

**IN THE MATTER OF AN OPPOSITION
by Anheuser-Busch, Incorporated to application
No. 674,696 for the trade-mark EAGLE COIN &
Design filed by Guangdong Cannery Guangzhon**

On January 29, 1991, the applicant, Guangdong Cannery Guangzhon, filed an application to register the trade-mark EAGLE COIN & Design (illustrated below) based on proposed use in Canada for the following wares:

meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies; jams, eggs, edible oils and fats, salad dressings, preserves.

The application was advertised for opposition purposes on July 1, 1992.

The opponent, Anheuser-Busch, Incorporated, filed a statement of opposition on March 1, 1993, a copy of which was forwarded to the applicant on March 30, 1993. The first ground of opposition is 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 following trade-marks of the opponent:

<u>Trade-mark</u>	<u>Reg. No.</u>	<u>Wares</u>
EAGLE	292,758	snack foods, namely chips, curls, pretzels and nuts
	301,732	snack foods, namely, chips, curls, pretzels, sticks, puffs, nuts and a snack food dip

332,251 snack foods, namely chips, curls, pretzels and nuts

A & EAGLE 342,893 snack foods, namely pretzels; snack foods, namely pretzels, cheese crackers and chips

The second ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(3) of the Act because, as of the applicant's filing date, the applied for trade-mark was confusing with each of the above-noted registered marks previously used in Canada by the opponent. The third ground is also one of prior entitlement based on the opponent's previously filed application No. 625,522 for various clothing items for essentially the same mark that is registered under No. 332,251. The fourth ground is that the applicant's trade-mark is not distinctive in view of the foregoing.

The applicant filed and served a counter statement. As its evidence, the opponent filed an affidavit of Philip S. Zima and certified copies of its four registrations and one application. As its evidence, the applicant filed the affidavits of Christine Reardon and Michael Godwin. As evidence in reply, the opponent filed an affidavit of Marie Lucie Jacques-Lyse Lussier. Both parties filed a written argument and an oral hearing was conducted at which only the applicant was represented.

As for the first ground of opposition, the material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). The onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Furthermore, 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. Finally, the most relevant of the opponent's marks is EAGLE registered under No. 292,758 and thus a consideration of the issue of confusion

between that mark and the applicant's proposed mark will effectively decide the outcome of the first ground.

As for Section 6(5)(a) of the Act, the marks of both parties are inherently distinctive since they suggest no particular idea relating to food products. There is no evidence of use of the applicant's mark and I must therefore conclude that it has not become known at all in Canada. The opponent's mark EAGLE, on the other hand, has been in continuous use in Canada for a number of years. According to Mr. Zima, the Division Manager of the opponent's former registered user Eagle Snacks, Inc., total sales in Canada of EAGLE brand snack foods for the period 1986 to October, 1993 were in excess of \$4 million.

The applicant contended that it was impossible to determine the extent to which any of the opponent's registered marks had been used since Mr. Zima did not provide a breakdown of sales by specific trade-mark. However, the exhibits appended to the Zima affidavit all illustrate use of either the word mark EAGLE or the design mark registered under No. 301,732, use of which, in my view, also constitutes use of the word mark EAGLE. Thus, I am prepared to conclude that all of the opponent's sales effected in Canada were of snack products bearing the trade-mark EAGLE. Thus, I am able to conclude that the opponent's mark had become known to some extent in Canada as of the material time.

The applicant submitted that the sales by Eagle Snacks, Inc. were effected outside the provisions of Section 50 and thus could not accrue to the benefit of the opponent. In this regard, the applicant relied on Mr. Zima's statement that the opponent and its parent company, Anheuser-Busch Companies, Inc., control the character and quality of snack foods manufactured and sold by Eagle Snacks, Inc. under the trade-mark EAGLE. The applicant contended that the fact that the character and quality of the snack foods was controlled not only by the opponent but also by a non-owner of the trade-mark rendered the mark non-distinctive. I'm not sure I agree with the applicant's contention since it would seem that all that Section 50 of the Act requires is the exercise of control by the registered owner whether or not some other entity also exercises control. In any event, I do not have to decide that issue

since almost all of the sales attested to by Mr. Zima occurred prior to the abolition of the registered user system. Since Eagle Snacks, Inc. was recorded as a registered user in respect of registration No. 292,758, then the use of the mark by Eagle Snacks, Inc. prior to June of 1993 accrued to the benefit of the opponent.

