

**IN THE MATTER OF AN OPPOSITION by Gould Inc., now  
Gould Electronics Inc., to application No. 686,774 for the trade-  
mark GOULD FASTENERS filed by Gould Fasteners Limited**

On July 30, 1991, the applicant, Gould Fasteners Limited, filed an application to register the trade-mark GOULD FASTENERS based upon use of the trade-mark in Canada since January 16, 1979 in association with:

“Connectors, nutserts, rivets, permanent and wash-away spacers, self-clinching nuts and studs, rods, cable ties, control knobs, self locking nuts, tap-lock inserts, wire thread inserts, tools, bolts, nylon and plastic fasteners, spacers and standoffs, nuts, "o" rings, panel fasteners, eyelets, rubber bumpers, heat sinks, insulators, electronic terminals, retaining rings, screws, washers, pins, and locks; plastic electronic hardware, namely, screws, nuts, bolts, washers, pins, rivets, spacers, standoffs, tie wraps, circuit board slides, card guides, transistor [SIC.] pads and mounts, led mounts, and card pulls; military hardware, namely, bolts, nuts, screws, washers, pins, rivets, spacers, standoffs, connectors, studs, plates, and terminals that meet a military specification.”

The applicant disclaimed the right to the exclusive use of GOULD and FASTENERS apart from its trade-mark.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of October 21, 1992 and the opponent, Gould Inc., filed a statement of opposition on March 22, 1993, a copy of which was forwarded to the applicant on April 16, 1993. The applicant served and filed a counter statement on May 13, 1993. The opponent filed as its evidence the affidavits of Allan B. Schwager and Leona R. Yantha while the applicant submitted as its evidence the affidavit of Irwin Myron Gould. The applicant also requested and was granted leave pursuant to Rule 44(1) of the *Trade-marks Regulations* to adduce further evidence by way of a second affidavit of Irwin Myron Gould. The opponent was granted leave on two occasions to amend its statement of opposition pursuant to Rule 40 of the *Trade-marks Regulations* and the applicant was granted leave to amend its counter statement in response to the amended statements of opposition. Both parties filed written arguments and neither party requested an oral hearing.

On March 25, 1997, the opponent advised the Registrar that it assigned all its assets including its trade-mark applications and registrations to Gould Electronics Inc., an affiliated company, and submitted an affidavit of Michael C. Veysey, Senior Vice President of Gould Electronics Inc., in support of the transfer. As a result, this opposition has continued in the name of Gould Electronics

Inc. as opponent.

The grounds of opposition now being pursued by the opponent are the following:

(a) The present application does not comply with Subsection 30(b) of the *Trade-marks Act* in that the applicant has not used its trade-mark GOULD FASTENERS in association with the wares covered in the application from the claimed date of first use of January 16, 1979 and has never used the trade-mark in association with the wares described in the application;

(b) The present application does not comply with Subsection 30(i) of the *Trade-marks Act* in that the applicant could not have stated that it was entitled to use the trade-mark GOULD FASTENERS in Canada in association with the wares described in the application in view of the opponent's prior use and/or registration of the trade-marks identified below, and in view of the prior use of the trade-names Gould Manufacturing of Canada Ltd., Gould Canada Ltd./Gould Canada Ltee, Gould Investments Limited,, and Gould National Battery of Canada Ltd., amongst others, by various wholly owned subsidiaries of the opponent;

(c) The trade-mark GOULD FASTENERS is not registrable having regard to the provisions of Paragraph 12(1)(a) of the *Trade-marks Act* in that the trade-mark is primarily merely the surname of an individual who is living or who has died within the preceding thirty years. The addition of the word FASTENERS, which is merely the name in the English language of various wares set out in the application, to the surname GOULD in no way alters the surname significance of the trade-mark;

(d) The trade-mark GOULD FASTENERS is not registrable having regard to the provisions of Paragraph 12(1)(d) of the *Trade-marks Act* in that the trade-mark is confusing with the following registered trade-marks of the opponent:

