



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

**Citation: 2010 TMOB 44**  
**Date of Decision: 2010-04-14**

**IN THE MATTER OF THREE  
OPPOSITIONS by Labatt Brewing  
Company Limited/LaBrasserie Labatt  
Limitée to application Nos. 1,257,441;  
1,257,440 and 1,257,439 for the trade-  
marks SUPER COLD; EXTRA COLD  
and EXTRA CHILLED, respectively, in  
the name of Molson Canada 2005**

**Application No.1,257,441 for the mark SUPER COLD**

THE RECORD

[1] On May 12, 2005, Molson Canada 2005 (“Molson”) filed an application to register the trade-mark SUPER COLD, based on proposed use in Canada, in association with  
  
brewed alcoholic beverages, namely beer.

The application disclaims the right to the exclusive use of the word SUPER apart from the mark as a whole. The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated December 28, 2005 and was opposed by Labatt Brewing Company Limited/LaBrasserie Labatt Limitée (“Labatt”) on February 13, 2007.

[2] The Registrar forwarded a copy of the statement of opposition to the applicant on February 20, 2007 as required by s.38(5) of the *Trade-marks Act*, R.S.C. 1985, c. T-13. The applicant responded by filing and serving a counter statement generally denying the allegations

in the statement of opposition. Neither party filed evidence. Only the applicant filed a written argument. Neither party requested an oral hearing.

#### STATEMENT OF OPPOSITION

[3] The first ground of opposition alleges that the subject application contravenes s.30(e) of the *Trade-marks Act* because the applicant did not intend to use the term SUPER COLD as a trade-mark but rather “as a descriptor.”

[4] The second ground, pursuant to s.12(1)(b) of the *Act*, alleges that the applied for mark is not registrable because it is clearly descriptive or deceptively misdescriptive of the character or quality of the wares, “namely of the state in which the Applicant’s beer will either be sold or served . . .”

[5] The last ground alleges that the applied for mark is not adapted to distinguish the applicant’s beer “from the wares of others in view of its descriptive nature.”

#### APPLICANT’S POSITION

[6] The position taken by the applicant is that the opponent (i) has not pleaded any relevant facts in the statement of opposition to support any of the opponent’s allegations, and (ii) has not submitted any evidence to meet the evidential burden on the opponent to put any of the grounds of opposition into issue. I must disagree with the applicant’s first submission. In my view, reading the statement of opposition as a whole, it is apparent that the first and third grounds of opposition are premised on the allegation in the second ground that the term SUPER COLD is clearly descriptive of beer. In my view it is also apparent, from the literal and descriptive meanings of the terms SUPER and COLD, why the intended use of the term SUPER COLD as a trade-mark for beer can arguably sustain a ground of opposition pursuant to s.12(1)(b). The applicant’s second submission will be discussed later in these reasons for decision.

## MAIN ISSUE

[7] The main issue in this proceeding, as alleged in the statement of opposition, is whether the applied for mark SUPER COLD is clearly descriptive or deceptively misdescriptive of the character or quality of beer. The material dates to assess the main issue are (i) the date of filing the subject application (May 12, 2005) with respect to the first ground, (ii) the date of my decision with respect to the second ground, and (iii) the date of opposition (February 13, 2007) with respect to the third ground: for a review of case law concerning material dates in opposition proceedings see *American Retired Persons v. Canadian Retired Persons* (1998), 84 C.P.R.(3d) 198 at 206 - 209 (F.C.T.D.).

### *Legal Onus and Evidential Burden*

[8] The legal onus is on the applicant to show that the application does not contravene the provisions of the *Trade-marks Act* as alleged by the opponent in the statement of opposition. The presence of a legal onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant. However, there is also, in accordance with the usual rules of evidence, an evidential burden on the opponent to prove the facts inherent in its allegations pleaded in the statement of opposition: see *John Labatt Limited v. The Molson Companies Limited*, 30 C.P.R. (3d) 293 at 298. The presence of an evidential burden on the opponent with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist.

### *Jurisprudence*

[9] In the recent opposition case of *Anheuser-Busch, Inc. v. Molson Canada 2005* (March 15, 2010 (yet unreported), application Nos.1,257,441; 1,257,440; 1,257,439 and 1,252,7360), I had occasion to consider whether the applied for mark SUPER COLD is clearly descriptive or deceptively misdescriptive of the character or quality of beer. In that case I noted, at para.15:

Whether the applied for mark SUPER COLD is clearly descriptive of beer must be considered as a matter of immediate impression from the point of view of the average consumer of beer. A mark is clearly descriptive if it

describes a feature, trait or characteristic of the wares in a way that is "easy to understand, self evident or plain:" see *Wool Bureau of Canada Ltd. v. Registrar of Trade Marks*, 40 C.P.R. (2d) 25 at 27-8; *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183 at 186; *Drackett Co. of Canada Ltd. v. American Home Products Corp.* (1968), 55 C.P.R. 29 at 34.

