

**IN THE MATTER OF AN OPPOSITION  
by Molson Canada 2005 (formerly Molson  
Canada) to application No. 1091807 for the  
trade-mark BUDWEISER in Script Label  
Design filed by Anheuser-Busch  
Incorporated**

On February 6, 2001, Anheuser-Busch Incorporated (the “Applicant”) filed an application to register the trade-mark BUDWEISER in Script Label Design (the “Mark”), shown below, based upon proposed use of the Mark in Canada. The statement of wares currently reads: beer, clothing, namely t-shirts and hats, and drinking vessels, namely cups, mugs, glasses and steins. The application was advertised for opposition purposes in the Trade-marks Journal of December 11, 2002.



On May 12, 2003, Molson Canada (the “Opponent”), filed a statement of opposition against the application. The Applicant requested an interlocutory ruling on the sufficiency of various paragraphs in the statement of opposition on October 15, 2003. An interlocutory ruling issued June 24, 2004, in which the Applicant’s request was denied. On July 28, 2004, the Applicant filed and served a counter statement, in which it generally denied the Opponent’s allegations. The statement of opposition was amended on May 30, 2005, to reflect the Opponent’s change of name from Molson Canada to Molson Canada 2005. The Applicant amended its counter statement on March 29, 2006, in order to preclude the Opponent from preventing registration of the Mark “by asserting against the applicant any rights deriving from the use or registration of the STANDARD LAGER & Design mark which is the subject of Registration No. TMDA 40809 and all derivations of that design.” The Applicant explains that this is because Registration No.

TMDA 40809 was wrongfully obtained, as determined by the Court of Appeal.

The Opponent's evidence consists of the affidavit of Lori Ball, Manager, Legal Administration for the Opponent and a certified copy of Registration No. TMDA 40809, for the trade-mark STANDARD LAGER & Design ("the STANDARD LAGER label"), shown below. The Applicant's evidence consists of the affidavit of Andrew Day, Vice-President, International Operations for Anheuser-Busch International, Inc. and Mary Mutchler, law clerk with the Applicant's agent. The Applicant also filed certified copies of its Registration Nos. 168,703; 172,014; 274,060; 415,990; 429,787; 429,784; 434,353; 445,757; 495,717; 593,073; 608,871 and the present application. Ms. Ball was cross-examined on her affidavit. The transcript of such cross-examination, and replies to undertakings, also form part of the record.



Both the Applicant and the Opponent filed a written argument. An oral hearing was conducted at which both parties were ably represented.

Prior to identifying the grounds of opposition, the Opponent set out the following facts in its amended statement of opposition:

1. Molson Canada 2005 is the owner of TMDA 40809 for the trade-mark STANDARD LAGER & Design, registered for use in association with standard lager. This trade-mark, which was registered on November 16, 1926, has been in use in Canada continuously since that time by Molson Canada 2005 or its predecessors in title, with

only minor modifications to the label, primarily to ensure the name of the brewer remained current.

2. Molson Canada 2005's trade-mark has not been abandoned at the date of advertisement of the Applicant's subject application.
3. The Federal Court of Appeal, in *Anheuser-Busch v. Carling O'Keefe* (1986), 10 C.P.R. (3d) 433, has previously ruled that the parties trade-marks, used in association with brewed alcoholic beverages, are confusing.
4. Molson Canada 2005 has previously used and made known its aforementioned trade-mark in respect of the wares listed above since before the filing date of the Applicant's subject application, and for many years.

The grounds of opposition, each based on the above noted facts, are as follows:

