

IN THE MATTER OF AN OPPOSITION
by National Sea Products Limited
to application No. 640,152 for
the trade-mark OCEAN GOLD filed
by Empire Alaska Seafoods, Inc.

On September 8, 1989, the applicant, Empire Alaska Seafoods, Inc., filed an application to register the trade-mark OCEAN GOLD for "fish and sea food" based on proposed use in Canada. The application was advertised for opposition purposes on May 23, 1990.

The opponent, National Sea Products Limited, filed a statement of opposition on September 21, 1990, a copy of which was forwarded to the applicant on October 10, 1990. The grounds of opposition are that the applied for trade-mark is not registrable and is not distinctive and the applicant is not the person entitled to registration because the applied for trade-mark is confusing with the registered trade-mark GOLD LINE previously used in Canada by the opponent in association with "seafood, namely soup and chowders, and fish and seafood, namely processed fish and crustaceans."

The applicant filed and served a counter statement. As its evidence, the opponent filed an affidavit of its Vice-President, Charles Gower. The applicant filed the affidavits of Valerie Miller and Generosa Castiglione. Only the opponent filed a written argument and no oral hearing was conducted.

As for the opponent's ground of opposition based on prior entitlement, Section 16(3) of the Trade-marks Act requires the opponent to evidence use of its trade-mark GOLD LINE prior to the applicant's filing date and non-abandonment of its mark as of the applicant's advertisement date. This the opponent has done by means of the Gower affidavit which evidences significant sales and advertising of the opponent's GOLD LINE soups and chowders from 1982 on and fairly significant sales and advertising of the opponent's GOLD LINE fish fillets, fish steaks and shrimp from 1987 on.

The opponent having satisfied its initial evidential burden, the ground of prior entitlement remains to be decided on the issue of confusion between the marks of the parties. The material time for considering the circumstances respecting that issue is as of the applicant's filing date in

accordance with the wording of Section 16(3) of the Act. Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the two marks. 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 set forth in Section 6(5) of the Act.

The applicant's mark is inherently distinctive of the applied for wares although it is not inherently strong. The word OCEAN points to the source of the wares and the word GOLD is laudatory. Thus, the applicant's proposed mark suggests that its seafood products come from the ocean and are of high quality. Since the present application is based on proposed use, I must conclude that the applicant's mark was not known at all in Canada as of the material time.

The opponent's trade-mark GOLD LINE is also inherently distinctive although it, too, is not inherently strong. The words GOLD LINE suggest that the associated products are of high quality. As noted, the opponent has evidenced fairly extensive use of its trade-mark for various seafood products. Thus, I am able to conclude that the opponent's trade-mark has become known in Canada.

The length of time the marks have been in use favors the opponent. The wares of the parties overlap and presumably the trades of the parties would also overlap.

As for Section 6(5)(e) of the Act, there is a fair degree of resemblance between the marks in all respects since both marks include the word GOLD. That resemblance may be even more pronounced if the applicant and consumers refer to the applicant's wares as its OCEAN GOLD "line" of seafood products.

Without the benefit of a written argument from the applicant, it is difficult to know what position it is taking in this opposition. However, from a review of the applicant's evidence, it would appear that it wishes to contend that a surrounding circumstance in the present case which lessens the effect of any degree of resemblance between the marks is the state of the register evidence introduced by the Miller and Castiglione affidavits. State of the register evidence is only relevant insofar as one can make inferences from it about the state of the marketplace: see the opposition decision in Ports International Ltd. v. Dunlop Ltd. (1992), 41 C.P.R.(3d) 432 and the decision in Del

Monte Corporation v. Welch Foods Inc. (1992), 44 C.P.R.(3d) 205 (F.C.T.D.). Also of note is the decision in Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd. (1992), 43 C.P.R.(3d) 349 (F.C.A.) which is support for the proposition that inferences about the state of the marketplace can only be drawn from state of the register evidence where large numbers of relevant registrations are located.

The Miller affidavit was presumably submitted to establish that the word "gold" is a common component of trade-marks registered for seafood products. Ms. Miller identifies herself as a computer operator with the applicant's agents and simply attaches to her affidavit a copy of the "computer search results" from a computer search she made on the "DYNIS database." She fails to indicate what the DYNIS data base is, how the printout was obtained or what it means. There is no indication that she conducted any search of the trade-marks register. Thus, the Miller affidavit cannot be given any weight.

Even if the printout attached to the Miller affidavit could be given some weight as an accurate representation of entries appearing on the trade-marks register, it would still be of little assistance in supporting the applicant's case. Some of the references in the printout are to design marks with no representation of the design provided. All of the references have only incomplete particulars and there is no indication as to whether the references located are current registrations, expunged registrations, pending applications or abandoned applications. Even if I could ignore all the deficiencies in the Miller printout and interpret it in the best possible light, the most that I could infer is that there may be seven or eight registrations for trade-marks incorporating the word GOLD for seafood products. The mere existence on the register of seven or eight such registrations does not allow me to infer that some of those marks are in substantial use such that consumers would be accustomed to seeing trade-marks including the word GOLD for seafood products.

The Castiglione affidavit is of even less assistance to the applicant's case. Ms. Castiglione examined the Trade-marks Office files for the present application and for the opponent's registration. Appended to her affidavit are copies of what appear to be computerized searches from those two files, presumably used during the initial examination process. Ms. Castiglione's affidavit therefore does nothing more than establish that those materials were on the two files; it does not establish the

utility, veracity or authenticity of the searches they supposedly represent. Even if I could somehow consider the results listed in those two search reports, they would not assist the applicant's case since they do not point to large numbers of registered marks including the word GOLD for seafood products. At best, they would point to a relatively large number of trade-marks incorporating the word OCEAN registered for seafood products which would serve to underscore the inherent weakness of the first component of the applicant's mark. In other words, if that evidence could be considered, it would support the proposition that consumers are used to seeing seafood trade-marks incorporating the word OCEAN and would therefore center on the other components of such marks in distinguishing them. Such a conclusion would strengthen the opponent's contention that the marks at issue are confusing.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the overlap in the wares and trades of the parties, the extent to which the opponent's mark has become known and the degree of resemblance between the two marks, I find that the applicant has failed to satisfy the onus on it to show that the marks are not confusing. If the applicant had been able to evidence common use of the word GOLD by other traders in the seafood trade, my conclusion might have been different. In any event, the ground of prior entitlement is successful and the remaining grounds need not be considered.

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

DATED AT HULL, QUEBEC, THIS 30th DAY OF June, 1994.

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