[10] I also noted at para.14 of *Anheuser*, above:

It appears to me that, at least in the circumstances of the instant case, the two issues raised by the second ground of opposition, that is, whether the applied for mark SUPER COLD is clearly descriptive or deceptively misdescriptive of (i) the conditions of how beer is produced and (ii) a category or type of beer, are closely related. In this regard, if the opponent can show that the mark is descriptive of a process of producing beer, then it will follow that the mark is descriptive of a character or quality of the beer, that is, the beer will have a certain character or quality because it was made by a certain process: see, for example, an excerpt from *Staffordshire Potteries Ltd. v. Registrar of Trade Marks* (1976), 26 C.P.R. (2d) 134 (FCTD) at para. [20], below.

(emphasis added)

[11] The excerpt from *Staffordshire*, referred to above, is shown below:

The word "Kilncraft" is a combination of the two common English words kiln and craft, both of which, in my opinion, contribute to what the composite word suggests. Where used in association with or in relation to tableware, it has, so far as I am aware, no recognized meaning, but to my mind, it strongly suggests that the tableware in association with which, or in respect of which it may be used has been skilfully made by a kiln process. This is what I think it would connote, as a matter of first impression, to a member of the public who saw it on tableware or in the boxes in which such wares are sold, or who heard it spoken in relation to tableware by a store clerk or salesman.

I also think the person seeing or hearing the word [KILNCRAFT] on such an occasion would probably regard it as assuring that the wares were the product of a kiln process and that they were of good quality. To my mind, the word represents to the viewers or listeners that the wares are so produced and are of such quality, and it is, therefore, clearly descriptive within the meaning of para. 12(1)(b), both of the conditions of production of the tableware in association with which it is used and of the quality of such wares, if not also of their character, as well.

(emphasis added)

[12] The applicant, at paras.19-22 of its written argument in the present proceeding, submits that the instant case is “on all fours” with *Registrar of Trade-marks v. Provenzano* (1978), 40 C.P.R.(2d) 288 (F.C.A); aff’g 37 C.P.R. (2d) 189 (F.C.T.D.). In *Provenzano*, the Court allowed an appeal from a decision of this Board refusing an application for the trade-mark KOLD ONE for beer. The Board had found that the mark KOLD ONE was clearly descriptive or deceptively misdescriptive of the character or quality of beer. The Trial Division reasoned as follows in allowing the appeal from the Board, at p.190:

The adjective "cold", when applied to a "beer" is not in any way descriptive of the intrinsic character or quality of the product. Unlike such food products as ice cream, frozen foods, ices or juices or appliances such as refrigerators, stoves or toasters, the temperature at which it might or might not be delivered, sold or used has nothing to do with the character or quality of the product itself: see for example the word "frigidaire" in *General Motors Corp. v. Bellows* (1949), 10 C.P.R. 101 , [1950] 1 D.L.R. 569, [1949] S.C.R. 678, and words "Tastee Freeze" in *Tastee Freeze International, Ltd.'s Appln.*, [1960] R.P.C. 255. Although a majority of people might prefer to drink their beer cold, others may prefer it at room temperature. The word "cold" in such a case can refer only to the state at which the product, namely, the beer, may or may not be sold or consumed and not to any intrinsic quality or characteristic of the product. It, therefore, is not descriptive of the beer itself.

[13] In the *Anheuser* case, above, I found that the mark SUPER COLD was clearly descriptive of the conditions of production of the applicant’s beer (through a “cold brewing” process) and that by the year 2005 the terms “super cold” and “extra chilled” had entered the English lexicon to describe a particular type of beer. My conclusions in *Anheuser*, above, were based on the evidence submitted by the opponent Anheuser-Busch. In particular, I found that the evidence submitted by the opponent Anheuser-Busch sufficed to meet the evidential burden on the opponent to put s.12(1)(b) into issue while the applicant had not supported its case. Further, I distinguished *Provenzano* on the basis that it was decided at a time before the “cold brewing” process of making beer was prevalent in the brewing industry or familiar to consumers of beer.

*Conclusion*

[14] In the instant case the opponent Labatt has not submitted any evidence that a new type of beer, based on a cold brewing process, was introduced into the Canadian marketplace at about the same time that the subject applicant was filed. I therefore agree with the applicant Molson that the opponent has failed to meet its evidential burden to put any of the grounds of opposition into issue. For that reason, the opposition to application No.1,257,441 is rejected.

**Application Nos.1,257,440 and 1,257,439 for the marks EXTRA COLD and EXTRA CHILLED, respectively**

[15] The above referenced applications for the trade-marks EXTRA COLD and EXTRA CHILLED were filed on the same day as the application for SUPER COLD and are also based on proposed use in Canada in association with beer. As in the SUPER COLD opposition, neither party submitted evidence and only the applicant submitted written arguments. Neither party requested oral hearings.

[16] The pleadings, issues and material dates in respect of the oppositions against EXTRA COLD and EXTRA CHILLED are entirely analogous to those discussed in respect of the opposition to SUPER COLD. Applying the same considerations and reasoning as in the opposition to the mark SUPER COLD, I find that the opponent has not met the evidential burden on it to put any of the grounds of opposition into issue.

DISPOSITION

[17] In view of the foregoing, the oppositions by Labatt to application Nos.1,257,441; 1,257,440 and 1,257,439 are rejected. These decisions have been made pursuant to a delegation of authority under s.63(3) of the *Trade-marks Act*.

[18] Of course, as the outcome in the *Anheuser* opposition, above, did not favour the applicant Molson, the subject applications will not proceed to allowance, subject to any appeal..

---

Myer Herzig  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office