



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2012 TMOB 88
Date of Decision: 2012-05-10

**IN THE MATTER OF AN OPPOSITION
by Anheuser-Busch Inc. to application
No. 1,229,431 for the trade-mark SUB
ZERO in the name of Molson Canada
2005 (formerly Molson Canada)**

[1] On September 7, 2004, Molson Canada 2005 (formerly Molson Canada) (the Applicant), filed an application for the trade-mark SUB ZERO (the Mark) based upon proposed use of the Mark in Canada in association with brewed alcoholic beverages, namely beer and draught beer dispensing systems. The statement of wares, as subsequently amended, reads as follows: Brewed alcoholic beverages, namely beer.

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of April 4, 2007.

[3] On September 4, 2007, Anheuser-Busch Inc. (the Opponent) filed a statement of opposition against the application. The statement of opposition was later amended on June 16, 2008. The grounds of opposition, as amended, have been pleaded as follows:

- (a) Under s. 38(2)(b) and s. 12(1)(b) of the *Trade-marks Act*, R.S.C. 1985 c. T-13 (the Act), the Mark is not registrable in association with “brewed alcoholic beverages, namely beer and draught beer dispensing systems” because the phrase SUB ZERO, whether depicted, written or sounded, is either clearly descriptive or deceptively misdescriptive in the English language of the character or quality of

such wares or of the conditions of their production. The phrase SUB ZERO either clearly describes or deceptively misdescribes:

i) beer designed to be sold, stored, served and/or consumed at a temperature lower than 0 degrees Celsius;

ii) beer produced in conditions involving a temperature lower than 0 degrees Celsius;

iii) systems for dispensing beer in draught form so that the beer is dispensed at a temperature lower than 0 degrees Celsius.

(b) Under s. 38(2)(d) of the Act, the Mark is not distinctive (under s. 2 of the Act) because it does not actually distinguish, nor is it adapted to distinguish, the wares in association with which the Applicant uses it or intends to use it (as described in the Application) from the wares of others because:

i) the alcoholic beverage wares of Foster's Australia Limited are associated with the term SUB-ZERO;

ii) the phrase SUB ZERO denotes a type of beer which is designed to be sold, stored, served and/or consumed at a temperature lower than 0 degrees Celsius, and accordingly the phrase is used by others in the trade (including Wildwood Grill & Brewing Co. of Calgary, Alberta) in association with such beer;

iii) the phrase SUB ZERO is used by others in the trade (including Old Credit Brewery of Mississauga, Ontario) to describe a temperature lower than 0 degrees Celsius used in the process of brewing beer; and

iv) the phrase SUB ZERO describes systems for dispensing beer in draught form so that the beer is dispensed at a temperature lower than 0 degrees Celsius, and accordingly the phrase is used by others in the trade

(including Icefloe Technologies Inc. of Mississauga, Ontario) in association with such systems, and the dispensed beer.

c) The Application does not conform to the requirements of s. 30(e) of the Act because the Applicant's statement in the Application that it intends to use the Mark with the wares described in the Application in Canada was false. The Applicant had no such intention because:

i) it did not intend to "use" (under s. 4 of the Act) the Opposed Mark with all of the wares described in the Application and/or;

ii) it did not intend to control sufficiently the character or quality of all of the wares described in the application.

[4] The Applicant filed and served a counter statement, in which it denied the Opponent's allegations.

[5] The Opponent's evidence consists of the affidavits of Jonathan Burkinshaw, Megan Langley-Grainger, Shafiq Lavji, Robert White, Yaroslav Bortnik, and certified copies of a letter dated March 15, 2005, from Carlton United Beverages to the Trade-marks Office regarding application No. 1,229,431, and certified copies of registration Nos. TMA606,189 and TMA606,161 for the trade-marks SUB ZERO and SUB ZERO and Design. The certified copies show that Carlton United Beverages is the owner of registration Nos. TMA606,189 and TMA606,161 and that it provided written consent to the Applicant to overcome confusion objections raised during examination of the application. The letter merely states that Carlton United Beverages' SUB ZERO product is not a beer, and that it does not object to the Applicant's sale of beer in Canada "under the SUB ZERO brand".