<u>Trade-mark</u>	<u>Registration No.</u>	<u>Wares</u>
GOULD	318,660	Printed circuit foils. Computer peripheral equipment, namely, high speed input and output recorders, oscillographs, oscilloscopes, digital recording systems and instruments, and parts for the above. Electric motors and generators. Batteries for automotive, industrial and recreational uses. Fuses, switches, bus ducts, circuit breakers. Panelboards, switchboards; connectors, namely, strain relief and liquid tight connectors for conduits; industrial controls, namely, sensing and pilot devices, limit switches, proximity switches, push buttons, relays, contactors, starters, and motor control centers. Surface measuring devices, namely, portable and production line devices which measure critical surface tolerances, pressure transducers, temperature transducers and industrial transmitters. Medical monitoring systems and instruments, namely, catheters, transducers, flow control devices, tubing and electronic display equipment for monitoring heartbeat rate, blood pressure, blood flow rate and fetal heartbeats. Electric motors for machines, printed circuit foils, minicomputers programmable controllers, industrial transmitters and transducers, motion controllers, computer imaging and graphics displays, oscilloscopes and recorders, logic analyzers, AC power conditioning

controls, towed array sensors, underwater speed log indicators and electronic tracer apparatus for recording ship's track, electronic aircraft cockpit procedure trainers and flight simulators, air traffic control radar proficiency simulators, electronic ship propulsion plant trainers for surface ships, electronic submarine ship control trainers and electronic missile trainers, altitude radar altimeters, portable radio navigation beacons and testers, limit and proximity switches, pushbuttons and selector switches, control relays, contactors, starters, short circuit protectors, motor control centers, electric fuses, zinc air batteries, semiconductors, microprocessor networks, custom integrated circuits, medical equipment, namely, patient monitoring apparatus for use in intensive care and coronary care units and operating rooms, defibrillators, transducers and pulmonary testing instruments.

GOULD & Design	275,877	Electrical products, namely, electrical conduit fittings, couplings, and supports, electrical service entrance fittings and supports, electrical housing supports, electric cable terminals and clamps, lug type electric cable connectors, and parts for all of the above; assemblies and parts therefor, high voltage ceramic insulators for distribution, transmission stations, specialities and component parts therefor, bushings, straps, liquid-tight connectors, ground clamps, conduit poll pennies, bushing liners, cable connectors, knockout seals, conduit lock nuts, cord connectors and cable ties, and parts therefor, metal couplings, hose and couplings assemblies and adapters, and parts therefor, hose assemblies, fittings, couplings and adapters suitable for hydraulic hoses, and parts therefor, fuses, and parts therefor, switches, heavy duty switches, circuit breakers, unassembled and assembled panel and distribution boards, panel board switches, universal lighting ducts and fittings, power ducts and fittings, ducts, bus plugs, power strips and fittings and circuit breakers, and parts for all of the above.
“GOULD”	UCA 24416	Storage batteries. Battery chargers.
GOULD & Design	232,221	Industrial recorders, being monitoring devices used in certain manufacturing processes; powder metal products, namely, gears, sprockets, cams and pump components for use in automotive, agricultural, appliances and industrial sectors; electric motors and generators; heat exchangers; bearings; bushings; pistons; piston rings; filters; computer peripheral equipment, namely, high speed input and output recorders; surface measurement systems; namely, portable and production line devices which measure critical surface tolerances; printed circuit foils; electric heating elements; automotive, truck, marine and recreational vehicle starting batteries, drycell batteries; nickel-cadmium batteries, silver-zinc batteries,

industrial batteries for lift trucks, mine vehicles, submarines, railroads, and the utility industry; medical monitoring systems, hearing aids, air conditioning equipment; electric motors for land vehicles.

