



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

Citation: 2010 TMOB 163
Date of Decision: 2010-09-30

**IN THE MATTER OF AN OPPOSITION
by Anheuser-Busch to application
No. 1064884 for the trade-mark BC-BUD
in the name of Jeffrey N. Daum**

[1] On June 27, 2000, Jeffrey N. Daum [the Applicant] filed an application to register the trade-mark BC-BUD [the Mark]. The application is based upon proposed use of the Mark in Canada in association with the following wares and services, as revised:

Wares:

(1) Clothing, namely coats, shirts, pants, dresses, sweaters, overalls, shorts, socks and scarves; printed publications of photographic wares, namely, magazines, papers, books, newsletters, and webpages; stickers; flags; novelties/knick-knacks, namely, ashtrays, glasses, mugs, plates, pens, pencils, business cards, cards, toothpick holders, scissors, awards, plastic bags, boxes, paper bags, plastic containers, lunch boxes, bottles and flasks, flying saucers, umbrellas, balls, flags, stickers, posters, plant food and conditioner, picture frames, towels, face clothes, blankets, neon signs, sunglasses, rings, necklace, pendants, lighters, rolling papers, cigarette packages, matches, antenna balls, clocks, murals, paintings, coffees, teas, juices and carbonated beverages excluding non-alcoholic beers.

Services:

(1) Operation of a retail store namely, in the field of clothing, printed publications of photographic wares, novelties and knickknacks and non-alcoholic beverages; online and retail sale of clothing, photographic services, books; operation of on-line chat clubs, on-line news sources, on-line sports trivia contests and on-line photography contests; providing online access in order to contract with government bodies to others.

[2] I note that the original application also included the wares hemp and hemp cloth.

[3] The application was advertised for opposition purposes in the *Trade-marks Journal* of December 10, 2003. On May 10, 2004, Anheuser-Busch Incorporated [the Opponent] filed a statement of opposition. The grounds of opposition are based on s.38(2)(a), s.38(2)(b), s.38(2)(c) and s.38(2)(d) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 [the Act].

[4] The Applicant filed and served a counter statement on November 10, 2004.

[5] In support of the opposition, the Opponent filed the affidavit of John Hanichak. The Opponent subsequently requested leave to replace the affidavit of Mr. Hanichak with the affidavit of Nick Gatehouse and leave was granted. The Applicant obtained an order to cross-examine Mr. Gatehouse on his affidavit and the transcript of the cross-examination as well as his replies to certain questions is of record.

[6] In support of its application, the Applicant filed the affidavit of Dawn Brennan. Ms. Brennan was not cross-examined.

[7] Each party filed a written argument and each party participated in an oral hearing.

Onus

[8] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts to support each ground of opposition exist [see *John Labatt Ltd. v. Molson Cos.* (1990), 30 C.P.R. (3d) 293 (Fed. T.D.) at 298].

Relevant Dates

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

- s. 38(2)(a)/s. 30(i) - the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 (T.M.O.B.) at 475];
- s. 38(2)(b)/s. 12(1)(d) - the date of my decision [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)];

- s. 38(2)(c)/s. 16(3) – the filing date of the application [see s. 16(3)];
- s. 38(2)(d)/non-distinctiveness - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.)].

Preliminary Issue

[10] The Opponent submits that most if not all of the evidence of Ms. Brennan is inadmissible hearsay. As the Applicant’s agent spent a considerable amount of time on submissions addressing this issue at the oral hearing, I consider it necessary to fully examine this issue as follows.

[11] Ms. Brennan identifies herself as a legal assistant employed by the agents for the Applicant. She explains that in this capacity, she has knowledge of the matters set forth in her affidavit.

[12] In each paragraph of the body of her affidavit, she states “Now shown to me” and attaches as exhibits a variety of documents, some of which include the following:

- printouts from websites for businesses in Canada that allegedly sell clothing and use the names LIL’ BUD CLOTHING COMPANY, BUDDS, BUD GOWAN FORMAL WEAR, and BUD THE SPUD;
- copies of on-line dictionary definitions for the word “bud” and “BC Bud”;
- copies of various Canadian and U.S. Internet articles and extracts from websites submitted to show, *inter alia*, a) that BC Bud is a type of marijuana grown in B.C.; and b) that BC Bud is known to a significant number of Canadians as a type of marijuana grown in B.C.

