

IN THE MATTER OF AN OPPOSITION by Anheuser-Busch,
Incorporated, to application No. 745,421 for the trade-mark BREW
WEAR filed by Molson Breweries, A Partnership

On January 19, 1994, the applicant, Molson Breweries, A Partnership, filed an application to register the trade-mark BREW WEAR based on use in Canada since October 28, 1993, with respect to services and proposed use in association with wares. The application covers the following wares:

“Jackets, sweaters, toques, shirts, T-shirts, pants, shorts, pyjamas, socks, slippers, handkerchiefs, scarves, ties, belts, headbands, wristbands, hats, caps, visors; mittens, gloves; sport bags, shoulder bags, tote bags, club bags, cooler bags, racquet bags, garment bags, back packs, ski binding covers, ski boot carrying straps; stadium cushions and blankets, towels, sheets, pillowcases, umbrellas, aprons, bibs; glassware namely, glasses, cups, mugs, steins, stemware, plastic cups, steins made of plastic, pewter or glass, ashtrays; travel kits, golf balls, scoresheets, cribbage boards, dart cabinets, puzzles; key chains, letter openers, lighters, matches, badges, pins, buttons, watches, business card cases, trinket boxes, pencil holders, pens, pen and pencil sets, markers, telephone, flashlights, brochures, paper weights, book marks, note magnets, plaques, medallions, flags, posters, banners, bumper stickers, calendars, maps, post cards, place mats, decals, crests; coasters, trays, clocks, cheese boards, openers, bottle openers, patio tables, draught signs and tap handles”

and the following services:

“Operation of a retail store dealing in merchandising items, namely jackets, sweaters, toques, shirts, T-shirts, pants, shorts, pyjamas, socks, slippers, handkerchiefs, scarves, ties, belts, headbands, wristbands, hats, caps, visors; mittens, gloves; sport bags, shoulder bags, tote bags, clubs bags, cooler bags, racquet bags, garment bags, back packs, ski binding covers, ski boot carrying straps; stadium cushions and blankets, towels, sheets, pillowcases, umbrellas, aprons, bibs; glassware namely, glasses, cups, mugs, steins, stemware, plastic cups, steins made of plastic, pewter or glass, ashtrays; travel kits, golf balls, scoresheets, cribbage boards, dart cabinets, puzzles; key chains, letter openers, lighters, matches, badges, pins, buttons, watches, business card cases, trinket boxes, pencil holders, pens, pen and pencil sets, markers, telephone, flashlights, brochures, paper weights, book marks, note magnets, plaques, medallions, flags, posters, banners, bumper stickers, calendars, maps, post cards, place mats, decals, crests; coaster, trays, clocks, cheese boards, openers, bottle openers patio tables, draught signs and tap handles.”

The application was amended to include a disclaimer to the word WEAR and was advertised for opposition purposes on December 28, 1994.

The opponent, Anheuser-Busch, Incorporated, filed a statement of opposition on May 29, 1995, a copy of which was forwarded to the applicant. The opponent’s first ground of opposition as it appears in its statement of opposition is as follows:

- 1(a) The Application does not conform with the requirements of Section 30(i) of the Trade-Marks Act (hereinafter referred to as “the Act” and all subsequent section references are to this Act), for all of the reasons outlined herein.
 - (i) The applicant could not have been satisfied that it is entitled to use the alleged trade-mark in Canada in association with the wares and services described in the application for all of the reasons listed herein.
 - (ii) The applicant has not used the term BREW WEAR as a trade-mark in association with services since the date of first use claimed in the application, namely October 28, 1993.
 - (iii) The applicant itself has not used the alleged trade-mark BREW WEAR as a trade-mark in association with services since the date of first use claimed in the application, namely October 28, 1993.
 - (iv) The applicant itself did not intend to use the alleged trade-mark BREW WEAR as a trade-mark in association with wares listed in the application.

- (v) The words BREW WEAR and variations thereof are commonly used in association with the wide range of goods listed in the application including, wearing apparel, sporting goods and accessories, linens, glassware and cups, travel kits, games, stationary and accessories, linens, glassware and cups, travel kits, games, stationery and accessories, household items and other promotional items including bottle openers, coasters and tap handles, all of which are merchandising items commonly used in the promotion and sale of beer. As such, the alleged trade-mark BREW WEAR cannot be monopolized by the applicant for such services.