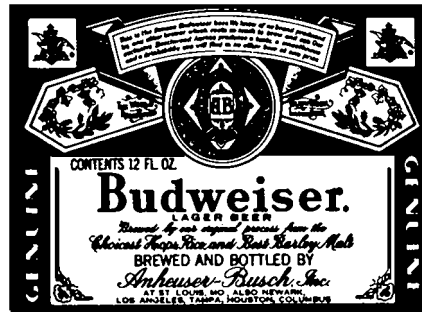
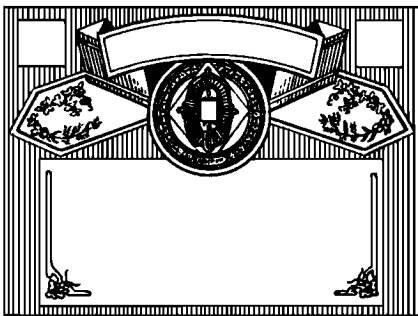
1. The Applicant's trade-mark is not registrable, pursuant to s.12(1)(d) of the Act;
2. The Applicant is not the person entitled to registration of the trade-mark pursuant to s.16(3)(a) of the Act; and
3. The Applicant's trade-mark is not distinctive pursuant to s.38(2)(d) of the Act in that the Applicant's mark neither distinguishes nor is adapted to distinguish the Applicant's wares from the wares offered for sale and sold by the Opponent in association with its trade-mark (Registration No. TMDA 40809 for the trade-mark STANDARD LAGER & Design).

The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the "Act"). There is however an initial burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist (see *John Labatt Ltd v. Molson Companies Ltd.* (1990), 30 C.P.R.

(3d) 293 (F.C.T.D.) at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)).

## Background

The beer labels used by the parties or their predecessors-in-title in the 1980s (and all earlier versions of those labels) were found to be confusingly similar by the Federal Court of Appeal in *Anheuser-Busch, Inc. v. Carling O'Keefe Breweries of Canada Ltd.* (1986), 10 C.P.R. (3d) 433 (F.C.A.) (“the Federal Court of Appeal decision”). Specifically, the Opponent’s STANDARD LAGER label registered in association with standard lager was found to be confusing with the Applicant’s RECTANGLE & Design label, Registration No. 168,703, (“the RECTANGLE and Design label”), and BUDWEISER & Design label, Registration No. 172,014, (“the BUDWEISER and Design label”), both registered for use in association with “beer”. Both of these marks are reproduced below.



The Federal Court of Appeal decision is the decision relied upon by the Opponent in its statement of opposition and was introduced into evidence as Exhibit M to the Ball affidavit. A certified copy of the judgment was also included as Exhibits A and B to the Mutchler affidavit filed by the Applicant. Two copies of the judgment are included, since the Federal Court of Appeal decision determined three appeals, two of which (A-80-83 and A-81-83) concerned the Budweiser label and Standard Lager label marks and registrations.

I agree with the Applicant that the Mark in the present case is an updated version of the Applicant's BUDWEISER and Design label (Registration No. TMA 172,014) addressed in the Federal Court of Appeal decision.

### **Federal Court of Appeal Decision**

The STANDARD LAGER label, registered November 16, 1926, owned at the time by the Opponent's predecessor-in-title, Carling O'Keefe ("Carling"), consisted of a label having both word and design features. Anheuser-Busch ("the Appellant") had begun to sell beer in Ontario using a label having similar word and design features, and registered October 16, 1970, (the BUDWEISER and Design label) and April 23, 1970 ("the RECTANGLE and Design label"). Carling brought an action for infringement and expungement against the Appellant because it wanted to expunge the Appellant's trade-marks, and restrain the Appellant from infringing its trade-mark by selling beer in Canada bearing a confusingly similar label.

The Appellant counterclaimed against Carling, seeking expungement of Carling's trade-mark for the reason of it being invalid since the elements of the Carling's mark had been used in Canada by the Appellant and its predecessors-in-title since 1883, many years prior to the first use by the Opponent or its predecessors-in-title of the STANDARD LAGER label.

The Federal Court of Appeal held that the parties' labels were confusing. In this regard, the Court of Appeal stated as follows at p. 443:

"Carling O'Keefe pleaded and the Appellants admitted that the Budweiser label currently used and proposed to be used in Canada was confusingly similar to the Standard Lager label being used in Canada. The matter went to trial on that basis. No evidence to the contrary was adduced. The learned trial judge found, nevertheless, that they were not confusing.

The finding cannot stand. Furthermore, the similarity between the trade-marks admitted on the pleadings to be confusingly similar *and all other labels in issue*, including those illustrated in the actual trade mark registrations, is so striking and pervasive as to preclude a contrary conclusion as to any of them." (emphasis added)

Despite this finding of confusion, the Appellant's registrations were not expunged by reason of Carling's laches and acquiescence. Carling had known of the BUDWEISER label for many years, but never took any action with respect to the Appellant's use of its trade-mark in Canada until those proceedings.

