

IN THE MATTER OF AN OPPOSITION by Anheuser-Busch,
Incorporated to application No. 747750 for the trade-mark GRAVITY
BEER filed by Molson Breweries, A Partnership

On February 18, 1994, the applicant, Molson Breweries, A Partnership, filed an application to register the trade-mark GRAVITY BEER based on proposed use in Canada in association with “brewed alcoholic beverages, namely beer”. The applicant disclaimed the right to the exclusive use of the word beer apart from the trade-mark as a whole. The application was advertised for opposition purposes on November 2, 1994.

The opponent, Anheuser-Busch, Incorporated, filed a statement of opposition on April 3, 1995. The grounds of opposition are as follows:

- (a) The application does not conform with the requirements of Section 30 of the *Trade-Marks Act* (hereinafter referred to as “the *Act*”).
 - (i) The phrase GRAVITY BEER which is the subject of this application is not a trade-mark as defined in the *Act*.
 - (ii) Further, the applicant did not at the date of filing, and does not now, intend to use this phrase as a trade-mark in association with the wares included in the application.
 - (iii) Further, the applicant could not have been satisfied that it is entitled to use the alleged trade-mark in Canada in association with the wares described in the application for all of the reasons outlined herein.
- (b) The alleged trade-mark is not registrable pursuant to section 12(1)(b) of the *Act* because the phrase GRAVITY BEER, is either clearly descriptive or deceptively misdescriptive of the character or quality of the wares covered by the application, namely beers, or of the conditions of their production.
- (c) The alleged trade-mark is not registrable pursuant to section 10 of the *Act* because the phrase GRAVITY BEER, has by ordinary and bona fide commercial usage become recognized in Canada as designating the kind, quality, quantity or value of the wares, namely beer.
- (d) The alleged trade-mark is not distinctive in that it does not actually distinguish the wares of the applicant, namely beer, from the wares of others nor is it adapted to distinguish them since the phrase GRAVITY BEER clearly describes a particular character or quality of the wares, beer.

The applicant filed and served a counter statement on June 26, 1995, in which it generally denied the allegations asserted by the opponent in its statement of opposition. As its evidence, the opponent submitted the affidavit of Robert W. White and two affidavits of Mark A. Chapman (both sworn January 26, 1996), the first attaching to it only Exhibit A and the second attaching to it Exhibits A through P. Mr. Chapman was cross-examined on his affidavits and a transcript of his cross-examination forms part of the record of these proceedings. The affidavit of Krishna K. Pathiyal was submitted as the applicant’s evidence. As evidence in reply, the opponent filed the affidavit of E. Harvey Seaman and Mark Schisler. Both Mr. Seaman and Mr. Schisler were cross-examined on their affidavits and transcripts of their cross-examinations, along with replies to undertakings, form part of the record in these proceedings. Both parties filed a written argument and an oral hearing was conducted at which both parties were represented.

The Opponent's Evidence

Mr. Chapman identifies himself as a student-at-law articling with the firm representing the opponent. Included in his affidavit are excerpts from various sources, including books, beer reference texts, home brewing articles, magazine articles and articles in major Canadian newspapers, in which reference to the word "gravity" in the context of beer are made. In the article entitled "How to Brew Your First Beer" which Mr. Chapman obtained off an Internet site and attached as Exhibit A to his first affidavit, the term "gravity" is defined as follows:

"Like density, gravity describes the concentration of malt sugar in the wort. The specific gravity of water is 1.000 at 59F. Typical beer worts range from 1.035 - 1.055 before fermentation (Original Gravity)".

Along with this reference are references to the terms high gravity, final gravity, liquid gravity, original gravity and specific gravity.

The second Chapman affidavit introduces into evidence definitions of the terms "specific gravity" and "original gravity" as they have appeared in many beer reference texts such as: *The Association of Brewers' Dictionary of Beer and Brewing, 1998*; *Michael Jackson's Beer Companion, 1993*; *1,000 Wine and Beer-making Hints and Recipes*; *Grossman's Guide to Wines, Beers & Spirits*; and *Beer Naturally* (see Exhibits A, B, G, H and I). Some of the definitions for the terms "specific gravity" and "original gravity" are as follows:

Michael Jackson's Beer Companion, 1993

original gravity: A measurement of the density of fermentable sugars in the mixture of malt and water with which a brewer begins a given batch.

1,000 Wine and Beer-making Hints and Recipes

original gravity: The specific gravity of a wort prior to the mixing in of the yeast.

Grossman's Guide to Wines, Beers & Spirits

specific gravity: A measure of the density of a liquid or solid; the ratio of the weight of any volume of a liquid or solid to the weight of an equal volume of water.

The second Chapman affidavit also evidences that the term "gravity" has appeared in other beer reference texts to describe the alcoholic strength of beer and in various newspaper and magazine articles that describe home brewing.