As its second ground of opposition, the opponent maintains that the applied for mark is not registrable because it is clearly descriptive of the wares and services listed in the application. The third ground of opposition is that the alleged trade-mark is not registrable pursuant to s.12(1)(e) since the term BREW WEAR has by ordinary and *bona fide* commercial usage become recognized as designating a particular type, category or quality of merchandising items and the retail sale of such items. The opponent's fourth ground of opposition is that the applied for trade-mark is not distinctive in respect of the wares and services listed in the application because it does not distinguish the wares and services of the applicant from the wares and services of others, including the opponent. In this regard, the opponent argues that in addition to alcoholic brewery beverages, other Canadian manufacturers, providers and sellers of beer have used the words BREW and WEAR and variations thereof in association with wares and services such as those set out in the application which are or relate to the sale of merchandising items collateral to the sale and promotion of beer.

The applicant filed and served a counter statement on August 23, 1995, in which it denied the allegations asserted by the opponent in its statement of opposition. As its evidence, the opponent submitted the affidavits of Todd D. Bailey and Robert W. White. Mr. Bailey was cross-examined on his affidavit, and the transcript of the cross-examination, the exhibits and the responses to undertakings given during cross-examination form part of the opposition record. Both parties filed a written argument and an oral hearing was conducted at which both parties were represented.

As for the first ground of opposition, the opponent submits that because the applicant has not filed any evidence in support of its application, the Board should conclude that the applicant has not satisfied its onus to show that it is entitled to registration. I respectfully disagree with this submission. Although the onus or legal burden is on the applicant to show its compliance with Section 30(i), there is an evidential burden on the opponent to prove the facts it has alleged in support of this ground. As the opponent has not brought forth any evidence which would tend to support any of its allegations raised in conjunction with s.30(i) of the *Act*, the opponent has not met its evidential burden and this ground is therefore unsuccessful.

As for the opponent's second ground of opposition, the material time for considering the circumstances respecting the issue arising pursuant to Section 12(1)(b) of the *Act* is the date of my decision: see the decision in Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers (1992), 41 C.P.R.(3d) 243 (F.C.A.). Further, the issue is to be determined from the point of view of an everyday user of the wares and services. Finally, the trade-mark in question must not be carefully analyzed and dissected into its component parts but rather must be considered in its entirety and as a matter of first impression: see Wool Bureau of Canada Ltd. v. Registrar of Trade Marks (1978), 40 C.P.R.(2d) 25 at 27-28 and Atlantic Promotions Inc. v. Registrar of Trade Marks (1984), 2 C.P.R.(3d) 183 at 186.

While the legal burden is upon the applicant to show that its trade-mark is registrable, there is an initial evidentiary burden upon the opponent in respect of this ground to adduce sufficient evidence which, if believed, would support the truth of its allegations that the trade-mark BREW WEAR is either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares and services listed in the application. It is therefore necessary to consider the opponent's evidence in order to determine whether it has met the initial burden upon it. In this regard, the Bailey affidavit introduces into evidence photocopies of pages from various reference books located by the affiant including: **Websters Third New International Dictionary**, **The Association of Brewers' Dictionary of Beer and Brewing**, and **Stephen Beaumont's Great Canadian Beer Guide**. Mr. Bailey has also annexed to his affidavit photocopies of articles from various magazines and newspapers in which the word "brew" appears to be used synonymously with the word "beer", as well as catalogues from the opponent offering for sale various merchandising items used to promote the opponent's beer products, and photographs and sale receipts for merchandising items the affiant purchased at various beer stores, all of which were marked with various beer brand names.

The only evidence introduced by the Bailey affidavit which shows the terms BREW WEAR together are copies of various documents Mr. Bailey obtained from three different sites on the Internet along with a copy of a merchandise catalogue entitled "Salt River Brew Ware" which Mr. Bailey states he received in the mail after ordering such item through the Salt River Brew Wear Internet site. On cross-examination, Mr. Bailey was not able to confirm whether any of the Internet sites he visited were located in Canada or the extent to which these sites may have been accessed by Canadians. He also confirmed that he did not purchase any items from the Salt River Brew Ware catalogue or the other Internet sites he referred to.

The opponent submits that its evidence shows that the term “brew” is synonymous with beer, and that the term BREW WEAR is descriptive of the merchandising wares and services covered by the applicant’s application. It further submits that since it has shown that the words BREW WEAR would be recognized by the Canadian consumer to mean a category of merchandising items on which breweries apply their particular trade-marks to promote their particular brands of beer, it would be impossible to conclude that the mark BREW WEAR is not clearly descriptive.

