

**IN THE MATTER OF AN OPPOSITION by GeoAcoustics Limited to application No. 687,826 for the trade-mark GEOACOUSTICS INC. filed by Geo Acoustics Inc.**

On August 12, 1991, Geo Acoustics Inc. filed an application to register the trade-mark GEOACOUSTICS INC. based upon use of the trade-mark in Canada: since 1987 in association with “computer programs relating to geophysical surveying”; since May 5, 1989 in association with “computer programs relating to underwater acoustic surveying and mapping”; and since March 1986 in association with services identified as “consulting services relating to geophysical surveying, consulting services relating to underwater acoustic surveying and mapping, consulting services relating to the design of instruments for geophysical surveying, and consulting services relating to the design of instruments for underwater acoustic surveying and mapping”. The application was also based upon proposed use of the trade-mark in Canada in association with “instruments for geophysical surveying, and instruments for underwater acoustic surveying and mapping”.

The present application was advertised for opposition purposes in the *Trade-marks Journal* of March 18, 1992 and the opponent, GeoAcoustics Limited, filed a statement of opposition on August 18, 1992. The opponent subsequently requested and was granted leave to amend its statement of opposition pursuant to Rule 40 of the *Trade-marks Regulations*. The applicant filed a counter statement and also requested leave to file an amended counter statement and then to file a further amended counter statement in response to the opponent’s amended statement of opposition. The Board granted leave to the applicant to file its further amended counter statement pursuant to Rule 40 of the *Trade-marks Regulations* by way of the Office letter of June 16, 1995.

The opponent filed as its evidence the affidavit of David Rodney Stone who was cross-examined on his affidavit, the transcript of the cross-examination, the exhibits to the cross-examination, and the responses to undertakings given during the cross-examination forming part of the opposition record. The applicant submitted as its evidence the affidavit of Donald Jackson Dodds. Both parties submitted a written argument and the applicant alone made submissions at an oral hearing.

The first ground of opposition set forth in the amended statement of opposition is based on Section 30 of the *Trade-marks Act*. While the legal burden is upon the applicant to establish that its application is in compliance with Section 30 of the *Trade-marks Act*, there is an initial evidential burden on the opponent in respect of the Section 30 ground [see *Joseph E. Seagram & Sons Ltd. et al 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]. Moreover, the opponent can rely upon the applicant's evidence to meet its initial burden in respect of the Section 30 issues.

The opponent initially alleged that the applicant's mark GEOACOUSTICS INC. is not a trade-mark as this term is defined in Section 2 of the *Trade-marks Act* and has relied upon the Dodds affidavit as meeting its initial burden in respect of this ground. In particular, the opponent has submitted that the exhibits to the Dodds affidavit point to its use of GEOACOUSTICS INC. as a trade-name rather than as a trade-mark. In my view, the words GEOACOUSTICS INC. appearing in exhibits F, H, Q, R and S might arguably be perceived by the average person as functioning as a trade-mark to distinguish the services performed by the applicant from those of others within the scope of the definition of "trade-mark" in Section 2 of the *Trade-marks Act*. As a result, I have dismissed the first of the issues raised under the Section 30 ground.

As a second issue, the opponent alleged that the applicant's corporate and trade-name is Geo Acoustics Inc. and that the manner of use of the name or style GEOACOUSTICS INC. by the applicant in the province of Ontario where its head office is located is an unauthorized use in view of the provisions of Section 11(1) of the *Business Corporations Act*, 1990, R.S.O. c. B-16. Section 11(1) provides that no person while not incorporated shall trade or carry on a business or undertaking in which "Limited", "Incorporated" or "Corporation" or any abbreviation thereof in another language, is used. The applicant's evidence establishes that it is incorporated federally under the Canada Business Corporations Act [see paragraph 4 and Exhibit A to the Dodds affidavit] and therefore the applicant had the right to use the designation "Inc." as part of its name. I have therefore

dismissed this ground.