The affidavit of Mr. White shows that the articles referred to in the second Chapman affidavit were circulated in Canada to a significant number of Canadians.

The Applicant's Evidence

Mr. Pathiyal identifies himself as an employee of the trade-mark agents representing the applicant. He states that he attended a beer store in Ottawa and examined the 153 different samples of the types of beer that were available for purchase at the store. He states that none of the labels on the beers he examined contained either the term "gravity" or "specific gravity".

The Opponent's Reply Evidence

Mr. Seaman identifies himself as the President of Product Acceptance Research, Inc., a marketing research company which maintains an extensive collection of beer bottles and cans. Attached to his affidavit are photocopies of photographs of ten labels of beers from his company's beer bottle collection that display the word "gravity" on the label. It was revealed at cross examination that Mr. Seaman's company only does research on the United States beer industry and that all of the original products identified in Mr. Seaman's affidavit would have come from somewhere in the United States.

At the oral hearing, the opponent's agent submitted that the applicant's agent frustrated the opponent's agent attempt to re-examine Mr. Seaman at his cross-examination. The scope of proper re-examination in an opposition was discussed by Board Member Martin in **Bedford Bedding & Upholstery Ltd. v. Duff, carrying on business as The Mattress King**, 24 C.P.R. (3d) 326 at p. 329 as follows:

The applicant apparently also sought to rely on the transcript of the cross-examination of Mr. Duff wherein Mr. Duff was re-examined by his own trade mark agent. However, rather than seeking clarification of Mr. Duff's answers on cross-examination, his agent asked unrelated questions seeking to indirectly introduce evidence on behalf of the applicant through the mechanism of re-examination. This is clearly unacceptable and I consider the re-examination of Mr. Duff to be, for the most part, inadmissible.

In the present case, the question asked by the opponent's agent on the re-direct of Mr. Seaman (see page 11 of the Seaman transcript) was not in the nature of reply or clarification. Rather, it was an attempt to introduce into evidence additional exhibits in the nature of additional beer bottles which had not been referred to in Mr. Seaman's original affidavit. I agree with the applicant's agent that such matters cannot be introduced by means of re-examination but instead, should have been introduced as part of the opponent's own evidence through the provisions of

Rule 41(1) or Rule 44(1) of the *Trade-marks Regulations*. Thus, I do not find that the applicant's agent, by objecting to the introduction of this evidence, frustrated the opponent's attempts to re-examine its witness. Rather, I consider that it was inappropriate for the opponent's agent to have attempted to introduce this new evidence at Mr. Seaman's re-examination.

Mr. Schisler identifies himself as a technical analyst employed by the opponent's trade-mark agent. Attached to his affidavit are photographs of labels of two different types of beer that he purchased at a liquor store in North York, Ontario, upon which the term "original gravity" appears in the text on the rear label of each product. Mr. Schisler also attached photographs of a beer bottle that he purchased at a Brewer's Retail store in Toronto sometime in the late 1980's or early 1990's upon which the term "original gravity" also appears on the side of the label.

The Grounds of Opposition

As its first ground of opposition, the opponent has alleged that the present application does not comply with the requirements of Section 30 of the *Act*. While the legal burden is on the applicant to show that its application complies with Section 30 of the *Act*, there is an initial evidential burden on the opponent to adduce sufficient evidence which, if believed, would support the truth of the allegations relating to the Section 30 grounds (see **Joseph E. Seagram & Sons Ltd. v. Seagram Real Estate Ltd.**, 3 C.P.R. (3d) 325, at pp. 329-330). To meet the evidential burden upon it in relation of a particular issue, the opponent must adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that issue exist (see **John Labatt Limited v. The Molson Companies Limited**, 30 C.P.R. (3d) 293, at p. 298). Further, the material time for considering the circumstances respecting the issue 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 first aspect of the opponent's Section 30 ground is that the phrase GRAVITY BEER is not a trade-mark as defined in the *Act*. However, the opponent has adduced no evidence to support its allegations that the applicant's trade-mark is not a trade-mark. Thus, this aspect of the Section 30 ground is not successful.

As the second aspect of its Section 30 ground, the opponent asserted that the applicant did not at the date of filing and does not now intend to use the phrase GRAVITY BEER as a trade-mark in association with the wares included in the application. No evidence has been furnished

by the opponent, however, to show that the applicant, as of the filing date of the present application, did not intend to use the phrase GRAVITY BEER. Further, there is no evidence from the applicant to show that it did not intend to use the trade-mark in association with the wares included in the application at the date of filing its application. I have therefore dismissed this aspect of the Section 30 ground.