[13] The Applicant argues that the website pages set out in the Brennan affidavit are crucial to the Applicant’s case as they are necessary to prove the facts in issue (distinctiveness and absence of the likelihood of confusion). It argues that the evidence is reliable based on the breadth of information compiled from independent sources with no reason to doubt their veracity. Relying on the decision in *R. v. Khelawon* (2006), 2 S.C.R. 787 (S.C.C.) [*R. v. Khelawon*], the Applicant further submits that it was up to the Opponent to put forth its concerns about why a document should be considered unreliable.

[14] The Opponent, on the other hand, submits that there is no reverse onus on the party objecting to the hearsay evidence to establish that the documents are not reliable. The Opponent further noted that the decision in *R. v. Khelawon* was based on criminal law and has not changed the underlying principles of necessity and reliability required to make hearsay evidence admissible. In this regard, the Opponent submits that it is up to the witness to explain why the evidence is both necessary (i.e. explain why non-hearsay evidence is not available) and reliable (i.e. explain how the source from which the information comes is trustworthy).

[15] I agree with the Opponent that the decision in *R. v. Khelawon* has not changed the law concerning hearsay. The recognized exceptions to the inadmissibility of hearsay evidence remain reliability and necessity. I find the following comments of Justice Martineau in *Express File Inc. v. HRB Royalty Inc.* (2003), 27 C.P.R. (4th) 251 (F.C.) helpful:

“ I also cannot infer here that the Prothonotary has chosen to ignore the legal principles established by the jurisprudence with respect to hearsay and its recognized exceptions. It is true that apart from the quote of the Federal Court of Appeal in *P.S. Partsource Inc. v. Canadian Tire Corp.* (2001), 267 N.R. 135 at p. 138, 11 C.P.R. (4th) 386 (F.C.A.) ("*Partsource*"), there is no other reference to the case law. However, a close reading of the Prothonotary's reasons shows that, based on the applicable principles, the latter properly asked himself whether or not the Applicant has demonstrated that the hearsay evidence contained in the paragraphs at issue and exhibits herein are reliable and reasonably necessary (see paras. 10-13 of the reasons).”

[16] I also agree with the Applicant however, that an administrative tribunal, even if required to hold an adjudicative type hearing, is not bound by the whole body of the law of evidence applied in Federal Court. Therefore, instead of finding the hearsay evidence in the Brennan affidavit inadmissible, I am prepared to give diminished weight to it. As an aside, I note that the most relevant portions of such evidence would be admissible in any event for the reasons that follow.

[17] The Applicant submits that, even I cannot give much weight to some of the results of Ms. Brennan's Internet searches, I should still be able to take judicial notice of the Canadian Oxford on-line dictionary definition and Wikipedia meaning of the term BC Bud. The Applicant also submits that I take judicial notice of the circulation of the *Vancouver Sun*, *Washington Times* and *Time Canada* newspapers and magazine in Canada.

[18] Judicial notice is defined in Sopinka and Lederman, *The Law of Evidence in Canada*, 2d ed. at 1055 as “the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs.” Considering first the dictionary definition, I consider it proper for me to take judicial notice that BC Bud has been defined in the Canadian Oxford On-Line dictionary as “an informal high-potency marijuana grown in B.C.” [*Envirodrive Inc. v. 836442 Canada Inc.* (2005), [2005] A.J. No. 747, 2005 ABQB 446 (*Envirodrive*)]. I am also prepared to give some weight to the similar meaning of the term as found in the Wikipedia reference [*Canadian Council of Professional Engineers v. Alberta Institute of Power Engineers* (2008), 71 C.P.R. (4th) 37 (T.M.O.B.)]. I will note, however, that I am not prepared to take judicial notice of the Applicant’s claim that this meaning of BC Bud is known to a significant number of Canadians.

[19] With respect to the *Vancouver Sun*, *Washington Times* and *Time Canada* Internet articles, in view that the Board can take judicial notice of the general circulation of major Canadian and American newspapers [see *Carling O’Keefe Breweries of Canada Ltd.-Les Brasseries Carling O’Keefe du Canada trading as Carling O’Keefe Breweries v. Anheuser-Busch, Inc.* (1985), 4 C.P.R. (3d) 216, and *Ports Int’l Ltd. v. Amcan Charter Imports Ltd.* (1984), 4 C.P.R. (3d) 390], I am also prepared to take judicial notice that a number of Canadians would have read articles emanating from such sources on the Internet. In my view, however, the existence of one article at one time that makes reference to BC Bud on these websites would not be sufficient for me to be able to conclude that the meaning of BC Bud is known to a significant number of Canadians across Canada, and not just those in British Columbia.