[6] The Applicant's evidence consists of the affidavits of Michael J. Abbass and Marisa Hood.

[7] Only Mr. Abass was cross-examined on his affidavit. The transcript of the cross-examination, exhibits and replies to undertakings all form part of the record.

[8] Both the Applicant and the Opponent filed a written argument, and both requested and were ably represented at an oral hearing.

Onus and Material Dates

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. There is however an initial burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, S.A.* (2002), 20 CPR (4th) 155 (FCA)].

[10] The material dates that apply to the grounds of opposition are as follows:

- s. 38(2)(a)/s. 30 - the filing date of the application [see *Georgia-Pacific Corp v Scott Paper Ltd* (1984), 3 CPR (3d) 469 (TMOB) at 475];
- s. 38(2)(b)/s. 12(1)(b) – the filing date of the application [see *Shell Canada Limited v P.T. Sari Incofood Corporation* (2005), 41 CPR (4th) 250 (FCTD); *Fiesta Barbeques Limited v General Housewares Corporation* (2003), 28 CPR (4th) 60 (FCTD)].
- s. 38(2)(d)/non-distinctiveness - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc v Stargate Connections Inc* (2004), 34 CPR (4th) 317 (FC)].

Applicant's Corporate Structure

[11] Prior to analyzing the grounds of opposition, it is helpful to understand the corporate structure of the Applicant and its related companies. The evidence of Mr. Abbass, Senior General Counsel for Molson Coors Brewing Company, is that the businesses of Molson Inc. and Adolph Coors Company were combined in February 2005 to form Molson Coors Brewing Company (Molson Coors). Molson Coors includes Molson Canada 2005 (the Applicant), Coors Global Properties, Inc., and Coors Brewing Company. All of these companies are subsidiaries of Molson Coors and are related companies [see Abbass cross-examination, q. 32-38].

[12] Coors Brewing Company is the registered owner of the COORS LIGHT trade-marks in Canada. The Applicant and its predecessors have held a license from Coors Brewing Company and its predecessors in title to use the COORS LIGHT trade-mark in Canada for over 20 years. On cross-examination, Mr. Abbass stated that any beer sold bearing the COORS LIGHT trade-mark in Canada is brewed by the Applicant under license [see Abbass cross-examination, q. 87-88]. The day to day brewing of the product is controlled by the Applicant since it is the brewery which is producing the product in Canada under the COORS LIGHT trade-mark [see Abbass cross-examination, q. 106-120]. While the Applicant has day to day control over the brewing of the product in Canada, Coors Brewing Company does take steps to ensure that the Applicant brews the COORS LIGHT product in accordance with the quality standards in the license agreement. Coors Brewing Company controls the character and quality of such beer by requiring that the Applicant follow a recipe and provide samples for quality control purposes [Abbass cross-examination, q. 178-179; 187; 194; 200-201].

[13] On cross-examination, counsel for the Applicant refused to permit Mr. Abbass to say whether the owner of the COORS LIGHT trade-mark had anything to do with brewing MOLSON CANADIAN SUB ZERO beer (or the character or quality of such beer) [qq. 202-214 of the transcript].

Section 12(1)(b) Ground of Opposition

[14] I will begin by noting that since the applied for wares no longer include draught beer dispensing systems, the final part of the Opponent's s. 12(1)(b) ground need not be considered.

