination is direct, comprehensive and consistent with her affidavit evidence.

*Deborah Eatherley*

The main purpose of Ms. Eatherley's affidavit is to introduce into evidence print-outs of web pages indicating use of the terms BREW HOUSE and BREWHOUSE by about 20 third parties in association with restaurants, pubs and brewed alcoholic beverages. For example, the HIGH MOUNTAIN BREWHOUSE in Whistler, British Columbia, describes itself as "Whistler's busiest spot ..... The cuisine is Northwestern, and the Brewery produces four different handcrafted ales ....." while THE BREW HOUSE WATERLOO describes itself as offering "the finest service and production for your beer, wine and cooler needs ... "

Ms. Eatherley also evidences trade-mark registration no. 579829 for the mark



BUDWEISER BREWHOUSE, used in association with restaurant and bar services, standing in the name of Anheuser-Busch, Incorporated.

*Marc Roy*

Mr. Roy's affidavit serves to introduce into evidence excerpts from various dictionaries and texts. His evidence indicates that the terms "brewhouse" or "brew-house" or "brew house" are archaic terms for the modern word "brewery," that is, a building where beer is made or a place where beer is served.

*Hartmut Brueck*

On May 19, 2002, Mr. Brueck purchased, in Scarborough, Ontario, a RICKARD'S TASTERS 12 PACK consisting of three varieties of RICKARD'S beer. The back and front panels of the pack carton featured the mark RICKARD'S BREW HOUSE & Design, which in my view also qualifies as use of the word mark RICKARD'S BREW HOUSE *per se*: in this regard, see *Nightingale Interloc v. Prodesign Ltd.* (1984), 2 C.P.R.(3d) 535 at 538 under the heading *Principle 1*.

*Main Issue*

As discussed earlier, the determinative issue in this proceeding is whether the applied for mark RICKARD'S BREW HOUSE is confusing with the opponent's mark BREWHOUSE at the material date August 14, 2000.

The legal burden is on the applicant to show that there would be no reasonable likelihood of confusion, within the meaning of Section 6(2) of the *Trade-marks Act*, between the applied for mark and the opponent's mark. The presence of a legal burden on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant: see *John Labatt Ltd. v. Molson Companies Ltd.* (1990) 30 C.P.R.(3d) 293 at 297-298 (F.C.T.D.).

The test for confusion is one of first impression and imperfect recollection. In determining whether there would be a reasonable likelihood of confusion, I am to have regard to all the surrounding circumstances, including those enumerated in Section 6(5) of the *Act* namely: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the wares, services or business; the nature of the trade; the degree of resemblance in appearance or the sound of the marks or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered. All factors do not necessarily have equal weight. The weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 C.P.R.(3d) 308 (F.C.T.D.).

#### Consideration of Section 6(5) Factors

The applied for mark RICKARD'S BREW HOUSE does not possess a high degree of inherent distinctiveness since the components BREW HOUSE relate to the applicant's wares and services and the first component RICKARD'S would be likely to be perceived as the possessive

form of a real or fanciful first name, or possibly as the possessive form of a real or fanciful surname. Similarly, the opponent's mark BREWHOUSE possesses little inherent distinctiveness in relation to the opponent's wares because the term is highly suggestive, if not descriptive, of a beer production facility. The opponent's evidence establishes that its mark had acquired a significant reputation in the provinces of Saskatchewan, Manitoba and Alberta by the material date August 14, 2000, through sales and advertising beginning in the fall of 1995. The applicant's mark RICKARD'S BREW HOUSE is a proposed use mark and therefore would not have acquired any reputation at the material date. However, the applicant's house mark RICKARD'S had acquired some reputation in the provinces of Saskatchewan, Manitoba and Alberta by the material date August 14, 2000, through sales of various brands of RICKARD'S beer beginning in 1991. The house mark had also acquired a significant reputation in other parts of Canada through sales of various brands of RICKARD'S beer beginning in 1983. Thus, at the material date the average consumer of beer would have been acquainted with the applicant's house mark RICKARD'S. The length of time that the marks in issue have been in use favours the opponent as the opponent commenced use of its mark BREWHOUSE about five years prior to the material date.