The third aspect of the Section 30 ground is based on Subsection 30(i) of the *Act*, the opponent alleging that the applicant could not have been satisfied as to its entitlement to use the alleged trade-mark in Canada in association with the wares described in the application. No evidence has been furnished by the opponent, however, to show that the applicant could not have been satisfied that it was entitled to use the trade-mark GRAVITY BEER in Canada. Moreover, to the extent that the Subsection 30(i) issue is founded upon allegations set forth in the remaining ground of opposition, the success of the Subsection 30(i) ground is contingent upon a finding that the applicant's trade-mark GRAVITY BEER is not registrable or not distinctive (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 of opposition.

With respect to the second ground of opposition, section 12(1)(b) of the *Act* reads as follows:

“(1) Subject to section 13, a trade-mark is registrable if it is not

(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;”

“(1) Sous réserve de l'article 13, une marque de commerce est enregistrable sauf dans l'un ou l'autre des cas suivants :

b) qu'elle soit sous forme graphique, écrite ou sonore, elle donne une description claire ou donne une description fautive et trompeuse, en langue française ou anglaise, de la nature ou de la qualité des marchandises ou services en liaison avec lesquels elle est employée, ou à l'égard desquels on projette de l'employer, ou des conditions de leur production, ou des personnes qui les produisent, ou du lieu d'origine de ces marchandises ou services;”

The opponent argues that the trade-mark GRAVITY BEER is clearly descriptive or deceptively misdescriptive of the character or quality of the wares covered by the application, namely beers, or of the conditions of their production. The issue as to whether the trade-mark GRAVITY BEER is clearly descriptive or deceptively misdescriptive must be considered from the point of view of the average purchaser of the proposed wares. Further, in determining this issue, the trade-mark must not be dissected into its component elements and carefully analysed, but rather

must be considered in its entirety as a matter of immediate impression (see **Wool Bureau of Canada Ltd. v. Registrar of Trade Marks**, 40 C.P.R. (2d) 25, at pp. 27-28 and **Atlantic Promotions Inc. v. Registrar of Trade Marks**, 2 C.P.R. (3d) 183, at p. 186). Finally, the material date for considering a ground of opposition based on Section 12(1)(b) of the *Act* is the date of decision (see **Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers**, 41 C.P.R. (3d) 243 (F.C.A.)).

In the present case, the opponent relies on the Chapman affidavits and exhibits to show that the terms “gravity”, “original gravity” and “specific gravity” are commonly used in the brewing industry to refer to the density of beer. The opponent also relies on the Schisler affidavit which shows use of the word “original gravity” on labels for beer available in Canada. It is the opponent’s submission that since the word “beer” is the name of the wares, the alleged trade-mark “gravity beer” as a whole clearly describes a character or quality of the wares and as a whole is unregistrable. In this regard, the opponent submits that the term “gravity” or “specific gravity” has become recognized as designating beer of a certain kind or with a certain character namely beer of a certain density, or strength.

The applicant, on the other hand, submits that there is no evidence which indicates that the trade-mark GRAVITY BEER has any defined or well known meaning, or that anyone has used the term GRAVITY BEER in association with beer. In this regard, the applicant submits that in many of the opponent’s articles the term GRAVITY appears to be a historic term, and not one which would convey any meaning today to the average Canadian consumer of beer. The opponent further submitted that if the Registrar were to accept the fact that a beer could have a quality called “gravity”, it is not clear how this quality is “self evident and plainly descriptive” of a characteristic of beer (see **Molson Cos. Ltd. v. Carling O’Keefe Breweries of Canada Ltd.** (1981), 55 C.P.R. (2d) 15 at 20 (F.C.T.D.)). In this regard, the applicant submits that the term “gravity” may be related to the alcoholic content of a beer, or it may be related to the level of sugar in wort from which the beer is brewed (prior to fermentation), but it does not clearly describe any intrinsic quality or character of the product (see **Provenzano v. Registrar of Trade-Marks v. Provenzano** (1978), 40 C.P.R. (2d) 288 (F.C.A.); affg. (1977) 37 C.P.R. (2d) 189 (F.C.T.D.) (hereinafter **Provenzano**). In the **Provenzano** decision, the Federal Court of Appeal upheld the Trial Division’s reversal of the Registrar’s decision pursuant to Section 12(1)(b) of the *Act* to refuse registration to the trade-mark KOLD ONE for beer. As stated by Mr. Justice Heald for the Court of Appeal:

“We agree with the statement of the learned trial Judge that the adjective “cold”, when applied to beer is not in any way descriptive of the intrinsic character or quality of the product. The temperature at which beer may be used is unrelated to the character or quality of the beer itself. Accordingly, the word “kold” as used in this mark refers only to the condition in which the beer may or may not be used and not to any intrinsic quality or character of the product”.