The Court of Appeal further held that had the attack on Carling's STANDARD LAGER label by the Opponent been timely, **it should certainly have succeeded**. In this regard, it noted that the original registrant of the mark, Drewrys, could not be found to have been the proprietor of a trade-mark that was, if not actually copied, inspired and designed with knowledge of the BUDWEISER label and was also confusingly similar to it in fact. However, the Court refused to expunge Carling's STANDARD LAGER label registration by reason of the acquiescence and laches of the Appellant. The trial judge had noted that Carling's mark had been in use for many years and grave injustice would result if it were expunged. The Federal Court of Appeal further noted that whatever the cloud on its initial registration, the STANDARD LAGER label had been used since 1950 as a trade-mark by Carling and its predecessors and their investment in it and its goodwill would be nullified by its expungement.

### **Grounds of Opposition**

Each of the grounds of opposition turns on the issue of the likelihood of confusion between the Mark and the Opponent's mark. This is a somewhat unusual case in that both parties agree that there is a likelihood of confusion between the marks in so far as they relate to beer. I have therefore decided to divide this decision into two parts. The first part concerns the Mark as it applies to beer and the second part concerns the Mark as it applies to the remaining applied for wares.

#### ***The Mark as it applies to beer***

In view that the parties agree that there is a likelihood of confusion between the marks as they relate to beer, there is no need to consider the various surrounding circumstances listed under s.

6(5) of the Act. I therefore only need to focus on the issue of whether the Opponent ought to be allowed to rely on its STANDARD LAGER label in this forum.

The Opponent submits that it can rely on its ownership and use of its mark. In this regard, it submits that any equitable claim the Applicant may have had against the Opponent's mark was nullified by the Applicant's laches and acquiescence. It further argues that in any event, the Board does not have the jurisdiction to prevent the Opponent from relying on its registration and the rights that flow from it. It submits that the present case can be distinguished from the decision in *McCabe v. Yamamoto & Co. (America) Inc.* (1989), 23 C.P.R. (3d) 498 (F.C.T.D.) because in the present case there was no finding by the Federal Court that the use by the Opponent of the STANDARD LAGER label was an infringement of the Applicant's rights.

I agree that the Registrar has no jurisdiction to question the ownership of a registration, and has no power to make any amendments to the register in an opposition proceeding (see *Bacardi & Co. v. Havana Club Holding S.A.* (2004), 32 C.P.R. (4<sup>th</sup>) 306 (F.C.A.)). The jurisprudence also states that the use of a registered mark is an absolute defence to an action of passing off (see *Remo Imports Ltd. v. Jaguar Cars Ltd.* (2007), 60 C.P.R. (4<sup>th</sup>) 130 (F.C.A.)). I also agree that the validity of an opponent's registration is not an issue in opposition proceedings (see *Cognos Inc. v. Cognisys Consultants Inc.* (1994), 53 C.P.R. (3d) 552 (T.M.O.B.)).

The present case can be distinguished from each of the above cases, however, because it does not regard an amendment to the register, an action for passing off or an issue about the validity of the Opponent's registration. In view that the Federal Court of Appeal ordered a co-existence of the parties' confusingly similar labels for beer, it is my understanding that the Applicant is asking the Board to follow that decision and allow it to register an up-to-date version of that same label. In order to do so, however, I need to determine whether I have jurisdiction to limit the scope of protection accorded to the Opponent's mark in the present case.

It is clear that an Opponent should not be allowed to rely on infringing activities in order to form the basis for opposing an application. It is also clear that the Registrar has jurisdiction to find the use of a trade-mark to be unlawful in opposition proceedings (see *Lunettes Cartier Ltee v. Cartier, Inc.* (1991), 36 C.P.R. (3d) 391 (T.M.O.B.)). Kelen J. set out when it may be reasonable for the Registrar to do so in *Sunbeam Products Inc. v. Mister Coffee & Services Inc.* (2001), 16 C.P.R.(4<sup>th</sup>) 53 (T.M.O.B.) (“Mister Coffee”) at pp. 58-59:

[17] The applicant submits that the Registrar did have the jurisdiction to find that the respondent's use of the trade name MISTER COFFEE was unlawful. The applicant relies upon *McCabe v. Yamamoto & Co. (America) Inc.* (1989), 23 C.P.R. (3d) 498 (F.C.T.D.), and *Lunettes Cartier Inc. v. Cartier, Inc.* (1991), 36 C.P.R. (3d) 391 (T.M.O.B.), where the Registrar did find unlawful the use of a trade-mark by an opponent in an opposition proceeding. In *McCabe*, the Federal Court had evidence of a finding by a U.S. Court that the respondent's use of the trade-mark was an infringement of the appellant's rights. In the *Lunettes Cartier* case, the Opposition Board had evidence that the respondent was subject to an injunction from the Federal Court enjoining the respondent's use of the trade-marks, the same trade-marks which the respondent was relying upon in support of its opposition.

[18] In the case at bar, there is not clear evidence that the use of the trade-mark MISTER COFFEE by the respondent is unlawful. *This question requires a proper hearing.* The fact that the applicant has not sought an interlocutory injunction or taken legal action prior to 1995, raise questions which need answers in an appropriate legal forum. The Registrar, in the course of opposition proceedings under s. 38 of the *Trade-marks Act*, does not have the jurisdiction to conduct a full hearing with *viva voce* evidence to determine the lawfulness of the respondent's use of the trade-mark. *If the lawfulness issue was clear, then the Registrar has the jurisdiction to state that the respondent cannot rely upon its use of the trade-mark because its use is not lawful.* In the case at bar, the Registrar cannot come to that clear conclusion in this opposition proceeding.

At p. 60, Kelen J. goes on to say:

[23] The respondent's use of the name MISTER COFFEE commenced in association with services, but evolved to include wares in association with coffee. The applicant's use of the name MR. COFFEE has always been in association with wares, *viz.* coffee-makers and coffee decanters, but the applicant now seeks to extend the trade-mark to other wares, *viz.* coffee and cleaning compositions. The applicant and the respondent have both evolved and grown to the point where their businesses are colliding. Accordingly, their respective use of the trade-mark MR. COFFEE and trade name MISTER COFFEE *requires a full legal hearing and determination of the parties' respective rights.* (emphasis added).



Although the Applicant in the present case is not asking that I find use of the Opponent's mark to be unlawful, I consider the fact that the Registrar has jurisdiction to state that an opponent can't rely on unlawful use of its mark if the lawfulness issue is clear to be relevant to the present case. While I appreciate that the Federal Court of Appeal decision is different from the decision in *Mr. Coffee, supra*, because there was no finding of infringement of the Applicant's mark by the Opponent's mark in that case, the reason why there was no such finding was because the Appellant did not make a claim for infringement in view of the particular facts of that case. On the other hand, in the Federal Court of Appeal decision, a "full legal hearing" was held with respect to the same parties as in the present case and almost the same trade-marks, as applied to beer. Even though infringement was not claimed in that case, the parties' marks were found to be confusing. Further, at that "full legal hearing", the Court of Appeal was clear that **but for** the laches and acquiescence of the appellant (who is the Applicant in the present case), the attack on the STANDARD LAGER label **should certainly have succeeded**. Therefore, although the Federal Court of Appeal did not make a finding specifically on the lawfulness of Carling's mark in that case, in my view it is clear from that decision that the Opponent's STANDARD LAGER label was wrongfully obtained.

In view of the Federal Court of Appeal decision, and the case law discussed above, I consider that I have the authority to limit the scope of protection accorded to the Opponent's mark in the present case and allow the parties' marks to co-exist, just as the Federal Court of Appeal did. As a result, I am rejecting each of the grounds of opposition with respect to beer.

I would like to add that by limiting the scope of protection accorded to the Opponent's mark because of the unique facts of this case, I do not consider that I would be causing "grave injustice" or the "nullification of the Opponent's goodwill" as may have been the case had I been a federal court judge deciding that the Opponent's mark should be expunged. While I appreciate that one of the purposes of the Act is to provide protection to the owners of both registered and unregistered marks, in view that the Federal Court of Appeal has already limited the scope of protection accorded to the Opponent's mark, it seems both reasonable and logical for me to do the same in the present case since it involves the same parties and almost the same marks.