[20] Ms. Brennan also provided articles from many other websites. The following comments of Justice Slatter in *Envirodrive, supra*, is instructive:

...The mere fact that something is publicly available and readily producible from the Internet does not make it admissible. Such evidence must still pass the normal tests for evidence, including the hearsay rule and the opinion evidence rule. Of course, if the information is merely tendered to show that certain information was known to the public, or for a purpose other than the truth of its contents, then the information would be admissible: *ITV Technologies Inc. v. WIC Television Ltd.* (2003), 29 C.P.R. (4th) 182 at 194 (F.C.T.D.).

[21] In the present case, in view that some of the Internet evidence has been tendered to show that certain information was known to the public [i.e. that BC Bud is used in a non-proprietary sense to refer to B.C. marijuana], and not for the truth of its contents, I consider it admissible. Absent information about the number of Canadians who may have accessed these websites, however, there is no evidence that the information from these websites has been brought to the attention of any consumers in the marketplace in Canada [*Candrug Health Solutions Inc. v. Thorkelson* (2007), 60 C.P.R. (4th) 35 (F.C.), reversed (2008), 64 C.P.R. (4th) 431 (F.C.A.)].

Section 30(i) Ground of Opposition

[22] Regarding the s. 30(i) ground I note that the Applicant has made the requisite statement and there is no evidence that it did so in bad faith [see *Sapodilla Co. Ltd. v. Bristol-Myers Co.* (1974), 15 C.P.R. (2d) 152 (T.M.O.B.) at 155]. I am therefore dismissing this ground of opposition.

Remaining Grounds of Opposition

[23] Each of the remaining grounds of opposition turn on the issue of the likelihood of confusion between the Mark and the following registered trade-marks of the Opponent:

Trade-mark	Status	Wares/Services
BUD	TMA157723	Beer
BUD and Design	TMA494209	Clothing, namely hats.
THIS BUD'S FOR YOU	TMA435446	(1) Beer; wearing apparel for men and women, namely, shorts, jackets, sweaters, shirts, sweatshirts, pants, headwear, namely, hats, caps, visors, bags, namely, sportbags, cooler bags, shoulder bags, tote bags, drinking vessels, namely, glasses and plastic cups, bottle openers, posters, towels, ornamental pins, mirrors, umbrellas, key chains, folding seats.
BUD	TMA429251	(1) Caps, hats, sweatshirts, sweatpants, shirts and shorts.

		<p>(2) Clothing, namely socks.</p> <p>(3) Wearing apparel for men and women, namely shorts, jackets, coats, sweaters, shirts, sweatshirts, pants, headwear namely hats, caps, visors, bags namely handbags, sportbags, cooler bags, shoulder bags, tote bags, golf head covers, drinking vessels namely glasses plastic cups, umbrellas, chairs and folding seats.</p>
THIS BUD'S FOR YOU	TMA261007	Beer
MAKE IT A BUD LIGHT	TMA523120	Beer; Clothing, namely shirts and headwear, namely caps.
BUD LIGHT and Design	TMA435223	<p>(1) Clothing, namely aprons, hats, jackets, shorts, shirts, socks, sweatshirts and visors.</p> <p>(2) Wearing apparel for men and women, namely shorts, vests, jackets, coats, sweaters, shirts, sweatshirts, pants; headwear namely hats, caps, visors; bags namely sportbags, cooler bags, shoulder bags, tote bags; gifts and novelties namely drinking vessels namely glasses and paper, plastic and ceramic cups, ceramic steins, coolers, bottle openers; ornamental pins; mirrors; umbrellas; key chains.</p>
BUD LIGHT	TMA434860	<p>(1) Clothing, namely caps, hats, visors, t-shirts, shirts, shorts, jackets, vests, belts, socks, sweatshirts, suspenders, scarves, wind-resistant jackets, sweaters, aprons and warmup suits.</p> <p>(2) Wearing apparel for men and women, namely jackets, mitts, bags namely handbags, sportbags, cooler bags, shoulder bags, tote bags, gifts and novelties namely drinking vessels namely plastic cups bottle openers, ornamental pins, umbrellas, key chains.</p>
BUD LIGHT and Design	TMA434585	<p>(1) Clothing, namely aprons, hats, jackets, scarves, shorts, shirts, socks, sweatshirts, sweaters, warmup suits, visors and vests.</p> <p>(2) Wearing apparel for men and women, namely shorts, vests, jackets, shirts, sweatshirts, pants; headwear namely hats, caps, visors; bags namely sportbags, cooler bags; drinking vessels namely paper, plastic and ceramic cups, ceramic steins; bottle openers; towels; mirrors; umbrellas and key chains.</p>