[15] The issue as to whether the Mark is clearly descriptive or deceptively misdescriptive of the character or quality of the wares or of the conditions of their production must be considered from the point of view of the average purchaser of those wares. The word "character" means a feature, trait or characteristic of the wares and "clearly" means "easy to understand, self-evident or plain" [*Drackett Co of Canada Ltd v American Home Products Corp* (1968), 55 CPR 29 (Ex Ct) at 34]. The Mark must not be dissected into its component elements and carefully analyzed but must be considered in its entirety as a matter of immediate impression [*Wool Bureau of Canada Ltd v Registrar of Trade-marks* (1978), 40 CPR (2d) 25 (FCTD) at 27-8; *Atlantic Promotions Inc v Registrar of Trade-marks* (1984), 2 CPR (3d) 183 (FCTD) at 186]. Finally, the

purpose of the prohibition in s. 12(1)(b) is to prevent any single trader from monopolizing a term that is clearly descriptive or common to the trade, thereby placing legitimate traders at a disadvantage [*Canadian Parking Equipment Ltd v Canada (Registrar of Trade-marks)* (1990), 34 CPR (3d) 154 (FCTD) at para. 15].

[16] In the present case, the Opponent has introduced the following dictionary definitions for the term “sub zero”:

Canadian Oxford Dictionary: of lower temperature; lower than zero
Webster’s Third New International Dictionary: registering less than zero on some scale, esp. Farenheit <sub-zero temperature> and “characterized by or suitable for sub-zero temperature”

[17] Mr. Burkinshaw is a law student employed by the agents for the Opponent who was instructed to access and print various web pages on May 14, 2008. His evidence shows various web pages showing the words SUB ZERO in association with a technology or system used to chill draught beer below zero degrees Celsius. The articles explain that in order for the draught beer to be served at this temperature, the beer must be poured from a specialized beer dispensing system which involves a draught tower installed at pubs and restaurants that can continuously pour the beer at temperatures below zero. Amongst the numerous references to SUB ZERO appearing in the evidence were the following:

- (a) *www.gelsing.ca* - Molson unveiled the world’s first draught tower that can continuously pour beer at temperatures below freezing. It is being marketed under the mark SUB ZERO.
- (b) *www.entrepreneur.com* - By providing a final flash of chilling to draft beer just prior to its release from the tower spout, the Tower Booster produces the coldest beer in the bar and provides customers with beer that is poured at sub zero temperatures – the ultimate cold beer experience ... the technology is currently in use by the Molson Coors Brewing Co.
- (c) Article from the June 20-July 17, 2005 issue of *Canadian Business* magazine - “In the quest for cold beer, no one has Icefloe Technologies Inc. of Mississauga, ON beat. The four year old company’s latest innovation is a draft beer cooler system called a Tower Booster that consistently pours beer at below freezing... Molson Coors Brewing Co. was impressed enough that it has bought first rights to the system in Canada, rebranding it the Molson Canadian Sub Zero Draft Tower.
- (d) Article from May 20, 2005, edition of *The Globe and Mail* discusses Molson’s SUB ZERO draught tower and how it is intended to consistently serve beer below 0 degrees.

[18] Mr. Burkinshaw was also instructed to attend at one pub and two restaurants located in Toronto and take photographs or obtain samples of related materials which show the words “sub-zero”, which are attached as exhibits to his affidavit.

[19] Mr. White, Senior Vice President, Canada, of the Audit Bureau of Circulations, shows that the Canadian paid circulation of *Canadian Business* magazine for the six month period ending December 31, 2005, was 89,254 (based on the distribution of the July 18, 2005 issue referred to by Mr. Burkinshaw) and the total average paid circulation of *Canadian Business* magazine for the twelve months ending December 31, 2005, was 84,663.

[20] Ms. Langley-Grainger, Associate Lawyer employed by counsel for the Opponent, attaches as Exhibit A to her affidavit dated May 30, 2008 a copy of the body of an affidavit dated April 12, 2007 (without the attached exhibits) she swore in relation to opposition proceedings against applications for the marks EXTRA CHILLED, EXTRA COLD, SUPER COLD and COLD PACK. Attached as Exhibit B to her affidavit are excerpts from Exhibits M, N, O and V to her April 12, 2007, affidavit which include materials that relate to: a) low temperature brewing, aging, storage and or serving of beer; b) ice beer; and/or c) the coorsfinelight.com website. She provided excerpts from books, periodicals and newspapers in Canada to show how the terms “ice beer” and “cold filtering” have been used in connection with the emergence of a category of beers designed to be stored and served at a low temperature. The print-out from the Coors Fine Light Beer website attached as Exhibit V to her affidavit describes what Coors Sub Zero is, how it is made and how it was invented.

