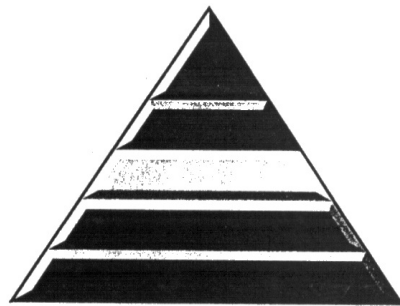


**IN THE MATTER OF AN OPPOSITION by Ralston Purina  
Canada Inc. and Ralston Purina Company to application No.  
788,455 for registration of the trade-mark Pyramid Design filed  
by Effem Foods Ltd.**

---

On July 25, 1995, the applicant, Effem Foods Ltd., filed an application to register the trade-mark Pyramid Design, a representation of which appears below, based upon proposed use of the trade-mark in Canada in association with “pet food” and services identified as “Advertising, marketing and promotional services relating to the pet food products of the applicant”.



The present application was advertised in the *Trade-marks Journal* of May 29, 1996 and the opponents, Ralston Purina Canada Inc. and Ralston Purina Company, filed a statement of opposition on July 23, 1996, a copy of which was forwarded to the applicant on August 12, 1996. The applicant served and filed a counter statement to the statement of opposition on October 30, 1996. The opponents submitted as their evidence the affidavit of Debbie L. Valois while the applicant filed as its evidence the affidavits of David Jones and Christopher Aide. David Jones was cross-examined on his affidavit, the transcript of the cross-examination and the exhibits to the cross-examination, together with the responses to undertakings given during the cross-examination, forming part of the record of this opposition. Both parties submitted written arguments and both were represented at an oral hearing.

The following are the grounds of opposition asserted by the opponents:

- a) The present application does not comply with Section 30 of the *Trade-marks Act* in that:
  - i) “pet food” is not an ordinary commercial term for the specific wares in association with which the trade-mark is proposed to be used, namely, dog food;
  - ii) “advertising, marketing and promotional services relating to the pet food products of the applicant” is not a service performed for others and thus is not capable of being registered as a trade-mark;
  - iii) the applicant does not intend to use the proposed trade-mark Pyramid Design in

the form as applied for;

*iv)* the applicant could not be satisfied that it is entitled to use the proposed trade-marks in Canada in that if it has any entitlement, which is denied, it is in its capacity as a licensee and not as a trade-mark owner;

b) Pursuant to Paragraph 12(1)(b) of the *Trade-marks Act*, the trade-mark Pyramid Design is not registrable in that, when depicted, written or sounded, the trade-mark is either clearly descriptive or deceptively misdescriptive in the English or French languages of the character or quality of pet food. The proposed trade-mark is either clearly descriptive or deceptively misdescriptive of a nutrition or ingredients pyramid relating to food, including pet food;

c) Pursuant to Paragraph 12(1)(e) and 10 of the *Trade-marks Act*, the trade-mark Pyramid Design is not registrable in that pyramid designs have by ordinary and *bona fide* commercial usage become recognized in Canada as designating the kind, quality or value of foods and beverages;

d) The proposed trade-mark neither actually distinguishes the pet food in association with which it is used by the applicant from the wares and services of others including, but not limited to, Kal Kan Foods Inc. and the U.S. Department of Agriculture, the U.S. Department of Health and Human Services, nor is it adapted so to distinguish them.

At the oral hearing, the applicant withdrew its services from its application. Also, the opponents withdrew their grounds of opposition based on Subsection 30(i) and on Subsection 30(a) as applied to the applicant's "pet food", as well as their Paragraph 12(1)(b) and Paragraph 12(1)(e) grounds. As a result, the only grounds remaining for consideration in this opposition relate to the alleged non-distinctiveness of the applicant's mark and to the present application not being in compliance with Subsection 30(e) of the *Act* in that the applicant does not intend to use the trade-mark Pyramid Design in the form as applied for.

Considering initially the non-distinctiveness ground, the opponents have alleged that the applicant's trade-mark neither actually distinguishes the pet food in association with which it is proposed to be used by the applicant from the wares and services of others including, but not limited to, Kal Kan Foods Inc. and the U.S. Department of Agriculture, the U.S. Department of Health and Human Services, nor is it adapted so to distinguish them.

The only affidavit evidence submitted by the opponents of relevance to this ground is the Valois affidavit which introduces into evidence copies of trade-mark registrations from the United States of America and the United Kingdom. The trade-marks covered by the registrations from the United States stand in the name of KAL KAN FOODS, INC. and are for the following: WALTHAM

THE WORLD'S LEADING AUTHORITY ON PET CARE AND NUTRITION & Design; PEDIGREE WALTHAM; WALTHAM WORLD AUTHORITY ON PET CARE AND NUTRITION & Design; WALTHAM PET NUTRITION PYRAMID & Design; and WALTHAM INTERNATIONAL FOCUS. Further, the registrations from the United Kingdom stand in the name of Mars G.B. and are for the marks: DEVELOPED WITH WALTHAM WORLD AUTHORITY ON PET CARE & NUTRITION & Design; WALTHAM CENTRE FOR EQUINE NUTRITION AND CARE & Design; and PEDIGREE WALTHAM. While this evidence establishes that one registration for a trade-mark which is somewhat similar to the applicant's mark has been granted to an entity other than the applicant in the United States of America, I would not expect that the average consumer who purchases pet food in Canada would be aware of this mark or its ownership by a person other than the applicant.

