

IN THE MATTER OF AN OPPOSITION
by Molson Breweries, A Partnership
to application No. 545,581 for the
trade-mark MOSEL GOLD filed by
J.P. Delf Companies Ltd.

On July 2, 1985, the applicant, J.P. Delf Companies Ltd., filed an application to register the trade-mark MOSEL GOLD for "wines" based on proposed use in Canada. In reply to an Examiner's report, the applicant filed a revised application restricting the wares to "wines from the Mosel region in Germany" and including a disclaimer to the word MOSEL. The application was subsequently advertised for opposition purposes on March 12, 1986.

The Molson Companies Limited filed a statement of opposition on April 7, 1986, a copy of which was forwarded to the applicant on May 6, 1986. The statement of opposition states that the opponent is the owner of the following trade-mark registrations and applications for "alcoholic brewery beverages" or "brewed alcoholic beverages":

<u>Reg. No./Appl'n. No.</u>	<u>Trade-mark</u>
100,941	MOLSON'S GOLDEN ALE & Design
114,145	GOLDEN ALE & Design
161,252	MOLSON GOLDEN ALE & Design
290,098	MOLSON GOLDEN & Design
292,103	MOLSON GOLDEN
293,246	GOLDEN ALE & Design
S.N. 385,655	GOLDEN
S.N. 466,237	MOLSON GOLDEN & Design
S.N. 506,627	GOLDEN

The applications and registrations were subsequently assigned to Molson Breweries, A Partnership, the current opponent of record.

The first ground of opposition is that the application does not comply with the requirements of Section 30 of the Trade-marks Act because the applicant could not have been satisfied that it was entitled to use or register its trade-mark presumably because it was aware of the opponent's marks. The second ground of opposition is that the applied for trade-mark is not registrable because it is confusing with the opponent's registered trade-marks noted above. The third ground is that the applicant is not the person entitled to registration because its applied for trade-mark is confusing with the opponent's above-noted trade-marks previously used in Canada and with the three marks for which applications had previously been filed. The fourth ground is that the applied for trade-mark is not distinctive in view of the foregoing.

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavits of David A. Barbour and J. David Lee. As its

evidence, the applicant filed the affidavits of Kim Pelletier, Jane Murphy and Michael J. McLaughlin. All of the applicant's affiants were cross-examined on their affidavits and the transcripts of those cross-examinations form part of the record of the present proceeding. As evidence in reply, the opponent filed the affidavit of Linda Wright. Only the opponent filed a written argument and no oral hearing was conducted.

As for the first ground of opposition, the onus or legal burden is on the applicant to show its compliance with Section 30 of the Act. However, there is an evidential burden on the opponent to prove the allegations of fact in support of this ground. The opponent having failed to do so, this ground is therefore unsuccessful.

The remaining grounds all turn on the issue of confusion between the applicant's mark and the various registered and applied for marks of the opponent. Although the opponent's written argument stresses its trade-mark GOLDEN, I consider that the most pertinent of the opponent's marks is the trade-mark MOLSON GOLDEN. I will therefore first consider the issue of confusion between that mark and the applicant's proposed mark. The onus or legal burden is on the applicant to show no reasonable likelihood of confusion. Furthermore, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

The opponent's mark GOLDEN has been held to be clearly descriptive of beer (see John Labatt Ltd. v. Molson Companies Ltd. (1987), 19 C.P.R. (3d) 88 (F.C.A.)) and the opponent's house mark MOLSON is a surname. Thus, the trade-mark MOLSON GOLDEN is inherently weak. The applicant's trade-mark, too, is inherently weak. MOSEL has been disclaimed and GOLD is at least somewhat laudatory.

The applicant's mark has not become known at all in Canada. As for the opponent's mark, the Barbour affidavit evidences long and extensive use of the opponent's trade-mark MOLSON GOLDEN for brewed alcoholic beverages. According to Mr. Barbour, sales by the opponent of beer bearing labels featuring the mark MOLSON GOLDEN were in excess of \$570 million for the period 1970 to 1984. Advertising expenditures for that same period were greater than \$15 million. Thus, as of the filing of the present opposition, the opponent's trade-mark MOLSON GOLDEN had become very well known in Canada.

The length of time the marks have been in use favors the opponent. The wares and trades of the parties are similar in line with the decision in Carling Breweries Ltd. v. Registrar of Trade Marks (1972), 8 C.P.R. (2d) 247 at 251

(F.C.T.D.) .

The marks of the parties bear some degree of visual and phonetic resemblance. Both marks comprise two words and the second word in the applicant's mark is very similar to the corresponding word in the opponent's mark. The first word in each mark comprises two syllables and commences with the letters "mo." The latter portions of the components MOLSON and MOSEL are somewhat similar when sounded. The ideas suggested by the two marks bear less resemblance.

Although the applicant did not file a written argument, it appears that its evidence has been submitted to establish the common use of the word "gold" or "golden" as a component of trade-marks in the alcoholic beverage trade. The Pelletier affidavit evidences a large number of registrations for such marks. The applicant has buttressed its state of the register evidence with state of the marketplace evidence. The McLaughlin and Murphy affidavits establish that a number of alcoholic products are sold having the word "gold" or "golden" as a prominent part of the product label.

A fair inference is that a number of the marks evidenced by the applicant are in use and that consequently the average consumer would be accustomed to making fine distinctions between such trade-marks in the marketplace. Thus, the average purchaser of alcoholic beverages would likely pay considerably more attention to the differences between such marks when considered in their totalities: see the opposition decision in Molson Companies Ltd. v. Rocky Mountain Breweries Ltd. (1985), 6 C.P.R. (3d) 121 at 124. In the present case, however, this does not greatly advance the applicant's case since there is still a fair degree of resemblance between the first components of the two marks at issue.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. As noted above, the onus or legal burden is on the applicant to show that the marks of the parties are not confusing. What this means is that if after all the evidence is in a determinate conclusion cannot be reached, the issue must be decided against the applicant. In the present case, in view of the similarities in the wares and trades of the parties, the extent to which the opponent's mark has become known in Canada, the fact that there is some resemblance between the marks of the parties and the further fact that no use of the applicant's mark has been made in Canada, I find that a determinate conclusion cannot be made. Thus, I must resolve the issue of confusion against the applicant and find that the applicant's grounds based on its registered mark MOLSON GOLDEN are successful. It is therefore unnecessary

to consider the remaining grounds of opposition.

In its written argument, the opponent sought to rely on a ground of non-distinctiveness based on a third party mark similar to the applicant's proposed mark. However, such a ground was not raised in the statement of opposition and cannot therefore be considered. In any event, due to the minimal evidence on point, it is highly unlikely that such a ground would have been successful in any event.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 22nd DAY OF June, 1990.

David J. Martin,
Member,
Trade Marks Opposition Board.