[21] I note that both the Burkinshaw and Langley-Grainger affidavits suffer from some evidentiary limitations. In this regard, the reliability of Internet evidence was discussed by Madame Justice Tremblay-Lamer in *ITV Technologies, Inc. v. WIC Television Ltd.* (2003), 29 CPR (4th) 182 (F.C.T.D.), as follows:

"With regard to the reliability of the Internet, I accept that in general, official web sites, which are developed and maintained by the organization itself, will provide more reliable information than unofficial web sites, which contain information about the organization but which are maintained by private persons or businesses.

In my opinion, official web sites of well-known organizations can provide reliable information that would be admissible as evidence, the same way the Court can rely on Carswell or C.C.C. for the publication of Court decisions without asking for a certified copy of what is published by the

editor. For example, it is evident that the official web site of the Supreme Court of Canada will provide an accurate version of the decisions of the Court."

The Court did not provide much further guidance about what constitutes an "official website".

[22] In the present case, while I am satisfied that the websites located by Mr. Burkinshaw and Ms. Langley-Grainger existed at the time the searches were performed, very little information was provided to establish that these websites were "official websites" or that the information from them is reliable. Further, with the exception of the *Canadian Business* article for which Mr. White provided circulation figures for, it is not clear from the Opponent's evidence whether the information on the websites set out in the Burkinshaw and Langley-Grainger affidavits have been brought to the attention of consumers in the marketplace in Canada. As a result, I am according less weight to both of these affidavits.

[23] The Opponent submits that the facts in the present case are analogous to the facts in the SUPER COLD opposition decision [*Anheuser-Busch, Inc. v. Molson Canada 2005*, 2010 TMOB 28]. In that case, the Board concluded that the applied for mark SUPER COLD was clearly descriptive of the conditions of production of the Applicant's beer as follows:

It appears to me that, at least in the circumstances of the instant case, the two issues raised by the second ground of opposition, that is, whether the applied for mark SUPER COLD is clearly descriptive or deceptively misdescriptive of (i) the conditions of how beer is produced and (ii) a category or type of beer, are closely related. In this regard, if the opponent can show that the mark is descriptive of a process of producing beer, then it will follow that the mark is descriptive of a character or quality of the beer, that is, the beer will have a certain character or quality because it was made by a certain process: see, for example, an excerpt from *Staffordshire Potteries Ltd. v. Registrar of Trade Marks* (1976), 26 C.P.R. (2d) 134 (FCTD) at para. [20], below.

...In my view, the opponent has met the evidential burden on it to put into issue whether the applied for mark SUPER COLD is clearly descriptive of the conditions of production of the applicant's wares. That is, there is sufficient evidence to support the opponent's contention that at the material date the public was aware of a relatively new type of beer in the marketplace and that the new product required low temperatures as part of the brewing process. In other words, the public would understand that when it was purchasing the applicant's SUPER COLD beer product, it was purchasing a beer brewed by a particular process or, in terms of s. 12(1)(b), "of the conditions of . . . their production." As the applicant has not filed any evidence in support of its application, or submitted any legal arguments to counter the opponent's arguments, I find that the applicant has failed to meet the legal onus on it to show, on a balance of probabilities, that the applied for mark SUPER COLD is not prohibited by s.12(1)(b).

Further, in my view the evidence submitted by the opponent suffices to put into issue whether the phrase “super cold” had been adopted, especially in the U.K., as a descriptive term for a relatively new type of beer product. Again, the applicant has not filed any evidence in support of its application nor submitted any legal arguments to counter the opponent’s arguments. In the result, I again find that the applicant has failed to satisfy, on a balance of probabilities, the legal onus on it to show compliance with Section 12(1)(b).