(e) The applicant is not the person entitled to registration of the trade-mark GOULD FASTENERS in view of Paragraph 16(1)(a) of the *Trade-marks Act* in that, as of the applicant's claimed date of first use, the applicant's trade-mark was confusing with the trade-marks identified above which had previously been used in Canada by the opponent in association with *inter alia* the wares described in the previous paragraph, and which trade-marks have not been abandoned;

(f) The applicant is not the person entitled to registration of the trade-mark GOULD FASTENERS in view of Paragraph 16(1)(b) of the *Trade-marks Act* in that, as of the applicant's claimed date of first use, the applicant's trade-mark was confusing with the trade-marks listed above, applications for which had been previously filed by the opponent and which subsequently issued to registration;

(g) The applicant is not the person entitled to registration of the trade-mark GOULD FASTENERS in view of Paragraph 16(1)(c) of the *Trade-marks Act* in that, as of the applicant's claimed date of first use, the applicant's trade-mark was confusing with the trade-names Gould Manufacturing of Canada Ltd., Gould Canada Ltd./Gould Canada Ltee, Gould Investments Limited, and Gould National Battery of Canada Ltd., amongst others, which had previously used in Canada by various wholly owned subsidiaries of the opponent in association with *inter alia* the manufacture and sale of the wares for which the trade-marks identified above are registered;

(h) The applicant's trade-mark GOULD FASTENERS is not distinctive in that it does not distinguish the wares with which it is used by the applicant from the wares of the opponent by reason of the opponent's use of the trade-marks identified above in association with *inter alia* the wares identified above, and by reason of the use of the trade-names Gould Manufacturing of Canada Ltd., Gould Canada Ltd./Gould Canada Ltee, Gould Investments Limited, and Gould National Battery of Canada Ltd., amongst others, described in paragraph (g) above;

(i) The applicant's trade-mark GOULD FASTENERS is not distinctive in that, as a whole, it cannot distinguish the wares of the applicant from the wares of others, including the opponent, bearing the same surname.

As the opponent's applications matured to registration prior to the date of advertisement of the present application, the opponent has failed to meet the initial burden upon it under Subsection 16(4) of the *Trade-marks Act* in relation to the ground of opposition based on Paragraph 16(1)(b) of the *Trade-marks Act*. I have therefore dismissed the sixth ground of opposition. Further, the opponent had not previously used the trade-names identified in paragraph (g) above. Rather, any use of the trade-names identified above was by subsidiaries of the opponent and there are no provisions in the *Trade-marks Act* whereby use by subsidiaries of their trade-names, whether under license or otherwise, would accrue to the benefit of the opponent. The opponent has therefore failed to establish its prior use of the trade-names identified in the statement of opposition. As a result, the

ground of opposition based on Paragraph 16(1)(c) of the *Act* is unsuccessful.

The third ground is based on Paragraph 12(1)(a) of the *Trade-marks Act*, the opponent alleging that the trade-mark GOULD FASTENERS is primarily merely the surname of an individual who is living or who has died within the preceding thirty years. A similar objection to registration of the trade-mark LABATT EXTRA was considered by Mr. Justice Cattanach of the Federal Court, Trial Division in *Molson Companies Ltd. v. John Labatt Ltd. et al*, 58 C.P.R. (2d) 157, at p. 162 as follows:

Likewise, in the present case, the applicant's trade-mark GOULD FASTENERS, when considered in its entirety, is not a surname. As a result, the trade-mark GOULD FASTENERS as applied to the wares covered in the present application does not offend the provisions of Paragraph 12(1)(a) of the *Trade-marks Act*.

The first two grounds of opposition are based on Subsections 30(b) and 30(i) of the *Trade-marks Act*. While the legal burden is upon the applicant to show that its application complies with Section 30 of the *Trade-marks Act*, there is an initial evidential burden on the opponent to establish the facts relied upon by it in support of its Section 30 grounds [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330; and *John Labatt Ltd. v. Molson Companies Ltd.*, 30 C.P.R.(3d) 293].

