

**IN THE MATTER OF OPPOSITIONS by Ralston Purina Canada Inc. and Ralston Purina Company to registration of the trade-marks LA PYRAMIDE D'ALIMENTATION POUR CHATS WALTHAM, application No. 788,453 and LA PYRAMIDE D'ALIMENTATION POUR CHIENS WALTHAM, application No. 788,454 filed by Effem Foods Ltd.**

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On July 25, 1995, the applicant, Effem Foods Ltd., filed applications to register the trade-marks LA PYRAMIDE D'ALIMENTATION POUR CHATS WALTHAM [application No. 788,453] and LA PYRAMIDE D'ALIMENTATION POUR CHIENS WALTHAM [application No. 788,454]. Both applications are based upon proposed use of the trade-marks 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 applicant has disclaimed the right to the exclusive use of the words POUR CHATS and POUR CHIENS apart from its respective trade-marks.

Application No. 788,453 was advertised for opposition purposes in the *Trade-marks Journal* of July 31, 1996 while application No. 788,454 was advertised in the *Trade-marks Journal* of July 24, 1996. The opponents, Ralston Purina Canada Inc. and Ralston Purina Company, filed statements of opposition to each of the applications on September 18, 1996, copies of which were forwarded to the applicant on October 2, 1996. The applicant served and filed a counter statement to each of the statements 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 each of the oppositions. Both parties submitted written arguments and both were represented at an oral hearing.

The following are the grounds of opposition asserted by the opponents in each of the opposition proceedings:

- 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, cat food [application No.

788,453] and a dog food [application No. 788,454];

ii) “advertising, marketing and promotional services relating to the pet food products of the applicant” is not an ordinary commercial term for the specific services in association with which the trade-mark is proposed to be used and is not a service performed by the applicant for others and thus is not capable of being used or registered as a trade-mark;

iii) 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 a capacity other than that of a trade-mark owner;

b) Pursuant to Paragraph 12(1)(a) of the *Trade-marks Act*, the trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM [application No. 788,453] and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM [application No. 788,454] are not registrable in that each is a word that is primarily merely the surname of an individual who is living or has died within the preceding thirty years;

c) Pursuant to Paragraph 12(1)(b) of the *Trade-marks Act*, the words LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM [application No. 788,453] and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM [application No. 788,454] are not registrable in that when depicted, written or sounded, they are either clearly descriptive or deceptively misdescriptive in the French language of the character or quality of a food pyramid relating to pet or cat/dog food, and the word WALTHAM in the proposed trade-marks is either clearly descriptive or deceptively misdescriptive of the person or persons employed in the production of pet food or of their place of origin;

d) Pursuant to Subsection 16(3) of the *Trade-marks Act*, the applicant is not the person entitled to registration of the proposed trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM [application No. 788,453] and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM [application No. 788,454] in that, as of the filing date of the applications, that is, July 25, 1995, the applicant’s marks were confusing with the same or similar English language trade-marks that had been previously used or made known in Canada by others, including, but not limited to, Kal Kan Foods Inc., Mars Incorporated, Mars G.B. Limited and The Waltham Centre for Pet Nutrition;

e) The proposed trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM [application No. 788,453] and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM [application No. 788,454] do not and are not adapted so to distinguish the wares and services in association with which they are proposed to be used by the applicant from the wares and services of others including, but not limited to, Kal Kan Foods Inc., Mars Incorporated, Mars G.B. Limited and The Waltham Centre for Pet Nutrition.

At the oral hearing, the applicant withdrew its services from its applications. Also, the opponents withdrew their grounds of opposition based on Subsection 30(a) as applied to the applicant’s “pet food”.

With respect to the first ground of opposition, the legal burden is on the applicant to show that its applications comply 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 their 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 applications.

As the only remaining aspect of the Section 30 ground which need be considered, the opponents have alleged that 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, it is in a capacity other than that of a trade-mark owner. No evidence has been furnished by the opponents to show that the applicant, as of the filing date of its applications, could not have been satisfied that it is entitled to use its trade-marks LA PYRAMIDE D'ALIMENTATION POUR CHATS WALTHAM and LA PYRAMIDE D'ALIMENTATION POUR CHIENS WALTHAM in Canada. I would also note that the other grounds of opposition, even were they successful, would not preclude the applicant from using, as opposed to registering, its trade-marks in Canada. I have therefore dismissed this ground of opposition in each of the proceedings.