There is some parallel between the instant case and *Staffordshire Potteries*, above at para. [14], where the Court, at pp.135-6, found that the term KILNCRAFT, for use in association with tableware, contravened s.12(1)(b):

The word "Kilncraft" is a combination of the two common English words kiln and craft, both of which, in my opinion, contribute to what the composite word suggests. Where used in association with or in relation to tableware, it has, so far as I am aware, no recognized meaning, but to my mind, it strongly suggests that the tableware in association with which, or in respect of which it may be used has been skilfully made by a kiln process. This is what I think it would connote, as a matter of first impression, to a member of the public who saw it on tableware or in the boxes in which such wares are sold, or who heard it spoken in relation to tableware by a store clerk or salesman.

I also think the person seeing or hearing the word [KILNCRAFT] on such an occasion would probably regard it as assuring that the wares were the product of a kiln process and that they were of good quality. To my mind, the word represents to the viewers or listeners that the wares are so produced and are of such quality, and it is, therefore, clearly descriptive within the meaning of para. 12(1)(b), both of the conditions of production of the tableware in association with which it is used and of the quality of such wares, if not also of their character, as well.

I would add that the opponent has brought to my attention *Registrar of Trade-marks v. Provenzano* (1978), 40 C.P.R.(2d) 288 (FCA); aff’g 37 C.P.R. (2d) 189 (FCTD) wherein the Court allowed an appeal from a decision of this Board. The Board had refused an application to register the trade-mark KOLD ONE for beer on the basis that the mark was clearly descriptive or deceptively misdescriptive of the character or quality of beer.

...I agree with the opponent that the *Provenzano* case is distinguishable from the instant case because (i) the prohibition in s.12(1)(b) against describing the conditions of production was not in issue in *Provenzano* and (ii) the cold filtering method of brewing beer was not prevalent in the beer industry at the time that the case was heard. Further, *Provenzano* offers little guidance in the instant case because there is no discussion by the Court of the evidence (if any) submitted by the parties.

[24] The Applicant, on the other hand, relies on the Federal Court of Appeal decision in *Registrar of Trade-marks v. Provenzano* (1978), 40 CPR (2d) 288 (FCA); aff’g 37 CPR (2d) 189 (FCTD), wherein the Court disagreed with the Board that the mark KOLD ONE was clearly

descriptive or deceptively misdescriptive of the character or quality of beer. In the Trial Division decision, the judge stated the following at p. 190:

The adjective "cold", when applied to a "beer" is not in any way descriptive of the intrinsic character or quality of the product. Unlike such food products as ice cream, frozen foods, ices or juices or appliances such as refrigerators, stoves or toasters, the temperature at which it might or might not be delivered, sold or used has nothing to do with the character or quality of the product itself: see for example the word "frigidaire" in *General Motors Corp. v. Bellows* (1949), 10 C.P.R. 101 , [1950] 1 D.L.R. 569, [1949] S.C.R. 678, and words "Tastee Freeze" in *Tastee Freeze International, Ltd.'s Appln.*, [1960] R.P.C. 255. Although a majority of people might prefer to drink their beer cold, others may prefer it at room temperature. The word "cold" in such a case can refer only to the state at which the product, namely, the beer, may or may not be sold or consumed and not to any intrinsic quality or characteristic of the product. It, therefore, is not descriptive of the beer itself.

[25] In the present case, I am not satisfied that the Opponent has met its burden under this ground. In this regard, the evidence shows that low temperatures and chilling can be part of the beer brewing process, and that a temperature of lower than 0 degrees Celsius is required to brew certain types of beer such as ice beer. The evidence in the present case does not, however, show that the public has become familiar with the term "sub zero" in connection with a type of beer.