With respect to the ground based on Subsection 30(i) of the *Act*, the opponent alleged that the applicant could not have been satisfied as to its entitlement to use the trade-mark GOULD FASTENERS in Canada in association with the wares covered in the present application in view of the prior use of its trade-marks and trade-names in Canada. No evidence has been adduced by the opponent to show that the applicant was aware of the opponent's use of its trade-marks or use by the opponent's subsidiaries of their trade-names in Canada. In any event, even had the applicant been aware of the opponent's trade-marks and its subsidiaries' trade-names prior to filing the present application, such a fact is not inconsistent with the statement in the present application that the applicant was satisfied that it was entitled to use its trade-mark GOULD FASTENERS in Canada on the basis *inter alia* that its trade-mark is not confusing with the opponent's trade-marks or its subsidiaries' trade-names. Thus, the success of this ground is contingent upon a finding that the trade-marks and trade-names at issue are confusing [see *Consumer Distributing Co. Ltd. v. Toy World Ltd.*, 30 C.P.R. (3d) 191, at p. 195; and *Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R. (2d) 152, at p. 155]. I will therefore consider the remaining grounds which are based on allegations of confusion between the applicant's trade-mark GOULD FASTENERS and the opponent's trade-marks and its subsidiaries' trade-names.

As its first ground of opposition, the opponent alleged that the present application does not comply with Subsection 30(b) of the *Trade-marks Act* since the applicant has not used its trade-mark GOULD FASTENERS in association with the wares covered in the present application from the claimed date of first use of January 16, 1979 and, further, has never used the trade-mark in association with the wares described in the application. While the legal burden is upon the applicant to show that its application complies with Subsection 30(b), there is as noted above an initial evidential burden on the opponent to establish the facts relied upon by it in support of this ground. The evidential burden on the opponent respecting the issue of the applicant's non-compliance with Subsection 30(b) of the *Act* is a light one [see *Tune Masters v. Mr. P's Mastertune*, 10 C.P.R.(3d) 84, at p. 89]. Moreover, the opponent's evidential burden can be met by reference not only to the opponent's evidence, but also to the applicant's evidence [see, in this regard, *Labatt Brewing Company Limited v. Molson Breweries, a Partnership*, 68 C.P.R.(3d) 216, at p. 230]. Finally, the material time for considering the circumstances respecting the issues of non-compliance with Section

30 of the *Act* is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475].

The opponent has submitted that the applicant's evidence meets its initial evidential burden in that the Gould affidavits point to use of the trade-name Gould Fasteners Limited and not use of the trade-mark GOULD FASTENERS. In particular, the opponent has argued that where reference is made in the Gould affidavits to packaging, cartons, labels, invoices, packing slips or the like, Mr. Gould refers to use of "Gould Fasteners Limited" and not GOULD FASTENERS while the invoices comprising Exhibit C to the first Gould affidavit all bear the applicant's corporate name. However, it is arguable that the appearance of the applicant's name on packaging, cartons, labels and invoices could constitute use of Gould Fasteners Limited as a trade-mark within the scope of Subsection 4(1) of the *Trade-marks Act* [see, for example, *Samuel Dubiner v. Cherrio Toys & Games Ltd.*, 44 C.P.R. 134, at p. 164]. In any event, the applicant's evidence is not inconsistent with "Gould Fasteners Limited" being considered as a trade-mark when it appears on packaging, cartons, labels, or the like. Moreover, absent evidence of the manner of use of "Gould Fasteners Limited" on packaging, cartons or labels, it is possible that the use of "Gould Fasteners Limited" would be perceived as use of the trade-mark GOULD FASTENERS.

