IN THE MATTER OF AN OPPOSITION
by Molson Breweries, A Partnership
to application No. 575,856 for the
trade-mark GOLDEN COOLER filed by
Schenley Canada Inc.

On January 7, 1987, the applicant, Schenley Canada Inc., filed an application to register the trade-mark GOLDEN COOLER for "wine coolers" based on proposed use in Canada. The application as filed included a disclaimer to the word COOLER. The application was advertised for opposition purposes on July 1, 1987.

The Molson Companies Limited filed a statement of opposition on July 24, 1987, a copy of which was forwarded to the applicant on August 28, 1987. 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":

Reg. No./Appl'n. No.	Trade-mark
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
309,841	MOLSON GOLDEN & Design
S.N. 385,655	GOLDEN
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 (1) 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 and (2) the applicant did not intend to use the applied for

trade-mark. 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 two 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 Harold J. Moran and Linda M. Wright. The applicant did not file evidence. 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.

As for the opponent's ground of prior entitlement, the opponent has satisfied the burden on it to evidence use of its trade-mark GOLDEN prior to the applicant's filing date and non-abandonment of that mark as of the applicant's advertisement date. The ground therefore remains to be decided on the issue of confusion between the marks of the parties.

The material time for considering the circumstances respecting the issue of confusion is as of the applicant's filing date in accordance with the wording of Section 16(3) of the Act. Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion. Finally, 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.

As for Section 6(5)(a) of the Act, the opponent's trade-mark GOLDEN is clearly descriptive of brewed alcoholic beverages: see the decision in John Labatt Ltd. v. Molson Cos.

Ltd. (1987), 19 C.P.R.(3d) 88 (F.C.A.). The applicant's mark GOLDEN COOLER is inherently weak since COOLER is the name of the wares and GOLDEN is arguably descriptive of the color of the wares.

Since the applicant filed no evidence, I must conclude that its mark had not become known at all in Canada as of the material time. The opponent, on the other hand, has evidenced long and extensive use of its trade-mark GOLDEN in combination with its house mark MOLSON or MOLSON'S for brewed alcoholic beverages. In his affidavit, Mr. Moran attests to sales by the opponent of beer bearing labels featuring the mark GOLDEN in excess of $700 million for the period 1970 to 1986. Advertising expenditures for that same period were greater than $24 million. Thus, as of the filing of the present application, the opponent's trade-mark 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 a high degree of resemblance, the first component of the applicant's mark being identical to the opponent's mark.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the similarities in the wares, trades and marks of the parties and the extent to which the opponent's mark has become known, I find that the applicant has failed to satisfy the legal burden on it to show that there is no reasonable likelihood of confusion between its mark GOLDEN COOLER and the opponent's mark GOLDEN. The ground of prior entitlement is therefore successful and the remaining grounds need not be considered.

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

DATED AT HULL, QUEBEC, THIS 31st DAY OF May, 1991.

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