The opponent submits that the present case can be distinguished from the Provenzano case in that the adjective GRAVITY does not refer to a condition in which a beer may or may not be used but rather refers to its quality or character. Although I agree with the opponent that the adjective “gravity”, when applied to the word “beer”, may suggest that the quality of the beer is somehow determined by its density or alcoholic strength, I do not consider the term GRAVITY BEER to be clearly descriptive of an **intrinsic character or quality** of beer. In this regard, the opponent’s evidence shows that beer may be brewed from various levels of gravity. For example, on the beer label attached as Exhibit D to the Schisler affidavit, the following appears:

“We, at the Niagara Falls Brewing Company have found that the common trait of all stouts is that they are uniquely different.

In keeping with this, we started with an original gravity of 1054[°], using the finest of hops and a rich blend of malts to produce a roasty, pleasant, bitter palate with a gentle but firm body.”

Further, the definition of gravity provided in Exhibit A to the first Chapman affidavit states that the specific gravity of water is 1.00 at 59F and that the original gravity for beer ranges from 1.035 -1.055 before fermentation.

The opponent’s evidence also shows that the strength of the beer may be described by the level of gravity used in the brewing process, such as low, medium or high. For example, in *The Association of Brewers’ Dictionary of Beer and Brewing* (Exhibit A to the second Chapman affidavit), the term “heavy beer” is defined as “a synonym for high gravity beer”. In *A Connoisseur’s Guide to the World’s Best Beer* (Exhibit F to the second Chapman affidavit), the following is stated at p.44: “Whether the beer is brewed from a high or low original gravity, many factors other than the concentration of the malt will affect its flavor and character”.

In view of the evidence as a whole, I do not consider that the ordinary user or dealer in beer in Canada, as a matter of first impression, would conclude that GRAVITY BEER, when applied to beer, clearly describes a beer of a certain standard or quality. Thus, the second ground of opposition is unsuccessful. I would like to add that my opinion may have been different had the term GRAVITY BEER been accompanied by a qualifying adjective such as the word “low”, “medium” or “high”.

The opponent’s third ground of opposition is that the alleged trade-mark is not registrable

pursuant to Section 10 of the *Act* because the phrase GRAVITY BEER, has by ordinary and *bona fide* commercial usage, become recognized in Canada as designating the kind, quality, quantity or value of the wares, namely beer. At the oral hearing, the agent for the applicant submitted that this ground should be disregarded because it was not properly pleaded. In this regard, the applicant's agent stated that the opponent did not refer to Section 12(1)(e) in its statement of opposition.

Pursuant to Section 38(3)(a) of the *Act*, a statement of opposition shall set out the grounds of opposition in sufficient detail to enable the applicant to reply thereto. In the present case, I am satisfied that the opponent has pleaded sufficient facts to support its allegation that the applied for mark is not registrable and I am of the view that it can be inferred from the wording of the third ground that the opponent had intended to rely upon s.12(1)(e) as part of this ground. Further, I am of the view that the applicant has already addressed the issue of non-registrability in its written argument as though it had been properly pleaded. Thus, I see no reason to disregard this ground of opposition.

With respect to the Section 10 ground of opposition, there is an initial burden on the opponent to establish that the phrase "gravity beer" has become ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity or value of the wares, namely beer. Further, pursuant to the Federal Court of Appeal decision in **Olympus Optical Company Ltd. v. Canadian Olympic Association** (1991), 38 C.P.R. (3d) 1 (F.C.A.), the relevant date for considering the question of registrability is the date of my decision.

No evidence has been adduced by the opponent that the term "gravity beer" has become recognized in Canada as designating the kind, quality, quantity or value of beer. As noted above, what the exhibits attached to the Chapman affidavits show is that the term "gravity" when applied to the word "beer" may suggest that the quality of the beer is somehow determined by its density or alcoholic strength. Further, all the Schisler affidavit shows is that the term "original gravity" appeared on the label of two different types of beer Mr. Schisler purchased in North York, Ontario in 1997, and one type of beer he purchased in Toronto sometime in the late 80's or early 90's. The applicant's evidence, however, shows that when Mr. Pathiyal conducted an examination of 153 types of beer for sale in Ottawa, Ontario in 1997, none of the labels contained either the term gravity or specific gravity. I am therefore not satisfied that the term GRAVITY BEER has become recognized in Canada by ordinary and *bona fide* commercial usage as designating the kind, quality, quantity or value of beer. Thus, this ground of opposition

is unsuccessful.

The fifth ground of opposition is contingent upon the second ground, the only difference being that the material time for considering the circumstances is as of the filing of the opposition. In view of my findings respecting the second ground, I must also find that the fifth ground is unsuccessful.

In view of the above, I reject the opponent's opposition.

DATED AT HULL, QUEBEC, THIS 29th DAY OF February, 2000.

C. R. Folz
Member,
Trade-Marks Opposition Board