The opponents also adduced as evidence by way of an exhibit to the Jones cross-examination an advertisement from Newsweek magazine which, according to Mr. Jones during his cross-examination, emanated from Kal Kan Foods, Inc. in the United States of America. However, the advertisement does not include a representation of a trade-mark similar to the applicant's mark and is dated more than ten months after the material date for considering the non-distinctiveness ground. As a result, the advertisement is of no relevance to the determination of the non-distinctiveness ground. I have therefore dismissed this ground of opposition.

With respect to the Subsection 30(e) ground of opposition, the legal burden is upon the applicant to show that its application complies with Section 30 of the *Trade-marks Act*. There is, however, an initial evidential burden on the opponents to adduce sufficient evidence which, if believed, would support the truth of the allegations relating to 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]. The material time for considering the circumstances respecting the issue of non-compliance with Section 30 of the *Act* is the filing date of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R.(3d) 469, at p. 475]. To meet the evidential burden upon them in relation of a particular issue, the opponents 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]. Finally, the opponents' evidential burden can be met by reference not only to the opponents' evidence, but also to the applicant's evidence [see, in this regard, *Labatt Brewing Company Limited v. Molson Breweries, a Partnership*, 68 C.P.R.(3d) 216, at p. 230]. However, while the opponents may rely upon the applicant's evidence to meet its evidential burden in relation to this ground, the opponents must show that the applicant's evidence is 'clearly' inconsistent with the applicant's claims set forth in its application.

In his affidavit, David Jones, Director of Pet Franchise with the applicant, states as follows in paragraph 22:

22. Since the July 25, 1995 application filing date, Effem Foods has widely used the trade-mark Pyramid Design Application No. 788,455 with the applied-for-wares and services. For example, I have attached as Exhibit "G" to my affidavit samples of Pedigree promotional flyers whereon the trade-mark Pyramid Design Application No. 788,455 also appears. The trade-mark also appears on the PEDIGREE product packaging reproduced as Exhibit "C" to my affidavit. Again, Effem Foods has sold many millions of dollars of pet food in Canada in association with the PEDIGREE trade-mark. The trade-mark Pyramid Design, Application No. 788,455 also appears on the PEDIGREE product labels produced as Exhibit "F" to my affidavit. Effem Foods designates the trade-mark Pyramid Design, Application No. 788,455 as such by using the internationally-recognized trade-mark symbol "TM" therewith. As such, consumers in Canada identify the trade-mark Pyramid Design, Application No. 788,455 as a trade-mark distinctive of Effem Foods and its products and services.

Further, in the transcript of the Jones' cross-examination, the following questions were asked of Mr. Jones and following answers given by him:

483. Q. And in particular, wherever -- is it fair to say that wherever you use this pyramid, the words, and I'll list them, vitamins, in French and English, minerals, in French and English, carbohydrates and fibre, in French and English and quality protein in French and English, those words, or similar words appear whenever you use this pyramid as found at Exhibit 10, or, sorry, Application 10

A. Yes.

484. Q. And that's the case, whether or not it's Application 9 or 10.

A. Yes.

Exhibit G to the Jones affidavit is identified by the affiant as being samples of promotional flyers. However, advertising and promotional materials are not evidence of use of the applicant's trade-mark in association with pet food. On the other hand, Exhibits C and F to the Jones affidavit show that the applicant has used the trade-mark Pyramid Design in association with pet food in one or other of the manners shown below.

Exhibit "C"

Exhibit "F"

In *Nightingale Interloc Ltd. v. Prodesign Ltd.*, 2 C.P.R. (3d) 535, a decision of the Trade-marks Opposition Board, Mr. Troicuk commented as follows at page 538:

"Use of a mark in combination with additional material constitutes use of the mark *per se* as a trade mark if the public, as a matter of first impression, would perceive the mark *per se* as being used as a trade mark."

In the present case, the Pyramid Design mark would not in my view be perceived, as a matter of first impression by the average consumer purchasing pet food, as being used *per se* as a trade-mark apart from the mark WALTHAM & Design and the wording which appears within the design of the pyramid. As a result, I am of the view that the opponents have met their evidential burden in relation to the Subsection 30(e) ground. Moreover, since the applicant has failed to establish that it intended to use the Pyramid Design trade-mark in Canada as of the filing date of its application, this ground of opposition is successful.

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

DATED AT HULL, QUEBEC, THIS 10<sup>th</sup> DAY OF NOVEMBER, 1999.

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