Considering next the grounds of opposition based on Paragraph 12(1)(a) of the *Trade-marks Act*, the opponents appear to have conceded that this ground should be rejected in view of paragraph 38 of their written argument. However, as this ground has not been specifically withdrawn by the

opponents, I will comment briefly on it. In considering the Paragraph 12(1)(a) ground, I have had regard to the following comments of Mr. Justice Cattanach in *Gerhard Horn Investments Ltd. v. The Registrar of Trade Marks*, 73 C.P.R. (2d) 23, at p. 30:

“The first and foremost consideration is whether the word or words sought to be registered in the name is the name or surname of a living individual or an individual who has recently died.

It is when that condition precedent is satisfied, and only then, that consideration need be given to the question whether the trade mark applied for is "primarily merely" a name or surname rather than something else.”

In the present case, no evidence has been furnished by the opponents in support of this ground. Thus, the first consideration for determining whether or not a word falls within the ambit of Paragraph 12(1)(a) of the *Act* has not been satisfied. Accordingly, I have concluded that the applicant’s trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM are not primarily merely a surname and have therefore rejected the Paragraph 12(1)(a) ground of opposition in each case.

The opponents have also alleged that the trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM and LA PYRAMIDE D’ALIMENTATION POUR CHIENS WALTHAM are not registrable in view of Paragraph 12(1)(b) of the *Trade-marks Act* in that the applicant’s marks, when depicted, written or sounded, are either clearly descriptive or deceptively misdescriptive in the French language of the character or quality of a food pyramid relating to pet or cat/dog food, and the word WALTHAM in the proposed trade-marks is either clearly descriptive or deceptively misdescriptive of the person or persons employed in the production of pet food or their place of origin. Paragraph 12(1)(b) of the *Act* provides as follows:

**12.** (1) Subject to section 13, a trade-mark is registrable if it is not  
(b) whether depicted, written or sounded, either clearly descriptive or deceptively misdescriptive in the English or French language of the character or quality of the wares or services in association with which it is used or proposed to be used or of the conditions of or the persons employed in their production or of their place of origin;

The issue as to whether the applicant’s trade-marks are either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant’s “pet food”, or of the persons employed in their production or of their place of origin, must be considered from the point of view of the average consumer of those wares. Further, in determining whether the trade-marks LA PYRAMIDE D’ALIMENTATION POUR CHATS WALTHAM and LA PYRAMIDE

D'ALIMENTATION POUR CHIENS WALTHAM are clearly descriptive, the trade-mark must not be dissected into its component elements and carefully analysed, but rather must be considered in its entirety as a matter of immediate impression [see *Wool Bureau of Canada Ltd. v. Registrar of Trade Marks*, 40 C.P.R. (2d) 25, at pp. 27-28 and *Atlantic Promotions Inc. v. Registrar of Trade Marks*, 2 C.P.R. (3d) 183, at p. 186]. Additionally, the material date for considering a ground of opposition based on Paragraph 12(1)(b) of the *Trade-marks Act* is the date of decision [see *Lubrication Engineers, Inc. v. The Canadian Council of Professional Engineers*, 41 C.P.R. (3d) 243 (F.C.A.)].

The only affidavit evidence submitted by the opponents 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 each of these trade-marks includes the element WALTHAM, none of these marks, when considered in their entireties, bears any similarity to the trade-marks at issue in these proceedings. Furthermore, I would not expect that the average consumer who purchases pet food in Canada would be aware of any of these marks and their ownership by companies other than the applicant.

The applicant's disclaimer of "POUR CHATS" and "POUR CHIENS" apart from its trade-marks is arguably an admission by the applicant that these words are either clearly descriptive of the character or quality of its "pet food", or of the conditions of or the persons employed in the production of "pet food", or of its place of origin [see *Andres Wines Ltd. v. Les Vins La Salle Inc.*, 3 C.P.R. (3d) 272, at p. 275]. The exhibits to the Jones' affidavit refer to WALTHAM as follows:

“The WALTHAM Centre for pet nutrition has studied growth in breeds of all sizes. This ensures that puppy foods developed by WALTHAM support growth in all breeds.”

“All Pedigree® products have been researched and developed by the veterinarians and pet food nutritionists at the Waltham Centre for Pet Nutrition in England. Waltham may be a new name to you, but veterinarians and animal nutritionists worldwide have turned to Waltham for nutritional expertise for over 50 years. ...”.

