

**IN THE MATTER OF AN OPPOSITION
by Molson Breweries, A Partnership to
application No. 633,573 for the trade-mark
GOLDEN HARVEST filed by Bacchus Agents
(1981) Ltd. and Heinrich Lorch GmbH Co.
trading as Bacchus Agents (1981) Ltd.**

On June 6, 1989, the applicant Bacchus Agents (1981) Ltd. and Heinrich Lorch GmbH Co. trading as Bacchus Agents (1981) Ltd. filed an application to register the trade-mark GOLDEN HARVEST for wine, based on use in Canada since May 1, 1989. I mention in passing that the second party identified in the application may be a misnomer for Weinkellerei Heinrich Lorch GmbH & Co.; in any event, I will refer to the applicant as "Bacchus Agents." The subject application was advertised for opposition purposes on January 10, 1990 and opposed by Molson Breweries, A Partnership, on March 19, 1990. A copy of the statement of opposition was forwarded to the applicant on March 29, 1990. The opponent was subsequently granted leave to amend its pleadings: see the Office ruling dated September 8, 1992.

The first ground of opposition is that the application does not comply with the requirements of Section 30 because, among other things, "The Applicant did not use the trade-mark as alleged in the application or at all. The applicant has never sold in Canada or elsewhere, the wares subject of this application in association with the subject trademark . . . Any and all use of the trade-mark subject of this application has been by parties other than the applicant."

Further grounds allege that the applied for mark GOLDEN HARVEST is not registrable and not distinctive of the applicant's wares, and that the applicant is not the person entitled to registration, because the applied for mark is confusing with various of the opponent's registered trade-marks (including the word GOLDEN as a component) for brewed alcoholic beverages, which the opponent used and advertised in Canada prior to the date of first use claimed by the applicant namely, May 1, 1989.

The applicant filed and served a counter statement, on April 18, 1990, generally

denying all of the opponent's allegations. I consider that the counter statement of record effectively denies the allegations in the amended statement of opposition.

The opponent's evidence in chief consists of the affidavits of David Perkins, Vice-President, Business Director, of the opponent, and Randy Marusyk, student at law. The applicant filed as its evidence the affidavits of Hank Smith and James Marion, employees of Bacchus Agents (1981) Ltd. (hereinafter "Bacchus"), Ian Thompson, and Victor G. Arcuri, agent for the applicant in this proceeding. At the opponent's request, the Registrar issued an order requiring each of the applicant's affiants to attend for cross-examination; see the Office ruling dated May 13, 1991. Mr. Thompson did not attend for cross-examination and consequently his affidavit was deemed not to form part of the record of this proceeding: see the Office ruling dated January 31, 1992. The transcripts of cross-examination of Messrs. Smith, Marion, and Arcuri, and answers to undertakings arising from cross-examination, form part of the evidence of record.

The opponent was refused an extension of time to file reply evidence: see the Office ruling dated June 17, 1992. However, the opponent filed its written argument in a timely manner. During the course of the proceedings the applicant was refused leave to file its written argument out of time, to amend its counter statement, and to file additional evidence: see the Office rulings dated September 8, 1992 (two rulings), and January 29 and April 30, 1993. An oral hearing was scheduled, however, neither party made an appearance.

The first ground of opposition is that the subject application does not comply with Section 30(b) of the Trade-marks Act which requires the application to specify the date from which the applicant has used its mark in association with the wares specified in the application. With respect to this ground of opposition, the legal burden or onus is on the applicant to show that its application complies with Section 30(b). That is, the applicant must show that it has actually used the mark (within the meaning of Section 4) and that the date of first use alleged in the application is factually correct (the applicant may allege a date of first use subsequent to the actual date of first use, but

may not allege a date prior to the actual date of first use). There is also, in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations that the applicant's date of first use is incorrect or that the mark was used by parties other than the applicant. The presence of an evidential burden on a party with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist. The evidential burden on the opponent with respect to Section 30(b) is lighter than in the ordinary case: see John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R.(3d) 293 at pp. 298-300 (F.C.T.D.) The presence of the legal burden on a party means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against that party: see Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd. (1984), 3 C.P.R.(3d) 325 at pp. 329-330 (TMOB). The material time for considering the circumstances respecting the issue of non-compliance with Section 30(b) is the filing date of the application: see Thomas J. Lipton Inc. v. Primo Foods Ltd. (1992), 44 C.P.R.(3d) 556 at p. 560 (TMOB); Georgia-Pacific Corp. v. Scott Paper Ltd. (1984), 3 C.P.R. (3d) 468 at p. 475 (TMOB).

In the instant case, the opponent relies on the applicant's affidavit evidence, and on evidence elicited on cross-examination, to support the allegations respecting the ground of opposition based on Section 30(b). That evidence may be summarized as follows.

For in excess of 20 years, Bacchus has imported and distributed in Canada the wines of a German wine maker namely, Weinkellerei Heinrich Lorch GmbH & Co. (hereinafter "Lorch"). Mr. Marion's evidence is that Lorch first introduced wine under the mark GOLDEN HARVEST to Canada on May 1, 1989. Attached as Exhibit 1 to his affidavit are copies of ten invoices, originating in Germany, showing sales of GOLDEN HARVEST wine directly from Lorch to the Alberta Liquor Control Board (I note in passing that the two earliest invoices are dated January 15, 1990). The invoices identify "BACCHUS AGENTS (1981) LTD" as the importing agent. Labels

of various Lorch wines, including labels for GOLDEN HARVEST wine, identify "Weinkellerei Heinrich Lorch GmbH & Co." as the bottler and shipper of the wine: see Exhibits 11-16 of Mr. Marion's affidavit. Both the labels and invoices show the abbreviation LORCH (a stylized representation of a bunch of grapes appears in the letter O) used as the trade-name of Weinkellerei Heinrich Lorch GmbH & Co.

I conclude from the evidence that Lorch is the sole manufacturer of the wine GOLDEN HARVEST. I also conclude from the evidence that Bacchus does not manufacture wine but rather acts through sales representatives who visit various retail establishments to encourage those outlets to carry certain alcoholic beverage products. I infer from the evidence that Lorch alone rather than the applicant Bacchus Agents is the owner of the applied for mark, and that Lorch in its own right, rather than the applicant Bacchus Agents, has been using the mark GOLDEN HARVEST in Canada. In other words, the opponent has met the evidential onus on it with respect to the allegation that the applicant has never used the applied for mark, and the applicant has not met the legal onus on it to show otherwise. It follows that the opponent succeeds on the first ground of opposition. It is therefore not necessary for me to consider the remaining grounds.

In view of the above, the applicant's application is refused.

DATE AT HULL, QUEBEC, THIS 31st DAY OF October, 1994.

Myer Herzig,
Member,
Trade-marks Opposition Board