BUD LIGHT	TMA377887	Beer.
BUD MAN	TMA433303	Beer.

[24] I consider the Opponent's case to be strongest with respect to the ground that the Mark is not registrable pursuant to s. 12(1)(d) of the Act due to a likelihood of confusion with the Opponent's BUD marks, registration Nos. TMA157723 and TMA429251, and BUD LIGHT marks, registration Nos. TMA377887 and TMA434860.

the test for confusion

[25] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; b) the length of time each has been in use; c) the nature of the wares, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight.

[26] The Supreme Court of Canada has discussed the appropriate process for assessing all the surrounding circumstances to be considered in determining whether two trade-marks are confusing in its decisions in *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 and *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée et al.* (2006), 49 C.P.R. (4th) 401 [*Veuve Cliquot*]. It is with these general principles in mind that I shall now assess all of the surrounding circumstances.

s. 6(5)(a) – inherent distinctiveness and the extent to which the trade-marks have become known

[27] Both of the Opponent's BUD and BUD LIGHT trade-marks and the Mark are inherently distinctive in relation to each party's wares. Given the strong geographic significance of the abbreviation B.C., I agree with the Opponent that this element does not increase the distinctiveness of the Mark.

[28] With respect to the extent to which the Opponent's marks have become known, Mr. Gatehouse, Country Manager of Canada for Anheuser-Busch International, states that BUDWEISER beer, which is also commonly referred to and marketed under the trade-mark BUD, has been sold in Canada continuously since at least as early as 1903. He explains that BUDWEISER and BUD are used interchangeably to refer to the Opponent's beer. I note that, on the packaging and bottles of the Opponent's beer, the BUD mark is not used alone but always appears in conjunction with the trade-mark BUDWEISER.

[29] Mr. Gatehouse further explains that the Opponent has entered into license agreements with numerous entities that are licensed to use the various BUD marks on a wide range of collateral merchandising items including clothing, drinking vessels, sporting goods and novelty items. He notes that the Opponent has direct or indirect control over the character and quality of the goods bearing the BUD mark. Mr. Gatehouse has also shown how the mark BUD and BUD LIGHT appear on such wares through showing examples of use on such items. For example, attached as Exhibit Q to Mr. Gatehouse's affidavit are copies of Anheuser-Busch's Promotional Products Group catalogues from the years 1996, 2000, 2001 and 2003, featuring a wide range of merchandising items on which the BUD marks, including BUD and BUD LIGHT, appear.

[30] Mr. Gatehouse provides evidence of huge volumes of sales and advertising of products bearing the Opponent's trade-marks in Canada over many years. Some of this evidence may be summarized as follows:

- sales of BUDWEISER beer between 1996 and 2004 were \$3,430 million;
- sales of BUD LIGHT beer between 1995 and 2004 were over \$257 million;
- Canadian sales of collateral merchandising items featuring the BUD trade-marks have been more than \$5.2 million U.S. between 1997 and 2004 [see Gatehouse affidavit, paras. 36-38];

- advertising figures between 1996 and 2004 were in excess of \$250 million for BUDWEISER and BUD LIGHT beer;
- the Opponent has also been involved in sports and music sponsorship activities and events where the Opponent's trade-marks have been displayed prominently;
- the forms of advertising in Canada in the period from 2002 – 2004 included:
 - (a) point of sale advertising;
 - (b) television advertising;
 - (c) sponsorship of sports events and leagues;
 - (d) music sponsorship;
 - (e) Internet advertising.

[31] From the evidence furnished, I am satisfied that the Opponent's BUD and BUD LIGHT marks have become well known in Canada in association with beer.

[32] With respect to the Opponent's other wares, the Applicant submitted that the Opponent had not shown use of its marks by themselves in association with any specific collateral merchandising item. In this regard, the Applicant notes that the Opponent has not provided any invoices to corroborate its alleged sales of BUD and BUD LIGHT merchandising items. Further, the Opponent has not provided a breakdown of which wares have been sold in association with either of these marks.

