

**IN THE MATTER OF AN OPPOSITION by Anheuser-Busch Incorporated to application No. 754,852 for the trade-mark PURE BEER TASTES BETTER filed by The Upper Canada Brewing Company Limited**

---

On May 17, 1994, the applicant, The Upper Canada Brewing Company Limited, filed an application to register the trade-mark PURE BEER TASTES BETTER based upon use of the trade-mark in Canada since at least as early as November, 1993 in association with: “brewed alcoholic beverages”, as well as being based upon proposed use of the trade-mark in Canada in association with:

“Rugby shirts, sweatpants, tennis shirts, sweaters, hats, caps, jackets, shorts, tanktops, beer steins, mugs, drinking glasses, table glassware, crests, pennants, bottle openers, coasters, posters, aprons, cooler bags, wooden signs, bows, ties, tote bags, ashtrays, key chains, sports bags, cooler seats and cooler bags”.

The applicant disclaimed the right to the exclusive use of the words PURE, BEER and BETTER apart from the trade-mark.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of January 18, 1995 and the opponent, Anheuser-Busch Incorporated, filed a statement of opposition on June 19, 1995, a copy of which was forwarded to the applicant on September 1, 1995. The opponent submitted as its evidence the affidavits of L. Jane Sarjeant, Todd Douglas Bailey and Isis E. Caulder while the applicant filed as its evidence the affidavit of Terence Smith. The opponent alone submitted a written argument and neither party requested an oral hearing.

The first ground of opposition is based on Section 30 of the *Trade-marks Act*, the opponent alleging that the phrase PURE BEER TASTES BETTER is not a trade-mark as defined in the *Trade-marks Act* and, further, that the applicant could not have been satisfied that it was entitled to use the alleged trade-mark in Canada in association with the wares covered in the present application for the following reasons:

- (i) The words PURE BEER TASTES BETTER and variations thereof are commonly used in association with alcoholic brewery beverages and the wide range of goods listed in the application including items of wearing apparel, drinking vessels, glassware, crests, pennants, bottle openers, coasters, posters, aprons, cooler bags, wooden signs, bows, ties, tote bags, ashtrays, key chains, sports bags, cooler seats and bags, are all merchandising items commonly used in the promotion and sale of

beer. As such, the alleged trade-mark cannot be monopolized by the applicant;

(ii) The applicant never intended to use the term PURE BEER TASTES BETTER as a trade-mark for the wares listed in the application; and

(iii) The applicant itself never intended to use the term PURE BEER TASTES BETTER as a trade-mark for the wares listed in the application.

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 to establish the facts relied upon by it in support of its 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 them 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 [see *John Labatt Limited v. The Molson Companies Limited*, 30 C.P.R. (3d) 293, at p. 298]. Further, the material time for considering the circumstances respecting the issues of non-compliance with Section 30 of the *Act* is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475]. Finally, the opponent may have regard to the applicant's evidence to meet its initial burden in relation to the Section 30 ground.

No evidence has been furnished by the opponent to show that the applicant never intended or that it never itself intended to use the term PURE BEER TASTES BETTER as a trade-mark for the wares listed in the application. Also, I am of the view that the use of the mark PURE BEER TASTES BETTER on the applicant's cartons arguably constitutes a trade-mark use in association with brewed alcoholic beverages. Further, no evidence has been adduced to support the allegation that the words PURE BEER TASTES BETTER and variations thereof are commonly used in association with any of the wares covered in the present application. Thus, the opponent has failed to meet its initial burden in respect of the Section 30 grounds which I have therefore dismissed.

As its second ground, the opponent alleged that applicant's trade-mark is not registrable in view of Paragraph 12(1)(b) of the *Trade-marks Act* in that the phrase PURE BEER TASTES BETTER, whether depicted, written or sounded, is either clearly descriptive or deceptively

misdescriptive of the character or quality of alcoholic brewery beverages. According to the opponent, the alleged trade-mark either clearly describes or deceptively misdescribes an alcoholic brewery beverage or beer which is made of pure ingredients and therefore has superior taste.

Paragraph 12(1)(b) of the *Act* provides as follows:

*12. (1) Subject to section 13, a trade-mark 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;*

The issue as to whether the trade-mark PURE BEER TASTES BETTER is clearly descriptive of the character or quality of the applicant's brewed alcoholic beverages must be considered from the point of view of the average consumer of those wares. Further, in determining whether the trade-mark PURE BEER TASTES BETTER is clearly descriptive, the trade-mark must not be dissected into its component elements and carefully analyzed, but rather must be considered in its entirety as a matter of immediate impression [see *Wool Bureau of Canada Ltd. v. Registrar of Trade Marks*, 40 C.P.R. (2d) 25, at pp. 27-28 and *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183, at p. 186]. Additionally, the material date for considering a ground of opposition based on Paragraph 12(1)(b) of the *Trade-marks Act* is the date of decision [see *Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers, The Canadian Council of Professional Engineers*, 41 C.P.R. (3d) 243 (F.C.A.)].