The nature of the parties' wares are the same and the opponent has not alleged use of its mark in association with services. In the absence of evidence from the applicant to the contrary, I assume that the parties' wares would be sold through the same or highly overlapping channels of trade.

The resemblance between the marks RICKARD'S BREW HOUSE and BREWHOUSE is of course attributable to the common components BREW and HOUSE. However, the term BREWHOUSE possesses little inherent distinctiveness in relation to beer products and there is some evidence to support the applicant's contention that the component BREWHOUSE (or BREW HOUSE) is in active use by various third parties for beer products and services. When a word in a trade-mark is a common and descriptive word, its importance diminishes in the sense that consumers would tend to focus more on other components of the mark. In the instant case the other component is the prefix RICKARD'S comprising part of the applied for mark. Further, it is a generally accepted principle in trade-mark law that the first portion or first syllable of a mark is the more important for the purposes of distinction: see *Conde Nast Publications Inc. v. Union Des Editions Modernes* (1979) 26 C.P.R.(2d) 183 at 188 (F.c.T.n.). In the circumstances of this case, the acquired distinctiveness of the house mark RICKARD'S is an additional reason for the average consumer to focus on the first portion of the applied for mark.

The applicant argues further, at paragraph 38 of its written argument, as follows:

In a case where any similarity between the mark in issue is the common use of a word which is part of the lexicon, the Register should be reluctant to grant a monopoly. As noted by Rand J. in *General Motors v. Bellows*:

Mr. Fox submitted this basic consideration: that where a party has reached inside the common trade vocabulary for a word mark and seeks to prevent competitors from doing the same thing, the range of protection to be given him should be more limited than in the case of an invented or unique or non-descriptive word; and he has strong judicial support for that proposition: *Office Cleaning Services Ltd. v. Westminster Window & Gen'l Cleaners Ltd.* (1944), 61 RP.C. 133 at p. 135; (1946), 63 RP.C. 39; *Br. Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312 at p. 321; *Aerators Ltd. v. Tollit*, [1902] 2 Ch. 319. In *Office Cleaning Services*, 63 RP.C. at

p. 43, Lord Simonds used this language: "It comes in the end, I think, to no more than this, that where a trade adopts words in common use for his trade name, some risk of confusion is inevitable. But that risk must be run unless the first user is allowed unfairly to monopolize the words. The Court will accept comparatively small differences as sufficient to avert confusion. A greater degree of discrimination may fairly be expected from the public where a trade name consists wholly or in part of words descriptive of the articles to be sold or the services to be rendered.

*General Motors Corp. v. Bellows* (1949), 10 C.P.R. 101 (S.C.C.); *Cadbury Trebor Al/an Inc. v. Effem Inc.* (2004), 41 C.P.R. (4<sup>th</sup>) 358 at 366 (T.M.O.B.);

See also: *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (F.C.A.).

The principles discussed above are applicable in the instant case because the applicant's evidence supports its contention that the term "brewhouse" is part of the lexicon of the beer industry.

### Conclusion

In view of the above, I find that the applicant has shown, on a balance of probabilities, that there is no reasonable likelihood of confusion between the applied for mark RICKARD'S BREW HOUSE and the opponent's mark BREWHOUSE at the material date August 14, 2000.

### APPLICATION No. 1131898 - RICKARD'S BREW HOUSE & Design

Application no. 1131898 was filed on February 20, 2002, and is based on use of the mark since October 12, 2000, in association with beer and with the operation of a brewery. The statement of opposition, filed on February 12, 2003, raises three grounds namely, (i) the applicant is not entitled to registration pursuant to Section 16 of the *Trade-marks Act* because of the

opponent's prior use of its mark BREWHOUSE, (ii) non-compliance with Section 30(b) on the basis that the applicant did not use its mark since the date of first claimed in the application; and (iii) non-compliance with Section 30(i). At the oral hearing the opponent withdrew the ground of opposition pursuant to Section 30(i) and advised that the Section 30(b) ground was limited to the wares beer.