[26] In my view, the evidence in the present case shows that "sub zero" designates a dispensing system designed to serve or pour beer at a below zero temperature. From my understanding of the evidence, the Applicant's beer only becomes below zero in temperature once it is poured. It follows that, if the term "sub zero" describes a cold beer dispensing technology, then it cannot be descriptive of **a condition of production**, i.e. it does not describe a beer that requires low temperatures **as part of the brewing process**. While it is acknowledged that some types of beer may now require low temperatures or temperatures below zero degrees Celsius as part of the brewing process, the first issue in the present case under this ground is whether the term "sub zero" is clearly descriptive of a condition of production or method of brewing beer. I find that it is not.

[27] The Opponent has also argued that the Mark is clearly descriptive of a beer designed to be sold, stored, served and/or consumed at a temperature lower than 0 degrees Celsius (i.e. the character or quality of the particular kind of beer associated with the mark). I disagree. In this regard, I consider the present case to be on all fours with the Federal Court of Appeal's decision

in *Provenzano*. In *Provenzano*, the mark KOLD ONE was found to refer only to the state at which the beer may or may not be sold or consumed and not to any intrinsic quality or characteristic of the product. It was therefore found not to be descriptive of beer itself.

[28] In the present case, while SUB ZERO may suggest to the consumer that the draught beer will be poured and served at a cold temperature, as noted above, it does not describe a beer that requires low temperatures as part of the brewing process. Nor is it clearly descriptive of an intrinsic quality or characteristic of the beer itself. As held in *Provenzano*, the temperature at which the beer might or might not be delivered, sold or used in the present case has nothing to do with the character or quality of the product itself.

[29] In view of the evidence as a whole, I do not consider that the average consumer or purchaser of beer in Canada, as a matter of first impression, would conclude that SUB ZERO, when applied to beer, clearly describes a beer of a certain character or quality. This ground is therefore unsuccessful.

Section 38(2)(d) Ground of Opposition

[30] At the oral hearing, the Opponent's agent admitted that the evidence furnished did not show that the Mark had become known sufficiently by the third parties set out in its s. 38(2)(d) ground to negate the distinctiveness of the applied for Mark. Instead, it argued that the Mark is not distinctive because the character or quality of the wares is being controlled by two different owners. In this regard, the Opponent stated the following in its written argument at para. 60:

The phrase SUB ZERO cannot function as a trade-mark for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by others" as defined by Section 2 of the Act. The draught beer dispensing system featuring the phrase SUB ZERO as actually used in the marketplace also prominently features both the COORS LIGHT and MOLSON CANADIAN trade-marks (and dispenses those brands of beer). The evidence shows that the COORS LIGHT and MOLSON CANADIAN trade-marks are owned by two different legal entities.

Accordingly the Mark does not distinguish the Applicant's beer from the beer of other

traders, which is the function of a trade-mark, and accordingly required for a mark to be distinctive.

Coors Light brand beer sold in Canada is brewed by Molson pursuant to a license, as stated by Mr. Abass on cross-examination and as indicated in the legends on the COORS LIGHT packaging attached to Ms. Hood's affidavit. Accordingly, the benefit of any use of SUB ZERO with COORS LIGHT beer enures to Coors Brewing Company and not the Applicant, rendering the SUB ZERO mark not distinctive [see *Novopharm Ltd. v. Pfizer Canada Inc.* (2001), 18 CPR (4th) 395 (TMOB) at pp. 413-414].

[31] This is not, however, what the Opponent has pleaded. When I pointed this out to the Opponent at the oral hearing, the Opponent's agent submitted that the sufficiency of pleadings should be assessed having reference to any evidence of record [*Novopharm v. Astrazeneca* (2002), 21 CPR (4th) 289 (FCA)]. The Applicant, on the other hand, submits that this opposition is confined by the specific facts raised in the statement of opposition. Relying on the decision in *Imperial Developments Limited v. Imperial Oil Limited* (1984) 79 CPR (2d) 12 at 20-21, the Applicant argues that it is trite law that an opposition is to be limited to those issues which are properly raised in the statement of opposition.