[33] While a breakdown of sales figures for each collateral ware sold in association with the mark BUD would have been helpful, the Opponent has explained that it is not possible to separate those wares specifically sold in association with the BUD mark from those wares sold in association with the BUDWEISER mark. While I can understand why this would be the case with its BUDWEISER beer on which both the marks BUDWEISER and BUD appear, I am not sure I understand why this is the case with the Opponent's other wares since the catalogue does identify some items as BUD items as opposed to BUDWEISER items. In any event, in view of the evidence showing various collateral merchandising items marked with the BUD mark, and the sales figures for collateral merchandising items sold in Canada, I am satisfied that the

Opponent's BUD and BUD LIGHT have become known to some extent in association with various wares other than beer.

[34] With respect to the extent known of the Applicant's mark, most of the Applicant's evidence has been submitted to show, *inter alia*, that BC Bud is known in Canada as a type of marijuana grown in B.C. As previously noted, the Applicant has not shown that the meaning of this term has been brought to the attention of a significant number of Canadians. Even if I were to accept that some Canadians are aware that BC Bud is sometimes used in a non-proprietary sense to refer to B.C. marijuana, I do not consider this evidence relevant with respect to whether the Applicant has acquired any reputation in the Mark in association with its applied for wares and services. This factor therefore favours the Opponent.

s. 6(5)(b) Length of time the marks have been in use

[35] The Opponent has shown use of each of its marks for many years. On the other hand, the Mark is based on proposed use in Canada and the Applicant has not provided any evidence of use of the Mark since the filing date. This factor therefore favours the Opponent.

s. 6(5)(c) & (d) Nature of wares and channels of trade

[36] When considering the wares, services and trades of the parties, it is the statement of wares or services in the Applicant's trade-mark application, as amended, and the Opponent's registration that govern in respect of the issue of confusion arising under s. 12(1)(d) (*Henkel Kommanditgesellschaft auf Aktien v. Super Dragon Import Export Inc.* (1986), 12 C.P.R. (3d) 110 (F.C.A.); *Mr. Submarine Ltd. v. Amandista Investments Ltd.* (1987), 19 C.P.R. (3d) 3 (F.C.A.); *Miss Universe Inc. v. Bohna* (1994), 58 C.P.R. (3d) 381 (F.C.A.)).

[37] The Opponent's registration Nos. TMA429251 and TMA434860 cover a variety of wares which are either related to or overlap with those of the Applicant including: clothing, drinking vessels, sporting goods and novelty items.

[38] With respect to the Applicant's services, the Applicant's operation of a retail store and online and retail sale of clothing services overlap with the Opponent's wares. The same cannot

be said, however, for most of the remaining applied for services of the Applicant (e.g. the operation of online chat clubs).

[39] As for the parties' channels of trade, Mr. Gatehouse states that BUDWEISER/BUD and BUD LIGHT beer are distributed to Canadian customers in restaurants and other drinking establishments and stores which sell beer across Canada. He explained in his answers to undertakings that people in Canada can access the budshop.com website (including via the Budweiser.ca website) and buy clothing branded with the Opponent's BUDWEISER/ BUD trade-marks on-line. He also provided a list of nearly 50 retailers in Canada that sell the Opponent's collateral merchandising items including: Mark's Work Warehouse, Giant Tiger, PEI Liquor Board, Work 'n Play, and Budweiser Motor Sports. [Gatehouse cross-ex., answer to Q. 11]. Licensed clothing bearing the BUDWEISER/BUD trade-marks can be purchased in Canada from Sears and Wal-Mart, as well as other retail stores [Gatehouse cross-ex, answer to Q12-13]. Given the nature of most of the Applicant's wares and services, the Applicant's channels of trade would likely overlap with those of the Opponent.

[40] I would like to add that, with respect to the Applicant's non-alcoholic beverage wares in particular, the evidence shows that the channels of trade for such wares and the Opponent's beer would overlap in the province of Quebec.

s. 6(5)(e) – the degree of resemblance between the marks in appearance or sound or in the ideas suggested

[41] The Opponent points out that the Applicant has taken the whole of its BUD trade-marks and has added non-distinctive initials before it. I agree. There is therefore a high degree of resemblance between the Mark and the Opponent's BUD marks in appearance and sound. The resemblance in appearance and sound between the Mark and the Opponent's BUD LIGHT marks is slightly less.

