

IN THE MATTER OF AN OPPOSITION by The Molson Companies Limited to application No. 584,678 for the trade-mark RAISINS D'OR/ GOLDEN GRAPES filed by Chateau de Fontpinot, une société anonyme

On May 25 1987, the applicant, Chateau de Fontpinot, une société anonyme, filed an application to register the trade-mark RAISINS D'OR/ GOLDEN GRAPES based upon use and registration of the trade-mark in France by the applicant's predecessor-in-title in association with "boissons alcooliques (à l'exception des bières), nommément: eaux de vie, cognacs". The applicant was granted a priority filing date of November 25, 1986 based on application Serial No. 825, 313 filed in France by the applicant's predecessor-in-title.

The opponent, The Molson Companies Limited, filed a statement of opposition on June 18, 1986 in which it alleged that the applicant's application is not in compliance with Section 29 (now Section 30) of the Trade-marks Act in that the applicant could not be satisfied that it was entitled to use and register its trade-mark and that the applicant did not use its trade-mark in Switzerland as alleged in its application or at all. Further, the opponent alleged that the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in view of the registration and prior user by the opponent of its trade-marks including the word GOLDEN covered by registration Nos. 100,941, 114,145, 161,252, 290,098, 292,103, 293,246 and 309,841. The opponent also challenged the applicant's entitlement to registration and the distinctiveness of the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES in view of the opponent's pending application serial No. 506,627 for the trade-mark GOLDEN, as well as its prior use of the trade-mark covered in its pending application.

The applicant served and filed a counter statement in which it denied the allegations set forth in the statement of opposition.

The opponent filed as its evidence the affidavits of Harold J. Moran and Nicola M. Hunt while the applicant submitted the statutory declaration of M. Cointreau. Mr. Cointreau failed to attend for cross-examination of his statutory declaration and his declaration was therefore deemed not to form part of the applicant's evidence in this opposition pursuant to rule 46(5) of the Trade-marks Regulations.

Both parties filed written arguments and both were represented at an oral hearing.

During the opposition proceeding, the opponent's trade-marks were assigned to Molson

Breweries, A Partnership, the present opponent of record in this opposition.

While the legal burden is upon the applicant to show that its application complies with Section 30 of the Trade-marks Act, there is an initial evidential burden on the opponent in respect of the Section 30 grounds (see Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd., 3 C.P.R. (3d) 325, at pp. 329-330). To meet the evidential burden upon it in relation of a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. However, no evidence was submitted by the opponent in support of its allegation that the applicant has not used its trade-mark in Switzerland. Further, the applicant's application is based on use of its trade-mark in France, and not Switzerland, as alleged by the opponent. Accordingly, the opponent has failed to meet the evidential burden upon it in respect of the Section 30(d) ground of opposition which I have therefore rejected.

The remaining grounds of opposition all turn on the issue of confusion between the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES as applied to brandies and cognacs and the opponent's registered trade-marks MOLSON GOLDEN & Design and GOLDEN ALE & Design and pending application for registration of the trade-mark GOLDEN. Of these grounds, the most relevant would appear to be the non-entitlement ground based on application No. 506,627 for the trade-mark GOLDEN. The opponent failed to evidence the application being relied upon. However, in accordance with the opposition decision in Royal Appliance Mfg. Co. v. Iona Appliances Inc., 32 C.P.R. (3d) 525, at page 529, I have checked the Trade-marks Office records. Application No. 506,627 was filed July 14, 1983, prior to the applicant's priority filing date (November 25, 1986), and was still pending as of the date of advertisement of the applicant's application in the Trade-marks Journal, as required by s. 16(4) of the Trade-marks Act.

A determination of the issue of confusion between the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES and the opponent's trade-mark GOLDEN as applied to the wares of the parties covered in their respective applications will effectively resolve the remaining grounds of opposition in this proceeding. In assessing whether there would be a reasonable likelihood of confusion between the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES as applied to brandies and cognacs and the opponent's mark GOLDEN as applied to brewed alcoholic beverages as of November 25, 1986, the applicant's priority filing date and therefore the material date in respect of the Section 16(2)(b) ground, the Registrar must have regard to all the surrounding circumstances including, but not limited to, those specifically enumerated in s. 6(5) of the Trade-marks Act.

Further, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the material date.

With respect to the inherent distinctiveness of the trade-marks at issue, the opponent's trade-mark GOLDEN, being clearly descriptive as applied to brewed alcoholic beverages (see John Labatt Ltd. v. Molson Cos. Ltd., 19 C.P.R. (3d) 88 (F.C.A.)), possesses little inherent distinctiveness. The applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES as applied to brandies and cognacs possesses some measure of inherent distinctiveness when considered in its entirety even though it may suggest to some consumers that the applicant's brandy or cognac is made from grapes.