The opponent also relied upon a certified copy of the Articles of Incorporation of the applicant to meet its evidential burden in relation to the Subsection 30(b) ground. The Articles of Incorporation establish that Gould Fasteners Limited was incorporated in January 16, 1979, the date of first use claimed by the applicant in the present application. In my view, this evidence is sufficient to meet the opponent's evidential burden, bearing in mind that the applicant has not claimed use by a predecessor-in-title. Accordingly, the legal burden is upon the applicant to show that it has used the trade-mark GOULD FASTENERS in association with the wares covered in the present application since the claimed date of first use. While the first Gould affidavit appears to confirm that the applicant was carrying on business in Canada on January 16, 1979, the applicant's evidence does not show that the applicant was using GOULD FASTENERS as a trade-mark in association with the wares covered in the present application. As a result, the applicant has failed to meet the legal burden upon it and this ground of opposition is therefore successful.

The fifth ground of opposition is based on Paragraph 16(1)(a) of the *Trade-marks Act*, the opponent alleging that, as of the applicant's claimed date of first use [January 16, 1979], the applicant's trade-mark was confusing with the trade-marks identified above which had previously been used in Canada by the opponent in association with *inter alia* the wares covered in the opponent's registrations. In paragraph 12 of his affidavit, Mr Schwager states that the annual net sales in Canada by Gould Manufacturing of Canada Ltd., the predecessor of Gould Canada, was \$40,800,525, and has annexed to his affidavit a photocopy of the corporation income tax return filed by Gould Manufacturing in support of this figure. However, the opponent's evidence does not indicate that the trade-mark GOULD was associated with sales by Gould Manufacturing in 1977, nor is there any evidence as to the wares or services associated with the total sales figure. Furthermore, I would note that Exhibit B to the Schwager affidavit indicates that Gould Manufacturing was not recorded as a registered user of the trade-mark GOULD & Design, registration No. 232,221, until March of 1979. As a result, the opponent has failed to meet the initial burden upon it under Subsections 16(5) and 17(1) of the *Trade-marks Act* in relation to this ground. I have therefore dismissed the Paragraph 16(1)(a) ground.

As its fourth ground, the opponent alleged that the trade-mark GOULD FASTENERS is not registrable having regard to the provisions of Paragraph 12(1)(d) of the *Trade-marks Act* in that the applicant's trade-mark is confusing with the opponent's registered trade-marks identified above. In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Subsection 6(5) of the *Trade-marks Act*. Further, the Registrar must bear in mind that the legal burden is upon the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the date of decision, the material date with respect to the Paragraph 12(1)(d) ground of opposition [see *Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd. et al*, 37 C.P.R. (3d) 413 (F.C.A.)].

The applicant's trade-mark GOULD FASTENERS possesses little inherent distinctiveness in that the word GOULD possesses a surname significance and the word FASTENERS describes many of the wares covered in the present application. Further, the applicant has disclaimed the right



to the exclusive use of both words apart from its trade-mark. Likewise, the opponent's trade-marks GOULD and GOULD & Design also possess little, if any, inherent distinctiveness in view of the surname significance of the word GOULD and the fact that the design features associated with the opponent's design trade-marks comprise minor elements of these marks.

Mr. Gould, President of the applicant, attests in his first affidavit to in excess of \$54,000,000 in sales of fasteners associated with the applicant's trade-mark GOULD FASTENERS from 1980 to 1994 inclusive and in excess of \$120,000 in advertising expenditures from 1986 to 1994. In his affidavit, Allan R. Schwager, General Manager of the Gould Shawmut Company, a division of Gould Electronics (Canada) Ltd. ("Gould Canada"), provides evidence of sales in Canada of the opponent's wares associated with its GOULD trade-marks. For the years 1990 to 1992 inclusive, net sales in Canada exceeded \$70,000,000 and advertising expenditures from 1981 to 1993 inclusive exceeded \$1,250,000. As a result, the extent to which the trade-marks at issue have become known in Canada favours the opponent.

The length of time the trade-marks at issue have been in use is a further surrounding circumstance which favours the opponent. While the applicant claims that it has used its trade-mark GOULD FASTENERS in Canada since January of 1979, the opponent commenced using its trade-mark GOULD in Canada prior to 1977.