The considerations with respect to the issue of confusion arising under Section 16 are essentially the same as those discussed under application no. 1070946, with the notable exception that there is less resemblance between the applicant's mark RICKARD'S BREW HOUSE & Design and the opponent's mark BREWHOUSE owing to the design features of the applicant's mark. Accordingly, I find that the applicant has shown, on a balance of probabilities, that there is no reasonable likelihood of confusion between the applied for mark RICKARD'S BREW HOUSE & Design and the opponent's mark BREWHOUSE at the material date October 12,2000.

The opponent relies on Ms. Ball's testimony on cross-examination to meet its evidential burden in respect of the ground of opposition pursuant to Section 30(b). Specifically, in response to Question 100 concerning the date of first use of the mark RICKARD'S BREW HOUSE & Design, Ms. Ball answered as follows:

100.

Q. Perhaps you can tell me what you know was in use at October 12, 2000 and why you know it was in use at that time?

A. I would have to assume that at the time the trade mark application was filed, I felt confident that there was use of the trade mark in association with the sale of beer in this location. That may have been the existence of these draft towers. It may have been the existence of point-of-sale materials.

Speaking today in 2005, I cannot tell you exactly what information was at my fingertips when that application was filed.

101.

Q. And no specific samples of anything of that sort were retained as part of the file?

A. I don't believe so.

In my view there is nothing inconsistent between Ms. Ball's testimony and the applicant claiming October 12, 2000, as the date of first use of the applied for mark. Ms. Ball's answer to Question 100 was essentially an admission of a failure to recollect particulars. Her response invited follow up by the opponent for an undertaking to establish the basis for the date October 12, 2000. Somewhat similar circumstances were discussed by this Board in *Mo/son Canada v. Labatt Brewing Co.* 33 C.P.R.(4th) 359 (2003) at para. 13:

... the opponent argues that, on the basis of Mr. Beasley's transcript of cross-examination, I should draw a negative inference against the applicant concerning what entity used or intended to use the mark DEEP CHILL. Certainly there are precedents where this Board has drawn negative inferences against a party based on vague or evasive answers

evidenced in a transcript of cross-examination. However, in my view, if there is any doubt in the instant case as to what entity actually used or intended to use the mark DEEP CHILL, that doubt might have been cleared up without difficulty by follow through cross-examination. I do not believe that the examining party can simply accept an unclear or ambiguous answer without follow through questioning. and then rely on the ambiguity to meet a light evidential burden. Therefore, even if I were to consider the opponent's Section 30 arguments raised for the first time in reply, I would not be prepared to find that the opponent has met its evidential burden to put non-compliance with the former registered user regime into issue.

(emphasis added)

In the instant case the evidence elicited on cross-examination was neither vague nor evasive. As the opponent did not follow through by requesting an undertaking for further information, I am not prepared to draw a negative inference respecting the applicant's claimed date of first. Accordingly, I find that the opponent has not met its evidential onus in respect of the Section 30 (b) ground of opposition which is therefore rejected.

I would add that the applicant voluntarily included further details in response to Question 100 as part of its answers to other undertakings. However, as the opponent did not request an undertaking for further details, I have not had regard to the answers provided by the applicant because they do not form part of the evidence of record.

#### **APPLICATION No. 1133023 - RICKARD'S BREW HOUSE U & Design**

Application no.1133023 was filed on March 5, 2002, and is based on use of the mark in Canada since August 2001, for the following services:

operation of a brewery;



providing training and education with respect to  
brewing and serving beer.

The grounds of opposition, the issues, the evidence and the considerations in respect of the opposition to application no. 1133023 are essentially the same as those discussed in respect of application nos. 1131898 and 1131898. Accordingly, the same results follow, that is, I find that (i) the applicant has shown, on a balance of probabilities, that there is no reasonable likelihood of confusion between the applied for mark RICKARD'S BREW HOUSE U & Design and the opponent's mark BREWHOUSE at the material date August 31, 2001, and (ii) the opponent has not met the evidential onus on it in respect of the Section 30 ground of opposition.

#### **DISPOSITION**

In view of the foregoing, the oppositions to application nos. 1070946; 113189; 1133023 are rejected.

DATED AT VILLE DE GATINEAU, QUEBEC, THIS 18th DAY OF JUNE, 2008.

Myer Herzig,  
Member,  
Trade-marks Opposition Board