I agree with the opponent that the Bailey evidence shows that in many publications, the word “brew” is often used interchangeably with the word “beer”. I also agree with the opponent that the average consumer may perceive the mark BREW WEAR, when used in association with the applicant’s wares and services, to mean that the wares and services promote beer. I do not consider, however, that the applicant’s trade-mark is either clearly descriptive or deceptively misdescriptive of the character or quality of the wares pursuant to s.12(1)(b). As the applicant’s agent pointed out, Section 12(1)(b) does not preclude the registration of a trade-mark which is merely suggestive of or connotes some aspects of the wares with which an applicant wishes to have its mark registered. In my view, although the mark BREW WEAR may suggest that the applicant’s wares and services promote beer, it does not clearly describe a feature or essential peculiarity of the wares or services material or intrinsic to the composition of the wares or services (see Anheuser-Busch, Inc. v. Molson Breweries, A Partnership, 66 C.P.R. (3d) 111 (TMOB) at 116; and Molson Companies Ltd. v. Carling O’Keefe Breweries of Canada Ltd. (1981), 55 C.P.R. (2d) 15 (F.C.T.D.) at 23). I have therefore concluded that the opponent has not met the evidentiary burden upon it in respect of the Section 12(1)(b) ground of opposition and this ground is not successful.

As for the opponent’s third ground of opposition, the opponent alleges that the applicant’s trade-mark is not registrable pursuant to s.12(1)(e) of the *Act* because the term “brew ware” has by ordinary and *bona fide* commercial usage become recognized in Canada as designating merchandising items or the operation of a retail store dealing in merchandising items. The relevant date for considering this issue is the date of my decision (see Olympus Optical Company Ltd. v. Canadian Olympic Association (1991), 38 C.P.R. (3d) 1 (F.C.A.)).

As noted, the only evidence submitted by the opponent with respect to the mark BREW WEAR as a whole are the documents attached to Mr. Bailey’s affidavit which he downloaded from three Internet sites on March 20, 1996, and a catalogue that he obtained from one of those sites. Also as noted, Mr. Bailey did not purchase any items through any of these sites or the catalogue he

ordered, nor was he able to confirm whether any of the Internet sites he visited were located in Canada or the extent to which these sites were accessed by Canadians. At best, this evidence shows that there are a handful of third parties who advertise on the Internet that they use the term BREW WARE in association with clothing and other promotional items connected with various brands of beer, and that items from at least one of these parties may be ordered from Canada through the company's catalogue. In my view, this evidence is insufficient to show that the term BREW WEAR has become recognized in Canada by ordinary and *bona fide* commercial usage as designating either the kind or quality of the applicant's wares and services within the scope of Section 10 of the *Act*. Therefore, this ground of opposition also fails.

As for the opponent's fourth ground of opposition, the onus or legal burden is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares and services from those of others throughout Canada: see Muffin Houses Incorporated v. The Muffin House Bakery Ltd. (1985), 4 C.P.R.(3d) 272 (T.M.O.B.). Further, the material time for considering the circumstances respecting this issue is as of the filing of the opposition (i.e. - May 29, 1995): see Re Andres Wines Ltd. and E. & J. Gallo Winery (1975), 25 C.P.R.(2d) 126 at 130 (F.C.A.) and Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. (1991), 37 C.P.R.(3d) 412 at 424 (F.C.A.). Finally, there is an evidential burden on the opponent to prove the allegations of fact supporting its ground of non-distinctiveness.

I agree with the opponent that the applicant's disclaimer of the word "wear" is arguably an admission that the word is not distinctive in relation to the applicant's services and proposed wares. Further, I agree with the opponent that its evidence has shown that the word "brew" is commonly used as a synonym for the word "beer", that other Canadian breweries sell merchandising items to promote their beer, and that many of the products listed in the applicant's application are often sold to promote brands of beer. However, in my view, the opponent has failed to meet the evidential burden upon it in respect of this ground of opposition because its evidence fails to show use of the mark BREW WEAR in Canada or that the words BREW WEAR have become known sufficiently in Canada to negate the distinctiveness of the applicant's mark. Consequently, this ground of opposition must also fail.

Accordingly, and with the authority delegated to me under s. 63(3) of the Act, I reject this opposition pursuant to s.38(8) of the Act

DATED AT HULL, QUEBEC, THIS 24th DAY OF FEBRUARY 1999.

C. R. Vandenakker
Member of the Trade-Marks Opposition Board