[42] With respect to the ideas suggested by the marks, the Opponent submits that its BUD mark is very well known in Canada as an abbreviation for BUDWEISER beer, resulting from its extensive reputation and marketing. I agree.

[43] As for the Applicant's mark, the Applicant submits that the idea suggested by its mark is a type of marijuana grown in B.C. As noted above, however, the Applicant has not shown that the average Canadian would be aware of this meaning. The idea suggested by the Applicant's mark, in my view, is simply a bud grown in B.C.

[44] The ideas suggested by the parties' marks are therefore different. As an aside, I would note that given the Opponent's reputation for its BUD marks in association with beer, it is conceivable that the idea suggested by the Mark to the average Canadian could be a beer brewed by the Opponent in B.C.

Surrounding Circumstances

[45] I have considered as a further surrounding circumstance the Applicant's state of the marketplace evidence. The Applicant's most relevant evidence concerning the use of "bud" by others in Canada in association with clothing includes the following:

- pages printed out from Lil' Bud Clothing Company's website which describe a children's clothing store in Toronto;
- pages printed out from www.buddsonline.com, which discuss a family clothing business in Kitchener, Guelph and Simcoe Ontario; and
- pages printed out from www.budgowan.com, which describes a formalwear business in London, Ontario.

[46] This Internet evidence is of very little assistance to the Applicant both because there is no evidence that any Canadians ever viewed these websites and because the contents of these websites constitute hearsay evidence. Further, the existence of the above noted websites on their own does not allow me to infer that such business names have been used more than minimally, if at all, in Canada. At best, it would appear that at the date of Ms. Brennan's affidavit, three companies had the word BUD as part of their clothing business name. In my view, it is not possible to infer from such evidence that there has been a common adoption of BUD marks in the clothing trade such as to reduce the likelihood of confusion between the marks at issue.

[47] As a further surrounding circumstance, I have considered whether the Opponent's notoriety in the field of beer extends to its clothing and other wares. The Applicant submits that it does not.

[48] This particular issue was considered in *Anheuser Busch v. Air Bud Productions*, 2009 CanLII 82178 [T.M.O.B.]. There, Board Member Carriere stated as follows "Even if I conclude that the trade-marks BUD and BUD LIGHT are famous in Canada, it would be only in association with beer and not all of the collateral merchandising listed in registrations TMA429,251 and TMA434,860". I come to the same conclusion in the present case. In this regard, most of the Opponent's evidence of use of its BUDWEISER, BUD LIGHT and BUD marks has been in association with beer. I therefore do not consider that the Opponent's notoriety in the field of beer extends to its collateral merchandising items.

Conclusion Re: Likelihood of Confusion

[49] The test to be applied is a matter of first impression in the mind of a casual consumer somewhat in a hurry who sees BC-BUD on the Applicant's clothing, novelties, knick knacks or operation of a retail store, etc., at a time when he or she has no more than an imperfect recollection of the Opponent's trade-marks, and does not pause to give the matter any detailed consideration or scrutiny [see *Veuve Clicquot*].

[50] In view of my findings above, and in particular the Opponent's extensive reputation of its BUD and BUD LIGHT marks in association with beer, the fact that there is a similarity between the marks in appearance and sound, and the fact that the Applicant's wares and services are related and overlap to some degree with the Opponent's wares, it seems to me that such a consumer would, as a matter of first impression, be likely to believe that the wares and services associated with the BUD and BC-BUD trade-marks were manufactured, sold or performed by the same person.

[51] The s. 12(1)(d) ground of opposition therefore succeeds based on registration Nos. TMA157,723, TMA429,251, TMA377,887 and TMA434,860.

Remaining Grounds of Opposition

[52] The remaining grounds of opposition also turn on a determination of the issue of the likelihood of confusion between the Mark and the Opponent's marks. The material dates for assessing the likelihood of confusion in respect of the non-entitlement and non-distinctiveness grounds are, respectively, the Applicant's filing date and the date of opposition. In my view, the differences in material dates do not have any significant impact on the determination of the issue of confusion between the trade-marks of the parties. Thus, my finding above that the trade-marks are likely to be confused applies to these grounds of opposition which also succeed.

Disposition

[53] Pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

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