It is noted that this is not the first time that a variation of either parties' beer label has been the subject of opposition proceedings since the Federal Court of Appeal decision. In *Molson Breweries, A Partnership v. Anheuser-Busch, Inc.* (1995), 66 C.P.R. (3d) 92 (T.M.O.B.) ("the 1995 Board decision"), Member Herzig found the Federal Court of Appeal decision distinguishable because the applied for mark in his case did not cover brewed alcoholic beverages. In *Anheuser-Busch, Inc. v. Molson Breweries, a Partnership* (successor in title to Carling O'Keefe Breweries of Canada Ltd. – Les Brasseries Carling O'Keefe du Canada Ltee), (1993), 49 C.P.R. (3d) 402 (T.M.O.B.) ("the 1993 Board decision"), Member Herzig considered that he was bound by the Federal Court of Appeal judgment and found the applied for STANDARD LAGER & Design mark to be confusing with Anheuser's Registration No. 168,703 because of the high degree of visual resemblance between the two marks.

Both of these decisions are distinguishable from the present case. The present case is different from the 1995 Board decision because in the present case both parties' marks cover brewed alcoholic beverages and therefore cover the same wares as the marks in the Federal Court of Appeal decision. The present case is also different from the 1993 Board decision because the parties are reversed, the applicant did not file any relevant admissible evidence in that case and finally, the applicant in that case did not argue that the scope of protection accorded to the opponent's RECTANGLE and Design label should be limited in view of the Federal Court of Appeal decision. As the issue of whether the Opponent's registration should be accorded limited protection in view of the Federal Court of Appeal decision was not raised by the Applicant or addressed by the Board Member in that case, I respectfully disagree with the Opponent that the same reasoning should apply in the present case.

### ***The Mark as it Applies to the Remaining Applied for Wares***

The remaining applied for wares include clothing, namely t-shirts and hats and drinking vessels, namely cups, mugs, glasses and steins. Each of the grounds of opposition turn on the issue of the likelihood of confusion between the Mark as it applies to these wares and the Opponent's mark.

The parties do not agree that there is a likelihood of confusion between the marks in so far as they relate to beer. Further, I consider the Federal Court of Appeal decision distinguishable from this part of the present case because the remaining applied for wares are different from the wares considered in that decision.

I shall now analyze the likelihood of confusion with respect to the Applicant's mark as it applies to these wares and the Opponent's STANDARD LAGER label. I consider the Opponent's case to be strongest with respect to the ground that the Mark is not registrable pursuant to s. 12(1)(d) of the Act due to the likelihood of confusion with the Opponent's STANDARD LAGER label. A finding under this ground will effectively decide all the grounds of opposition because the material date to consider the issue is the date of my decision (see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks* (1991), 37 C.P.R. (3d) 413 (F.C.A.)) which is the latest date that the issue can be considered.

The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class. In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known; b) the length of time each has been in use; c) the nature of the wares, services or business; d) the nature of the trade; and e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them. Those criteria are not exhaustive and it is not necessary to give each one of them equal weight (see *Clorox Co. v. Sears Canada Inc.* (1992), 41 C.P.R. (3d) 483 and *Gainers Inc. v. Marchildon* (1996), 66 C.P.R. (3d) 308 (F.C.T.D.)).

While both parties' marks possess a fair degree of inherent distinctiveness in view of the combination of design features that comprise them, I find the Opponent's mark to be less

distinctive because the words STANDARD LAGER are descriptive of the wares in association with which it is used. With respect to the extent to which the marks have become known, the Opponent has shown use of its mark in association with beer in Manitoba only. Sales of STANDARD LAGER label have been between 350,000 litres (i.e. approx. one million bottles) and 440,000 litres per annum between 1999 and 2004. The Opponent's affiant Ms. Ball admitted on cross-examination that the Opponent's STANDARD LAGER is not supported by any marketing budget and that no advertising or promotional budget has been allocated to the brand since 1989. I therefore find that the Opponent's mark has only become known to some extent in Manitoba.

With respect to s.6(5)(b) of the Act, the length of time the marks have been in use favours the Opponent as the Applicant's mark is based on proposed use.

With respect to s. 6(5)(c), the nature of the parties' wares are different since the Opponent's registration covers brewed alcoholic beverages while the remaining applied for wares of the Mark cover clothing, namely t-shirts and hats, and drinking vessels, namely cups, mugs, glasses and steins. The Opponent has not shown use of its STANDARD LAGER label in association with any of the remaining applied for wares of the Applicant. As for s. 6(5)(d), in view that the Applicant's collateral merchandising items could be sold in the same beer stores as the Opponent's beer, the parties' channels of trade could overlap. Finally, with respect to s.6(5)(e), the marks are similar in view of the design features common to both marks.