While the legal burden is upon the applicant to show that its trade-mark is registrable, there is an initial evidential burden upon the opponent in respect of this ground to adduce sufficient evidence which, if believed, would support the truth of its allegations that the trade-mark PURE BEER TASTES BETTER is clearly descriptive of the character or quality of the applicant's wares. It is therefore necessary to consider the opponent's evidence in order to determine whether it has met the initial burden upon it. Initially, I would note that the applicant has disclaimed the right to the exclusive use of the words PURE, BEER and BETTER apart from the trade-mark. In my view, such a disclaimer is arguably to be taken as an admission by the applicant that the words PURE, BEER and BETTER are not independently registrable in relation to an alcoholic brewery beverage and therefore may constitute an admission that the words are either clearly descriptive of the character

or quality of an alcoholic brewery beverage, or otherwise are common to the trade or are the name of such wares [see *Andres Wines Ltd. v. Les Vins La Salle Inc.*, 3 C.P.R. (3d) 272, at page 275]. Additionally, the opponent has filed the Caulder affidavit which introduces into evidence various dictionary definitions for the words “pure”, “beer”, “taste” and “better”. Further, Exhibits F, G and H to the Caulder affidavit point to the use of the word “Purity” in referring to the “Bavarian Beer Purity law of 1516, the Reinheitsgebot”, as well as referring to “purity” as a synonym to “brilliance” which is an expression of the quality of beer in terms of clearness, limpidity, brightness and sparkle in *The Association of Brewers’ Dictionary of Beer and Brewing*.

Apart from the above, the opponent in its written argument has noted that Exhibit E to the Smith affidavit includes the following extracts:

***“Pure Beer Tastes Better***

**Pure beer is better tasting beer. The only way to know if a beer is pure is if all of its ingredients are listed on the label. Our’s are: malted barley, spring water, hops and yeast. Proudly, we invite you to visit our brewery and see for yourself how pure, better tasting beer is brewed.”**

...

“All of our beers are made in strict conformance with the world’s highest brewing standard - the Bavarian Purity Law of 1516. That is to say, they are made in small batches with only water, malt, hops and yeast. It is common practice for the vast majority of beers to be brewed with adjuncts, additives, chemicals or preservatives. We will not use these.”

...

“What will help preserve the fresh taste of beer in addition to dark brown bottles is cold, dark storage.”

...

“Our commitment to purity, quality and taste was recognized when Upper Canada’s beers were the first from North America to be accepted in the prestigious European markets of Germany, the Netherlands, Belgium, Luxembourg, Sweden and Switzerland.”

As well, Exhibit A to the Smith affidavit includes the following:

“Our Proof Of Purity Is An Ingredients List On Every Bottle”

Having regard to the disclaimer by the applicant of the words PURE, BEER and BETTER, together with the dictionary definitions and other exhibits to the Caulder, and considering Exhibit A and the extracts from Exhibit E to the Smith affidavit, I am satisfied that the opponent has met the evidential burden upon it in respect of the Paragraph 12(1)(b) ground as it applies to the applicant’s “brewed alcoholic beverages” by showing that the applicant's trade-mark PURE BEER TASTES BETTER might be perceived by the average consumer as describing a beer which tastes better because of its purity. Accordingly, the legal burden is upon the applicant to satisfy the Registrar that its trade-mark is registrable in relation to brewed alcoholic beverages.

In his affidavit, Terence Smith, President of the applicant, states that the applicant has used the trade-mark PURE BEER TASTES BETTER in association with the sale of brewed alcoholic beverages in Canada since November of 1993 in that it appears on cartons in which beer is sold to the public in beer stores and liquor stores. According to Mr. Smith, more than 235,000 cartons containing six bottles of beer, each carton bearing the trade-mark, have been shipped out to beer stores and liquor stores in Canada. Further, Mr. Smith states that the applicant has a fleet of twenty-one trucks (vans) which deliver the applicant’s beer to restaurants, pubs, beer stores and other customers primarily in Ontario, each truck (van) prominently displaying the applicant’s trade-mark on its side. Finally, the affiant notes that the mark appears on coasters and tent cards which have been supplied by the applicant to restaurants throughout Ontario, as well as appearing in the applicant’s point of sale materials and brochures.

While the applicant’s sales of beer in association with its trade-mark are not insignificant, I am not convinced that the use by the applicant of the trade-mark PURE BEER TASTES BETTER as a secondary mark at the bottom edge of the end panels of its carton is such that the applicant’s mark has become known to any significant extent in Canada. Moreover, the above extracts from Exhibit E to the Smith affidavit support the conclusion that the average Canadian consumer would be aware that the word PURE has a descriptive significance as applied to brewed alcoholic

beverages. As a result, and considering that the applicant disclaimed the right to the exclusive use of the word PURE apart from its trade-mark and that the applicant has not even presented a written argument in support of its application, I have concluded that the applicant has failed to meet the legal burden upon it in respect of the Paragraph 12(1)(b) ground in relation to its “brewed alcoholic beverages”. Thus, the second ground is successful.