As of the applicant's priority filing date, the applicant's trade-mark RAISINS D'OR/ GOLDEN GRAPES had not become known to any extent in this country. On the other hand, as of 1985, sales of brewed alcoholic beverages bearing labels including the trade-mark GOLDEN were of the order of \$71,000,000 annually while advertising expenditures were in excess of \$1,900,000 annually. As a result, the opponent's trade-mark GOLDEN had become relatively well known in Canada prior to the applicant's priority filing date. Likewise, the length of time that the trade-marks had been in use must also favour the opponent in that it has evidenced use of the trade-mark GOLDEN as applied to brewed alcoholic beverages in this country since December of 1954, more than thirty years prior to the applicant's priority filing date.

The applicant's brandies and cognacs differ from the opponent's brewed alcoholic beverages although the wares of both parties can be categorized generally as alcoholic beverages. In this regard, Mr. Justice Denault in his yet unreported reasons for judgment in Molson Breweries v. Pernod Ricard, (F.Ct. File No. T-1478-90, dated August 11, 1992) commented as follows at page 9 with respect to the nature of the wares at issue in that case, namely, "brewed alcoholic beverages" and "apératifs, alcools et eaux-de vie, liqueurs et spiritueux":

"Having regard to the nature of the wares, the Registrar found that, although "brewed alcoholic beverages" differ from the wares covered in the respondent's registration, "the wares of both parties could be categorized generally as alcoholic beverages".

and at page 10, the learned trial judge stated the following:

"I believe that Mr. Perkins' statement does address the proper test to be applied under this heading, that is, whether there is a real likelihood that the average consumer of alcoholic beverages would believe that the wares associated with these trade marks are manufactured and sold by the same person. In my opinion, such a likelihood exists since the wares of both parties are products of the same industry. Consequently, I see no reason to disagree with the Registrar's finding on this point."

With respect to the channels of trade associated with the wares of the parties, I would refer

to the decisions of the Federal Court, Trial Division in Carling Breweries Ltd. v. Registrar of Trade Marks, 8 C.P.R. (2d) 247 and John Haig & Co. Ltd. v. Haig Breweries Ltd., 24 C.P.R. (2d) 66. In the Carling Breweries case, Carling Breweries Ltd. applied to register the trade-mark WHITE CAP as applied to alcoholic brewery beverages, namely, beer, ale, lager, porter and stout. The Registrar refused the application pursuant to Section 36(1) (now section 37(1)) of the Trade-marks Act, the Registrar being of the opinion that the proposed trade-mark was confusing within the meaning of Section 12(1)(d) of the Act with two registered trade-marks for the words "White Cap", one covering wines and the other covering rum. At page 251 of the published decision, Mr. Justice Gibson commented as follows in relation to the criteria of Section 6(5) of the Trade-marks Act as applied to the trade-marks before him:

From the above quotation, it is apparent that Gibson, J. had before him no evidence of use of the trade-marks at issue from which he could conclude that the registered trade-marks were known to any extent in Canada. Further, the learned trial judge also pointed out at page 250 of the published reasons for judgment that "...it is not essential that the wares of the appellant and the owners of the two registered trade marks be of the same general class (s. 6(2) of the Act)". Nevertheless, Mr. Justice Gibson concluded that there would be a likelihood of confusion between the applicant's trade-mark and the two registered marks, the learned trial judge giving considerable weight to the fact that the alcoholic beverage industry is one industry and, therefore, that beer, wines and spirits are all products of the one industry, such that it was probable that the public would be more likely to confuse the source of origin of any of these products.

In the John Haig & Co. Ltd. case, the court considered the issue of the likelihood of confusion between the trade-marks HAIG & HAIG as applied to whisky and the trade-mark HAIG covering alcoholic beverages, namely, beer. At page 70 of the published reasons for judgment, Addy, J. commented as follows:

The comments in the above decisions are equally applicable to the channels of trade associated with the wares of the parties in this opposition. As a result, I have concluded that the channels of trade associated with the applicant's brandies and cognacs and the opponent's brewed alcoholic beverages are closely related.

As to the degree of resemblance between the trade-marks at issue, I consider there to be some degree of similarity between the trade-marks GOLDEN and RAISINS D'OR/ GOLDEN GRAPES in appearance although there appears to be little similarity in sounding and no resemblance in the ideas suggested by the trade-marks at issue. Further, it is noted that the applicant has adopted the entirety of the opponent's trade-mark as an element of its trade-mark RAISINS D'OR/ GOLDEN GRAPES.

Having regard to the degree of resemblance between the trade-marks at issue and the overlapping in the channels of trade, and bearing in mind the extent to which the opponent's trade-mark GOLDEN had become known in Canada as of the applicant's priority filing date, 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 RAISINS D'OR/ GOLDEN GRAPES as applied to brandy and cognac and the opponent's trade-mark GOLDEN (application serial No. 506,627) as applied to brewed alcoholic beverages. As a result, the applicant is not the person entitled to registration of the trade-mark RAISINS D'OR/GOLDEN GRAPES for brandies and cognacs.

I refuse the applicant's application pursuant to s. 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC, THIS 23rd DAY OF December, 1992.

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