

IN THE MATTER OF AN OPPOSITION  
by Ocean Fisheries Limited to  
application No. 612,710 for the  
trade-mark OCEAN TREASURE filed  
by Collage Communicators Limited

On August 11, 1988, the applicant, Collage Communicators Limited, filed an application to register the trade-mark OCEAN TREASURE for "seafood" based on proposed use in Canada. The application was advertised for opposition purposes on January 25, 1989.

The opponent, Ocean Fisheries Limited, filed a statement of opposition on February 16, 1989, a copy of which was forwarded to the applicant on March 3, 1989. The grounds of opposition include, among others, that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Trade-marks Act because it is confusing with the opponent's trade-mark OCEAN'S & Design (illustrated below) registered under No. 298,015 for "canned salmon" and under No. 309,431 for "canned tuna and canned salmon."

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavit of Edward Anthony Safarik. The applicant filed the affidavit of Dean Alan Ennes. Both parties filed written arguments and an oral hearing was conducted at which both parties were represented.

As for the opponent's ground of opposition pursuant to Section 12(1)(d) of the Act, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is as of the filing of the opposition. 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.

The opponent's mark OCEAN'S & Design is inherently weak since it is suggestive of the source of origin of the registered wares. However, the Safarik affidavit evidences extensive sales by the opponent in Canada of seafood products in general and salmon and tuna products in particular in association with the registered mark. Safarik also provides evidence of advertising activities and expenses in relation to that mark. Thus, I am able to conclude that the opponent's mark had become known in Canada as of the material time.

The applicant's mark is not inherently strong, the words OCEAN TREASURE having a somewhat suggestive and laudatory connotation in association with the applied for wares. There being no evidence of use of the applicant's mark, I must conclude that it had not become known at all in Canada as of the filing of the opposition.

The length of time the marks have been in use clearly favors the opponent. The

wares of the parties are the same and presumably the trades would be identical. The marks themselves bear a fairly high degree of resemblance in all respects since the first component of the applicant's mark is essentially identical to the opponent's mark. In fact, a consumer viewing the applicant's mark in the marketplace might easily mistake it as being OCEAN'S TREASURE and assume that the opponent had simply added the somewhat laudatory word TREASURE to its registered trade-mark OCEAN'S & Design.

The applicant relied on the Ennes affidavit to mitigate the effect of the resemblance between the marks of the parties. Mr. Ennes purports to provide what might be termed state of the trade-marks register evidence respecting trade-marks which include the word OCEAN and which are registered for seafood wares. However, Mr. Ennes' affidavit is deficient in several respects. First, he did not provide copies of the registrations referred to. Second, it is not entirely clear that Mr. Ennes checked the register as opposed to simply checking the card indices maintained by the Trade-marks Office. Those indices are less reliable. Thus, in accordance with the opposition decision in Molson Companies Ltd. v. T.G. Bright & Co. Ltd. (1984), 3 C.P.R.(3d) 202 at 204-206, the Ennes affidavit must be given relatively low probative weight.

The Ennes affidavit is further deficient because Mr. Ennes did not provide complete particulars of the registrations referred to. For example, he did not provide the names of the registered owners. Thus, it may be that some traders own two or more of the registrations listed. This would seem to be more than a remote possibility since the statement of opposition reveals that the opponent itself owns at least five such registrations. A final point is that two of the registrations listed by Mr. Ennes cover wares unrelated to seafood.

In view of the above, I must give lessened weight to the Ennes affidavit. However, since he does list some twenty potentially relevant registrations, I can perhaps conclude that a very few of those registered marks are in use in the marketplace thereby lessening the effect of the resemblance between the marks to a limited extent.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of the virtual identity between the wares and trades of the parties, the extent to which the opponent's registered mark has become known, the degree of resemblance between the marks and the limited effect of the applicant's evidence, I am left in doubt as to the issue of confusion between the two marks. Since the onus or legal burden is on the applicant, I must resolve that doubt against the applicant. Thus, the ground of opposition based on Section 12(1)(d) of the Act is successful. Had the applicant's evidence been more reliable, that result might well have been different.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 31st DAY OF October, 1990.

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