The length of time the marks have been in use favors the opponent. The wares of the parties are similar in that they are all food products. The applicant contends that the wares at issue differ since its wares are food for meals and the opponent's wares are snack foods. However, such items as jellies, jams and preserves are more in the nature of condiments and dried fruits might qualify as a snack food. Furthermore, Exhibit D to the Reardon affidavit comprises brochures which illustrate the types of product sold and the types of packaging used by the applicant. They illustrate canned convenience products, canned fish, canned meat, canned drinks, canned fruits, canned jellies and juices in single serving aseptic packages. This suggests that many of the applicant's wares are in the nature of ready-to-eat, convenience foods which are related to snack foods. Thus, I consider there to be some similarity between the wares at issue.

It appears that the trades of the parties could easily overlap. The opponent's wares are sold through grocery stores, convenience stores and mass merchandisers. Presumably, the applicant's wares will, or could, be sold through the same types of outlets. The brochures appended as Exhibit D to the Reardon affidavit support the opponent's contention that the goods of the parties could easily be sold through the same channels of trade. The applicant contends that the use of Chinese characters as part of its trade-mark indicates that the applicant's wares will only be sold through speciality Chinese food stores. However, there is no evidence to support that contention. Even if there were, there is nothing to suggest that the opponent's wares could not also be sold through such stores.

As for Section 6(5)(e) of the Act, I consider there to be a fair degree of resemblance between the marks at issue in all respects. The applicant's mark is dominated by the words EAGLE COIN and a representation of an eagle. The opponent's registered mark is the word

EAGLE ‘per se.’ Thus, the ideas suggested by the marks are also very similar. Furthermore, when sounded, the applicant’s mark would be EAGLE COIN which is very similar to the opponent’s mark EAGLE.

As an additional surrounding circumstance, I have also considered that the opponent has evidenced at least some use of its registered trade-mark incorporating the word EAGLE and a representation of an eagle (registration No. 301,732). Thus, to the extent that consumers have been made aware of that design mark, they would more likely see a resemblance between the applicant’s mark which includes a similar design and the opponent’s registered mark EAGLE.

As a further surrounding circumstance, the applicant has relied on the state of the register evidence in both the Reardon and Godwin 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.

Ms. Reardon conducted a computerized search to locate relevant trade-marks which include the word EAGLE. Mr. Godwin conducted a search to locate design marks which include the design of an eagle “or the like.” The results of Mr. Godwin’s search are, for the most part, irrelevant since most of the registered marks he located include designs which are barely discernible, are stylized representations of birds or bear little resemblance to the designs of eagles used by the applicant and the opponent. As for the Reardon affidavit, it reveals, at best, nine registrations standing in the name of six owners for trade-marks including the word EAGLE, a representation of an eagle or both. I am unable to conclude from the mere existence of nine registrations on the register that any of the marks located are

in substantial use. Thus, the applicant's state of the register evidence fails to show common adoption and use of other EAGLE marks for similar wares.

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 resemblance between the wares, trades and marks of the parties and the reputation associated with the opponent's mark, I find that the applicant has failed to satisfy the legal burden on it to show that its applied for mark is not confusing with the opponent's registered mark. The first ground of opposition is therefore successful.

As for the second ground of opposition, the opponent has shown use of its most relevant mark EAGLE prior to the applicant's filing date and non-abandonment of that mark as of the applicant's advertisement date. Thus, the second ground remains to be decided on the issue of confusion between the applicant's mark and the opponent's registered mark EAGLE as of the applicant's filing date. My conclusions respecting the first ground are, for the most part, applicable to the second ground as well. Thus, I find that the applicant has failed to satisfy the onus on it to show that its proposed mark is not confusing with the opponent's previously used trade-mark EAGLE. Thus, the second ground is also successful.

As for the third ground, the opponent has established that its application No. 625,522 was filed prior to the present application and was pending as of the applicant's advertisement date. The third ground therefore remains to be decided on the issue of confusion. Given the different natures of the wares at issue and the relatively low degree of resemblance between the two marks, I find that the marks at issue are not confusing. Thus, the third ground is unsuccessful.

The material time for considering the circumstances respecting the fourth ground is the filing of the opposition. The ground of non-distinctiveness in this case essentially turns on the issue of confusion between the applicant's mark and the opponent's marks. Given my conclusions respecting the first and second grounds, it follows that the applicant has failed to

show that its proposed mark is adapted to distinguish or actually distinguishes its wares from those of the opponent throughout Canada. Thus, the fourth ground is also successful.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 12th DAY OF DECEMBER, 1996.

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