

**IN THE MATTER OF AN OPPOSITION by Canus Fisheries
Ltd. to application No. 775,976 for the certification mark GASPÉ
filed by Association Québécoise de l'Industrie de la Pêche**

On February 21, 1995, the applicant, Association Québécoise de l'Industrie de la Pêche, filed an application to register the certification mark GASPÉ based on use of the mark by the applicant's licensees since February 16, 1995 in association with "poissons salés". The applicant has stated in its application that it is a commercial association having a representative "sur la côte de Gaspé" and has claimed that the use of its certification mark is intended to indicate that the wares in association with which it is used conform to the following defined standard:

"le poisson salé faiblement a été transformé et produit sur la côte de Gaspé en respectant la méthode traditionnelle utilisée dans cette région, laquelle nécessite un temps de séchage à l'extérieur; et le produit fini satisfait aux normes de transformation et de qualité que le requérant peut fixer de temps à autre"

The present application was advertised for opposition purposes in the *Trade-marks Journal* of July 12, 1995 and the opponent, Canus Fisheries Ltd., filed a statement of opposition on August 23, 1995, a copy of which was forwarded to the applicant on November 10, 1995. The applicant responded by filing and serving a counter statement on December 12, 1995. The opponent filed as its evidence the affidavit of Peter W. Stoddard while the applicant submitted as evidence the affidavits of Réal Nicolas, Benoît Reeves, Jean-René Denis, Robert Langlois, Roch Lelièvre, Alphonse Gagnon, Armand Lachance and two affidavits of Jean-Paul Gagné, dated April 10, 1997 and June 26, 1997. The opponent filed a further affidavit of Peter W. Stoddard as evidence in reply. The applicant alone submitted a written argument and neither party requested an oral hearing.

The first ground of opposition is based on Paragraph 12(1)(e) and Section 10 of the *Trade-marks Act*, the opponent alleging that the mark GASPÉ in association with the mark CURE (GASPÉ CURE) has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind and quality of salted fish more particularly defined and classified under *Fish Inspection Regulations*, C.R.C., C. 802, ss. 111 and 114, which Regulations were made pursuant to the *Fish Inspection Act*, R.S.C. 1985, c. F-12. The opponent further alleged that it produces "Gaspé Cure" under its "Fox River Brand" in accordance with the standards prescribed in the aforesaid *Fish Inspection Regulations* and has been producing Gaspé Cure in Canada since at least

as early as 1987 and continues to use the designation Gaspé Cure to describe the kind and quality of salted fish produced by it.

As with other grounds of opposition under Subsection 12(1) and Paragraph 38(2)(b) of the *Trade-marks Act*, the legal burden is upon the applicant to demonstrate that its certification mark is registrable and therefore does not offend the provisions of Paragraph 12(1)(e) and Section 10 of the *Act*. However, there is an initial evidential burden on the opponent to establish the facts being relied upon by it in support of this ground. Paragraph 12(1)(e) and Section 10 of the *Act* provide as follows:

12. (1) Subject to section 13, a trade-mark is registrable if it is not
(e) a mark of which the adoption is prohibited by section 9 or 10;

10. Where any mark has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality, quantity, destination, value, place of origin or date of production of any wares or services, no person shall adopt it as a trade-mark in association with such wares or services or others of the same general class or use it in a way likely to mislead, nor shall any person so adopt or so use any mark so nearly resembling that mark as to be likely to be mistaken therefor.

As noted in the *Petit Robert 2*, the Gaspé Peninsula is a peninsula situated in southeastern Quebec between the mouth of the St. Lawrence River and Chaleur Bay. In the present application, the applicant has asserted that it is a commercial association having a representative “sur la côte de Gaspé” and this has not been challenged by the opponent. As a result, the applicant falls within the provisions of Section 25 of the *Trade-marks Act* which provides as follows:

25. A certification mark descriptive of the place of origin of wares or services, and not confusing with any registered trade-mark, is registrable if the applicant is the administrative authority of a country, state, province or municipality including or forming part of the area indicated by the mark, or is a commercial association having an office or representative in that area, but the owner of any mark registered under this section shall permit the use of the mark in association with any wares or services produced or performed in the area of which the mark is descriptive.

Thus, while the certification mark GASPÉ is clearly descriptive of the place of origin of the applicant’s wares, the opponent’s evidence does not show that the applicant’s certification mark has by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind and quality of salted fish. At most, the opponent’s evidence points to the words GASPÉ CURE as referring to a type of fish product in the *Fish Inspection Regulations* but the *Regulations* do not

identify GASPÉ per se as referring to a kind or quality of fish product.

The issue arises, however, as to whether the applicant's certification mark GASPÉ so nearly resembles the mark GASPÉ CURE as to be likely to be mistaken therefor. In my view, the immediate reaction of the average consumer encountering the certification mark GASPÉ would be that it refers to the region of southeastern Quebec and such a consumer would not therefore be likely to mistake the applicant's certification mark for the mark GASPÉ CURE. In any event, no evidence has been furnished by the opponent which would support the conclusion that the average consumer would be likely to mistake the certification mark GASPÉ for the mark GASPÉ CURE. I have therefore rejected the first ground of opposition.

The second ground of opposition is based on Paragraph 38(2)(d) and Section 2 of the *Trade-marks Act* in that the certification mark GASPÉ is not distinctive of the the wares of those persons authorized or licensed by the applicant to use the certification mark, nor is it adapted to distinguish the wares of those persons from the wares of the opponent which has a long history of use of the designation GASPÉ CURE in Canada in association with a particular kind and quality of salted fish produced in accordance with the above-noted subsections of the *Fish Inspection Regulations*. However, having concluded that the average consumer would not likely mistake the applicant's certification mark for the mark GASPÉ CURE, the evidence of use of the mark GASPÉ CURE would not impact on the distinctiveness of the applicant's certification mark. I have therefore dismissed the second ground of opposition.

In view of the above, and having been delegated by the Registrar of Trade-marks pursuant to Subsection 63(3) of the *Trade-marks Act*, I reject the opponent's opposition pursuant to Subsection 38(8) of the *Trade-marks Act*.

DATED AT HULL, QUEBEC THIS 20th DAY OF OCTOBER, 1998.

G.W.Partington,
Chairperson,
Trade-marks Opposition Board.