

IN THE MATTER OF AN OPPOSITION
by Molson Breweries, A Partnership
to application No. 582,320 for
the trade-mark DASGOLD filed by
Brauerei Feldschlosschen

On April 15, 1987, the applicant, Brauerei Feldschlosschen, filed an application to register the trade-mark DASGOLD based on use and registration (No. 348956) in Switzerland for the following wares:

beer; non-alcoholic beer and brewed malt
beverages; syrups; concentrates for making
malt beverages.

The application was advertised for opposition purposes on February 17, 1988.

The Molson Companies Limited filed a statement of opposition on May 31, 1988, a copy of which was forwarded to the applicant on June 21, 1988. The trade-marks relied on in the statement of opposition were subsequently assigned to Molson Breweries, A Partnership, the current opponent of record. The grounds of opposition include, among others, that the applicant is not the person entitled to registration pursuant to the provisions of Section 16 of the Trade-marks Act because, as of the applicant's filing date, the applied for trade-mark was confusing with the trade-mark GOLDEN previously used by the opponent in Canada for "brewed alcoholic beverages."

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavits of Harold J. Moran and Nicola M. Hunt. The applicant chose not to file evidence. Only the opponent filed a written argument and an oral hearing was conducted at which only the opponent was represented.

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(2) 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 has no apparent meaning in either English or French although it does include the word GOLD which is inherently weak in relation to the applied for wares: see the decision in Molson Cos. Ltd. v. John Labatt Limited (1990), 28 C.P.R. (3d) 457 at 463 (F.C.T.D.). Thus, the applicant's mark is not inherently strong.

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 essentially the same. The marks of the parties bear some resemblance visually, phonetically and in the ideas suggested in view of the fact that the second component of the applicant's mark is the word GOLD.

In its correspondence with the Opposition Board, the applicant took the position that regard should be had to the state of the trade-marks register respecting third party marks including the word GOLD registered for similar wares. However, in general, the Registrar in opposition proceedings will not have regard to the state of the register unless proved by evidence: see the opposition decision in Realestate World Services v. O'Connor (1989), 24 C.P.R.(3d) 95.

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 and trades of the parties, the extent to which the opponent's mark has become known and the fact that there is some resemblance between the marks at issue, 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 DASGOLD 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 30th DAY OF November, 1990.

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