As its third ground, the opponent alleged that the applicant’s trade-mark is not distinctive in that it cannot distinguish the alcoholic brewery beverages and associated merchandising products of the applicant from the alcoholic brewery beverages and associated merchandising products of others including the opponent in that the phrase PURE BEER TASTES BETTER clearly denotes a type of beer which is made of pure ingredients and therefore has a superior taste. The material date for considering this ground is the date of opposition [see *Re Andres Wines Ltd. and E.&J. Gallo Winery*, 25 C.P.R. (2d) 126 (F.C.A.), at p.130; *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd.*, 37 C.P.R.(3d) 412 (F.C.A.), at p. 424; and *Molson Breweries, a Partnership v. Labatt Brewing Company Limited*, (Court No. T-162-96, dated June 25, 1998, yet unreported, at p. 25)] and, while the legal burden is upon the applicant to satisfy the Registrar that its trade-mark is distinctive, there is nevertheless an evidential burden on the opponent to adduce sufficient evidence to establish the facts being relied upon by it in support of this ground.

While the material date for considering this ground is as of the date of opposition, the comments made in respect of the second ground are equally applicable to this ground. Consequently, the opponent has met its evidential burden in relation to this ground as it applied to the applicant’s brewed alcoholic beverages. Further, the applicant’s evidence fails to show that its trade-mark PURE BEER IS BETTER actually distinguished its brewed alcoholic beverages from those of others as of the date of opposition. As a result, this ground is also successful as applied to the applicant’s “brewed alcoholic beverages”.

The opponent also alleged that the applicant’s trade-mark is not distinctive of the associated merchandising products covered in the present application. The opponent has relied upon the Bailey and Sarjeant affidavits to meet its evidential burden in relation to this aspect of the third ground.

While these affidavits describe investigations undertaken by the affiants shortly after the material date [June 19, 1995], I am satisfied that they nevertheless establish that breweries often apply their trade-marks to clothing items such as t-shirts, sweat shirts, caps, visors, tank tops, denim shirts, shorts, jackets, slippers, bathing suits and aprons, as well as to bottle openers, lighters, coasters, playing cards, umbrellas, sunglasses, drinking mugs, glasses, plastic cups, beer kegs, individual beer coolers, beer cooler bags, sports bags, gym bags, hockey bags, key chains, toy trucks and the like. Furthermore, Exhibits B to E of the Smith affidavit appear to indicate that it is the applicant's intention to apply its trade-mark to its wares in a manner similar to other breweries. The issue, therefore, is whether the fact that applicant's trade-mark is clearly descriptive when applied to its brewed alcoholic beverages precludes it from being capable of distinguishing the applicant's remaining wares from those of others in the marketplace and, in the event that I were to find in favour of the applicant on this issue, whether I should exercise my discretion in rendering a split decision in the facts of this case.

The applicant's intended use of the trade-mark PURE BEER TASTES BETTER on wares other than brewed alcoholic beverages would, in my view, serve to promote its brewed alcoholic beverages. However, such use could arguably also serve to distinguish the applicant's wares from the wares of other breweries who are likewise applying their trade-marks to their merchandising products. Moreover, the fact that the applicant's trade-mark is clearly descriptive when applied to brewed alcoholic beverages does not mean that the applicant's trade-mark is likewise descriptive when applied to the remaining wares of the applicant. Nevertheless, since the applicant's remaining wares are intended to promote its brewed alcoholic beverages, the remaining wares and the brewed alcoholic beverages must be considered as being closely related. I am therefore not prepared to render a split decision in the circumstances of the case. I have therefore found in favour of the opponent in respect of this ground of opposition.

The final ground also relates to the alleged non-distinctiveness of the applicant's trade-mark, the opponent alleging that other manufacturers of beer have used the words PURE BEER TASTES BETTER and variations thereof in association with alcoholic brewery beverages and the other wares set forth in the present application which are or relate to merchandising items collateral to the sale

and promotion of beer. While the legal burden is upon the applicant to satisfy the Registrar that its trade-mark is distinctive, there is, as in the case of the third ground, an evidential burden on the opponent to adduce sufficient evidence to establish the facts being relied upon by it in support of this ground. However, no evidence has been adduced to support the allegation that the words PURE BEER TASTES BETTER and variations thereof have been used in association with alcoholic brewery beverages or any of the other wares listed in the present application. Thus, the opponent has failed to meet its evidential burden in respect of the final ground which I have therefore dismissed.

In view of the above, and having been delegated by the Registrar of Trade-marks by virtue of Subsection 63(3) of the *Trade-marks Act*, I refuse the applicant's application pursuant to Subsection 38(8) of the *Trade-marks Act* .

DATED AT HULL, QUEBEC, THIS \_\_\_\_ DAY OF DECEMBER, 1998.

G.W. Partington  
Chairperson  
Trade-marks Opposition Board