As a further surrounding circumstance, I have considered the significant reputation and extent known of the Applicant's BUDWEISER mark and its main constituent elements. As Mr. Day deposed, the basic design of the BUDWEISER label and its main constituent elements have remained unchanged since the product was first introduced in Canada in the late 1880's. Canadian dollar sales of BUDWEISER beer from 1996 to 2004 averaged approximately \$380 million per annum, and at the date of Mr. Day's affidavit, BUDWEISER was the top-selling beer in Canada. Further, the Applicant has spent hundreds of millions of dollars in advertising its

BUDWEISER beer in Canada over the ten year period prior to the date of Mr. Day's affidavit. Finally, between 1997 and 2005, the Applicant sold in excess of \$9 million dollars (U.S.) worth of collateral merchandise bearing the BUDWEISER mark in Canada. Details and illustrations of the representative samples of such collateral merchandise were shown in paragraphs 16-23 and Exhibits AD16 to AD17 of the Day affidavit. In the consideration of the likelihood of confusion, I find that the extensive reputation of the Applicant's BUDWEISER mark for beer and other merchandising wares is another circumstance in the Applicant's favour.

As another surrounding circumstance, I have considered the Opponent's evidence of merchandising activities in association with its other beer trade-marks. Ms. Ball states that brewed alcoholic beverages are frequently promoted and marketed by merchandising items such as those of the Applicant. She further states that many brewers, including Molson, use such merchandise as promotional give-aways or as added-value items. Ms. Ball also explains that the Opponent has a licensing program whereby it permits authorized licensees to use certain of Molson's registered trade-marks in association with various types of merchandise offered by sale through various retail outlets including the Beer Store, retail outlets owned by Molson in Montreal and Toronto, department stores such as Sears Canada, Wal-Mart and Zellers and other retail channels throughout Canada. Sales of such merchandise in Canada over the three year period preceding the date of her affidavit were in excess of three million dollars per year.

While the Opponent's evidence may show that members of the public have become accustomed to seeing various types of merchandise, including t-shirts, hats, mugs, steins, glasses and cups, bearing other beer marks of the Opponent, the Opponent has not established why the ambit of protection accorded to its STANDARD LAGER label should include wares unrelated to alcoholic brewery beverages. I refer to the following comments from the 1995 Board Decision at p.98:

“in order for a registration covering standard lager to be afforded a wide scope of protection that would extend to wares other than beer or beverages, it is necessary that the opponent establish that *the registered mark is so well-known* that use of the same mark would lead consumers to infer that the wares associated with those

trade-marks are manufactured or sold by the same person...there is no evidence which would support a conclusion that the opponent is even entitled to prevent the use or registration of [the mark which is the subject of regn. No. TMDA 40809] in association with unrelated wares..." (emphasis added)

In the present case, the Opponent has not established that its STANDARD LAGER label is "so well-known" that use by the Applicant of a confusingly similar mark on clothing items and drinking vessels would create the impression that such items either originated with the Opponent or were authorized by the Opponent. The Applicant, on the other hand, has evidenced a significant reputation of its BUDWEISER mark in association with beer and other wares. Therefore, in my view, the average consumer would more likely associate the remaining applied for wares with the Applicant's existing marks as opposed to the Opponent's mark.

Having considered all of the surrounding circumstances, I conclude that, on a balance of probabilities, there is not a reasonable likelihood of confusion between the Opponent's Registration No. TMDA 40809 and the Applicant's mark as it applies to clothing, namely t-shirts and hats, and drinking vessels, namely cups, mugs, glasses and steins. I therefore reject each of the grounds of opposition, as they concern the remaining applied for wares.

### **Disposition**

Having been delegated by the Registrar of Trade-marks by virtue of s. 63(3) of the Act, I reject the opposition pursuant to s. 38(8) of the Act.

DATED AT Gatineau, Quebec, THIS 28th DAY OF November, 2008.

Cindy R. Folz  
Member,  
Trade-marks Opposition Board