[32] Section 38(3) of the Act requires the statement of opposition to set out the grounds of opposition with "sufficient detail to enable the applicant to reply thereto." In the present case, the Opponent's s. 38(2)(d) ground has been pleaded as follows:

The Mark does not actually distinguish or is not adapted to distinguish the wares with which the Applicant uses it or intends to use it from the wares of others because:

- i) the alcoholic beverage wares of Foster's Australia Limited are associated with the term SUB-ZERO;
- ii) the phrase SUB ZERO denotes a type of beer which is designed to be sold, stored, served and/or consumed at a temperature lower than 0 degrees Celsius, and accordingly the phrase is used by others in the trade (including Wildwood Grill & Brewing Co. of Calgary, Alberta) in association with such beer;

iii) the phrase SUB ZERO is used by others in the trade (including Old Credit Brewery of Mississauga, Ontario) to describe a temperature lower than 0 degrees Celsius used in the process of brewing beer; and

iv) the phrase SUB ZERO describes systems for dispensing beer in draught form so that the beer is dispensed at a temperature lower than 0 degrees Celsius, and accordingly the phrase is used by others in the trade (including Icefloe Technologies Inc. of Mississauga, Ontario) in association with such systems, and the dispensed beer.

[33] In my view, the Opponent's s. 38(2)(d) ground is restricted to the sub-paragraphs set out above. The "others" relied upon by the Opponent under this ground are specifically identified in the sub-paragraphs for this ground, and Coors Brewing Company is not identified as one of them. I therefore agree with the Applicant that the s. 38(2)(d) ground in the present case should be confined by the specific facts raised in the statement of opposition.

[34] In my view, the s. 38(2)(d) ground was sufficiently detailed to enable the Applicant to respond. Contrary to the decision in *Astrazeneca*, wherein the s. 38(2)(d) ground was pleaded very broadly and was not restricted to the three companies listed in that case, the s. 38(2)(d) ground in the present case was specifically restricted to the entities identified in the sub-paragraphs for this ground. As there was no deficiency in the pleading, and as I am satisfied that the Applicant knew the case it had to meet, the present case is distinguishable from *Astrazeneca* and there is no need for me have regard to the evidence in determining what specific facts the pleadings alleged. This ground is therefore unsuccessful.

[35] I would like to add that even if the s. 38(2)(d) ground could have been broadened to include the alleged use of SUB ZERO by Coors Brewing Company, I would not have been satisfied that the Opponent had met its burden of showing that, as of the filing of the opposition, SUB ZERO had become known sufficiently as indicating the source of Coors Brewing Company that it negated the distinctiveness of the Mark in the hands of the Applicant. In this regard, most of the Opponent's evidence post-dates the material date of September 4, 2007, and I am not convinced that the evidence that may relate to the period before the material date is sufficient to meet the Opponent's burden. While there may be some Internet articles dated prior to Sept. 4,

2007, these articles are not evidence of the truth of their contents. Further, it is not clear from the Opponent's evidence whether the information on the websites set out in the Burkinshaw and Langley-Grainger affidavits has been brought to the attention of consumers in the marketplace in Canada. This ground is therefore dismissed.

Section 30(e) Ground of Opposition

[36] Since the application contains a statement that the Applicant by itself and/or through a licensee intends to use the trade-mark in Canada, it formally complies with s. 30(e). The issue therefore becomes whether or not the Applicant substantially complied with s. 30(e), i.e. was the Applicant's statement that it intended to use the Mark true? [see *Home Quarters Warehouse, Inc v. Home Depot, U.S.A., Inc.* (1997), 76 CPR (3d) 219 (TMOB); *Jacobs Suchard Ltd. v. Trebor Bassett Ltd.* (1996), 69 CPR (3d) 569 (TMOB)]. Based on the evidence before me, I am not able to conclude that the Applicant did not truly intend to use the SUB ZERO mark when it filed its application. The s. 30(e) ground of opposition is accordingly dismissed.

Disposition

[37] Pursuant to the authority delegated to me under s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

Cindy R. Folz
Member,
Trade-marks Opposition Board
Canadian Intellectual Property Office