The applicant generally describes its wares as being fasteners although the statement of wares also covers "control knobs, rubber bumpers, heat sinks, electronic terminals, circuit board slides, card guides, transistor [sic.] pads and mounts, led mounts, and card pulls". The opponent's registrations cover a broad range of wares most of which are either electrical products or parts or components for electrical products. While the wares of the parties specifically differ, certain of the applicant's wares have electrical applications and the opponent's registered trade-mark GOULD & Design, registration No. 275,877, covers *inter alia* "conduit lock nuts, cord connectors and cable ties, metal couplings, hose and couplings assemblies and adapters, and parts therefor, metal couplings, hose and couplings assemblies and adapters, and parts therefor". It is unclear from the opponent's registration as to whether these wares are intended for use with high-voltage insulators or

transmission stations although the remaining wares covered in the registrations suggests that these wares are intended for electrical applications. As such, there appears to be little overlap in the respective wares of the parties.

In assessing the likelihood of confusion between trade-marks in respect of a Paragraph 12(1)(d) ground of opposition, the Registrar must have regard to the channels of trade which would normally be associated with the wares set forth in the applicant's application and the opponent's registrations since it is the statement of wares covered in the respective application and registrations which determine the scope of the monopoly being claimed by the parties in relation to their marks [see *Mr. Submarine Ltd. v. Amandista Investments Ltd.*, 19 C.P.R. (3d) 3, at pp. 10-12 (F.C.A.)]. Thus, absent a restriction in the statement of wares set forth in the present trade-mark application as to the channels of trade associated with the applicant's wares, the Registrar cannot, when considering the issue of confusion, take into consideration the fact that the applicant may only be selling its wares through a particular channel of trade [see *Henkel Kommanditgesellschaft Auf Aktien v. Super Dragon Import Export Inc.*, 2 C.P.R. (3d) 361, at pg. 372 (F.C.T.D.), 12 C.P.R. (3d) 110, at pg. 112 (F.C.A.)]. In the present opposition, neither the applicant's application nor the opponent's registrations limit the channels of trade associated with their respective wares. However, the respective statements of wares must be read with a view to determining the probable type of business or trade intended by the parties rather than all possible trades that might be encompassed by the wording. In this regard, evidence of the actual trades of the parties is useful [see *McDonald's Corporation v. Coffee Hut Stores Ltd.*, 68 C.P.R.(3d) 168, at p. 169 (F.C.A.)].

According to Mr. Schwager, the opponent's market is primarily composed of industrial and commercial companies across Canada including original equipment manufacturers, although many of the end users are also small operations or individuals, such as contractors, electricians and construction companies. As well, Mr. Schwager noted that the opponent's products are available to consumers off the rack at hardware and other retail stores, such as Canadian Tire and Aikenhead. Mr. Gould points out in his first affidavit that the applicant's wares are sold to manufacturing companies from all across Canada and that the applicant does not market its fasteners through wholesalers or retailers for ultimate sale to individual consumers for general household and hardware

purposes. As a result, according to Mr. Gould, purchasers of the applicant's wares are almost exclusively buyers for manufacturing companies whose responsibility it is to purchase the various components and raw materials that will be incorporated into their company's final products. Nevertheless, the applicant's wares are such that they could be sold through retail outlets such as hardware stores or the like; and there is no limitation in the present application which restricts the sale of the applicant's wares to manufacturing companies. Thus, there is a potential overlap in the respective channels of trade of the parties, particularly insofar as the wares of the parties being sold to manufacturing companies.

As for the degree of resemblance between the trade-marks at issue, the applicant's trade-mark GOULD FASTENERS and the opponent's trade-marks GOULD and GOULD & Design are very similar in appearance, sounding and in the ideas suggested by them.