The remaining issues raised by the opponent under the Section 30 ground are that the applicant has not used the trade-mark GEOACOUSTICS INC. in Canada in association with: computer programs relating to geophysical surveying since 1987; computer programs relating to underwater acoustic surveying and mapping since May 5, 1989; or the various consulting services identified in the application since March 1986. Again, the opponent has relied upon the Dodds affidavit as meeting its initial evidentiary burden in respect of this ground. In my view, paragraph 16 and exhibits F, G and H to the Dodds affidavit are not inconsistent with the applicant's claim that it has used the trade-mark GEOACOUSTICS INC. since 1987 in association with "computer programs relating to geophysical surveying". Further, paragraph 18 of the Dodds affidavit and exhibits H, L and M are not inconsistent with the applicant's claim that it has used the trade-mark GEOACOUSTICS INC. since May 5, 1989 in association with "computer programs relating to underwater acoustic surveying and mapping". As a result, the opponent has not met the evidentiary burden upon it in respect of the Section 30(b) ground as it applied to these wares.

The opponent also challenged the applicant's claim that it has used the trade-mark GEOACOUSTICS INC. in association with various consulting services identified in the application since March 1986. In his affidavit, Dodds states that the applicant was incorporated on March 21, 1986 and that it immediately took over the geophysical consulting services which he personally had commenced in February of 1986. Mr. Dodds also asserts that his clientele was informed of this and that these services were provided under the mark GEOACOUSTICS INC. While Mr. Dodds has not specifically identified the manner in which the applicant informed Mr. Dodds' clientele in March of 1986 that it would be continuing to provide the geophysical consulting services under the GEOACOUSTICS INC. mark, the opponent has not challenged this evidence by way of cross-examination, nor has it submitted any evidence which might contradict these statements. While the applicant's evidence is inconsistent with it having provided all of the specific services identified in the present application since March of 1986, I would note that Section 30(b) of the *Trade-marks Act* provides as follows:

**30.** An applicant for the registration of a trade-mark shall file with the Registrar an application

containing

(b) in the case of a trade-mark that has been used in Canada, the date from which the applicant or his named predecessors in title, if any, have so used the trade-mark in association with each of the general classes of wares or services described in the application;

Thus, the applicant need only identify the date of first use with respect to the general class of services covered in its statement of services. In this regard, there is nothing in the Dodds affidavit which is inconsistent with the applicant's claim that its clients were receiving geophysical consulting services under the trade-mark GEOACOUSTICS INC. in March of 1986. As a result, I find that the opponent has not met the evidentiary burden upon it in respect of the Section 30(b) ground as it applies to the applicant's geophysical consulting services and have therefore rejected the Section 30(b) ground of opposition.

The second ground of opposition is based on Section 16(3) of the *Trade-marks Act*, the opponent alleging that the applicant is not the person entitled to registration of the trade-mark GEOACOUSTICS INC. on a proposed use basis in association with "instruments for geophysical surveying, and instruments for underwater acoustic surveying and mapping" in that, as of the applicant's filing date, the applicant's trade-mark was confusing with the opponent's trade-mark application No. 701,746 for the trade-mark GEOACOUSTICS & Design, filed March 25, 1992 and claiming a priority filing date of October 1, 1991. As the priority filing date [October 1, 1991] of application No. 701,746 is subsequent to the applicant's filing date of August 12, 1991, the opponent's application does not qualify as an application which had been previously filed in Canada and therefore cannot be relied upon to support a ground of opposition under Section 16(3)(b) of the *Trade-marks Act*. I have therefore dismissed this ground of opposition.