As a further surrounding circumstance in assessing the likelihood of confusion between the trade-marks at issue, the applicant relied upon there being no admissible evidence of instances of actual confusion despite the concurrent use of the trade-marks at issue for several years. In paragraph 15 of his affidavit, Mr. Schwager states that he understands from Susan McMillan, Customer Services Supervisor for Gould Canada, that there have been instances of confusion between Gould Canada and the applicant. However, this evidence is hearsay with respect to Mr. Schwager and the opponent has not established that Ms. McMillan could not have submitted an affidavit in this opposition in relation to the alleged instances of confusion. Likewise, the letters from various purchasers of the applicant's wares comprising Exhibit K to the first Gould affidavit are hearsay evidence insofar as establishing the truth of their contents. Thus, these letters are only admissible to confirm that letters were received by the applicant from various customers.

In my view, the absence of evidence of actual confusion between the trade-marks at issue is a relevant surrounding circumstance given the significant sales evidenced by both parties in this opposition, as well as the lengthy period of time during which both parties have carried on business in Canada. While I am mindful of the fact that the applicant only sells its wares to manufacturers, the opponent's evidence indicates that Gould Canada also sells GOULD products to manufacturers

in Canada. I have concluded therefore that the applicant has met the legal burden upon it in respect of the issue of confusion and have rejected the Paragraph 12(1)(d) ground of opposition.

The final two grounds relate to the alleged non-distinctiveness of the applicant's trade-mark. The first of these grounds is that the applicant's trade-mark GOULD FASTENERS is not distinctive in that it does not distinguish the wares with which it is used by the applicant from the wares of the opponent by reason of the opponent's use of the trade-marks identified above in association with *inter alia* the wares identified above, and by reason of the use of the trade-names Gould Manufacturing of Canada Ltd., Gould Canada Ltd./Gould Canada Ltee, Gould Investments Limited,, and Gould National Battery of Canada Ltd. However, the applicant has met the legal burden upon it in respect of the issue of confusion between its trade-mark GOULD FASTENERS and the opponent's GOULD and GOULD & Design trade-marks. Thus, this aspect of the non-distinctiveness ground is unsuccessful. I am equally satisfied that in the absence of admissible evidence of actual confusion, there would be no reasonable likelihood of confusion between the applicant's trade-mark and the trade-names relied upon by the opponent. I have therefore rejected this ground of opposition.

The final ground of opposition is that the applicant's trade-mark GOULD FASTENERS is not distinctive in that, as a whole, it cannot distinguish the wares of the applicant from the wares of others, including the opponent, bearing the same surname. The opponent relied upon the LABATT EXTRA decision, referred to above, in support of its position that the applicant's trade-mark is not distinctive in that GOULD is a surname and the word FASTENERS describes many of the wares covered in the present application. With respect to the issue of the non-distinctiveness of the trade-mark LABATT EXTRA, Cattnach, J. commented as follows at pages 163-165:

Unlike the situation in the LABATT EXTRA case where Cattnach, J. found that the proposed use trade-mark LABATT EXTRA was not adapted to distinguish the applicant's wares in that case, the

trade-mark GOULD FASTENERS is based on use in Canada since 1979. Furthermore, the evidence of sales of the applicant's wares is such that at least the applicant's mark "Gould Fasteners Limited" had acquired some measure of distinctiveness in Canada as of the date of opposition, the material date for considering this ground. Moreover, whatever acquired distinctiveness may have accrued to the applicant's mark "Gould Fasteners Limited" would also have had an impact on the distinctiveness of the applicant's trade-mark GOULD FASTENERS. As a result, I have dismissed the final ground of opposition.

Having been delegated by the Registrar of Trade-marks pursuant to Subsection 63(3) of the *Trade-marks Act*, I refuse the applicant's application pursuant to Subsection 38(8) of the *Trade-marks Act* as being contrary to Subsection 30(b) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC THIS 24<sup>th</sup> DAY OF MARCH, 1998.

G.W. Partington  
Chairperson  
Trade-marks Opposition Board