The opponent also alleged that the applicant is not the person entitled to registration of the trade-mark GEOACOUSTICS INC. on a proposed use basis in that, as of the applicant's filing date, the applicant's trade-mark was confusing with the opponent's trade-names GeoAcoustics and GeoAcoustics Limited which had previously been used in Canada, as well as with the trade-mark GEOACOUSTICS & Design which had previously been used and made known in Canada in association with "sub-bottom profilers, transmitters, receivers, swell-filters, electro-mechanical sound sources, and power supplies". With respect to a ground of opposition under Sections 16(3)(a)

and (c) of the *Trade-marks Act*, there is a burden on the opponent in view of the provisions of Sections 16(5) and 17(1) of the *Trade-marks Act* to establish its prior use of its trade-names GeoAcoustics and GeoAcoustics Limited and its prior use and prior making known of its trade-mark GEOACOUSTICS & Design in Canada as of the applicant's filing date. Further, the opponent must establish that it had not abandoned its trade-names and trade-mark as of the date of advertisement for opposition purposes of the present application in the *Trade-marks Journal* [March 18, 1992].

The Stone affidavit is silent as to the opponent's prior use of its trade-names GeoAcoustics and GeoAcoustics Limited and its prior making known of its trade-mark GEOACOUSTICS & Design in Canada. I have therefore dismissed the Section 16(3) ground which is based on these allegations. Moreover, and having regard to the transcript of the Stone cross-examination and the responses to undertakings given during the cross-examination, I have my doubts as to whether the opponent has established use in the normal course of trade of its trade-mark GEOACOUSTICS & Design in Canada in association with sonar enhancement systems for oceanography. In particular, the opponent has relied upon two transactions which were not sales, but rather involved the provision of replacement and upgraded systems to systems which had originally been sold to Bedford Institute of Oceanography in Dartmouth, Nova Scotia by the opponent's predecessor-in-title, Ferranti ORE Limited in October, 1990 and January, 1991. Further, the evidence of record establishes that the opponent acquired the assets of Ferranti ORE Limited May 1, 1991. In my view, the upgrading and redelivery of SN103 without charge to Bedford Institute of Oceanography may arguably have constituted the provision of a service in association with the opponent's trade-mark but certainly did not constitute use in the normal course of trade of the mark GEOACOUSTICS & Design in association with a sonar enhancement system. Likewise, the delivery by the opponent of a replacement system of the enhancement system originally supplied by Ferranti ORE Limited cannot constitute a transaction which would support a claim to use of the trade-mark GEOACOUSTICS & Design in association with a sonar enhancement system within the scope of Section 4(1) of the *Trade-marks Act*.

Having regard to the above, the opponent has failed to establish its prior use of its trade-mark in association with a sonar enhancement system. As a result, the opponent has not met the burden

upon it under Sections 16(5) and 17(1) of the *Trade-marks Act* in respect of the Section 16(3) ground of opposition which I have therefore rejected.

The final ground relates to the alleged non-distinctiveness of the applicant's trade-mark. The material date for assessing this ground is as of the date of opposition [August 18, 1992]. Further, while the legal burden is upon the applicant to show that its trade-mark is distinctive, there is an evidentiary burden upon the opponent to establish the facts relied upon by it in respect of this ground. The opponent can rely upon activities in respect of this ground which do not necessarily qualify as trade-mark use within the scope of Sections 4(1) and (2) of the *Trade-marks Act*. However, the only evidence furnished by the opponent relates to the two transactions referred to above which involve the replacement and upgrading of two sonar enhancement systems originally sold by the opponent's predecessor-in-title, Ferranti ORE Limited, to the Bedford Institute of Oceanography in Nova Scotia. Having regard to the transcript of the Stone cross-examination and paragraphs 29 to 35 of the Dodds affidavit and exhibits "V" to "Z" to the affidavit, I am not satisfied that whatever activities the opponent may have been involved in this country would have been sufficient to meet the initial burden on the opponent to raise an issue as to the distinctiveness of the applicant's trade-mark. I have therefore rejected this ground of opposition.

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

DATED AT HULL, QUEBEC, THIS 22<sup>nd</sup> DAY OF JANUARY 1997.

G.W.Partington,  
Chairman,  
Trade Marks Opposition Board.