“At Waltham, hundreds of scientists, veterinarians, animal behaviorists and pet nutritionists study pets and their dietary needs on a day to day basis..”.

“All the mainmeal Pet foods developed by Waltham are highly palatable, 100% complete and perfectly balanced for your animal.”

“At the Waltham Centre alone, 200 dogs representing 10 breeds and 60 veterinarians, pet nutritionists and behavioralists are involved in the process every day.”

**“Now you can visit our web site and tour the Waltham facility to learn more about the science behind the PEDIGREE® brands. ([Http://www.waltham.com](http://www.waltham.com))”**

Having regard to the foregoing, as well as the remaining evidence of record, I am of the view that some consumers who purchase pet food in Canada might possibly recognize the reference to WALTHAM in the applicant’s marks as identifying the Waltham Centre for Pet Nutrition which is involved in the research and development of pet food. To these consumers, the applicant’s marks may indicate that the pet food manufactured and sold by the applicant was developed by pet nutritionists associated with the Waltham Centre. On the other hand, I suspect that the average consumer who purchases pet food would not likely be familiar with the applicant’s promotional materials or advertisements and would therefore not be aware of the existence of the Waltham Centre. Thus, the average consumer would perceive the reference to WALTHAM in the applicant’s marks as possibly referring to some entity involved in pet nutrition and the development of pet food formulas, but not involved either in the manufacture or the sale of the “pet food”. However, in either case, I do not consider that the average consumer would perceive the applicant’s trade-marks when considered in their entirety as being either clearly descriptive or deceptively misdescriptive in the French language of either the character or the quality of “pet food”, bearing in mind that none of the evidence of record points to there being a descriptive significance associated with the words LA PYRAMIDE D’ALIMENTATION. Further, the applicant’s marks when considered in their entirety certainly are not descriptive of the persons employed in the production of “pet food” or of the place of origin of “pet food”. Furthermore, even if WALTHAM were perceived by the average consumer who purchases pet food as referring to a place where research into pet nutrition is carried

out or where the formula for the applicant's pet food was developed, the mark WALTHAM *per se* would still not be clearly descriptive of the place of origin of the pet food. In this regard, I am of the view that the place of origin of pet feed refers to where the pet food is manufactured. In any event, and even if I am incorrect, the trade-marks at issue include the words LA PYRAMIDE D'ALIMENTATION such that the trade-marks at issue, when considered in their entirety, are certainly not clearly descriptive or deceptively misdescriptive of the place of origin of pet food. I have therefore rejected the Paragraph 12(1)(b) grounds of opposition.

As indicated in paragraph 33 of their written arguments, the opponents have withdrawn the fourth ground of opposition. In any event, having regard to Subsection 17(1) of the *Trade-marks Act*, the opponents' allegations do not support grounds of opposition under Paragraph 16(3)(a) of the *Act*. These grounds are therefore unsuccessful.

The final ground in each opposition is that the trade-marks LA PYRAMIDE D'ALIMENTATION POUR CHATS WALTHAM and LA PYRAMIDE D'ALIMENTATION POUR CHIENS WALTHAM do not and are not adapted so to distinguish the pet food in association with which they are proposed to be used by the applicant from the wares and services of others including, but not limited to, Kal Kan Foods Inc., Mars Incorporated, Mars G.B. Limited and The Waltham Centre for Pet Nutrition. Having regard to my previous comments in relation to the Paragraph 12(1)(b) grounds, and absent any evidence from the opponents to the contrary, I am of the view that the applicant's trade-marks are either adapted to distinguish or in fact distinguish the applicant's "pet food" from the wares of others. While the average consumer who purchases pet food might well conclude that there is an entity involved in the development of the formulation of the pet food manufactured and sold by the applicant in association with its trade-marks, that alone does not preclude the applicant's marks from being adapted to distinguish or in fact distinguishing the applicant's pet food from the pet food of others in the marketplace in Canada. Further, as noted above, I do not consider that the average consumer who purchases pet food would be aware of the use and certainly not the registration of their respective trade-marks by companies related to the applicant either in the United States of America or in the United Kingdom.

The opponents adduced as an exhibit to the Jones cross-examination an advertisement from Newsweek magazine which, according to Mr. Jones during his cross-examination, emanates from Kal Kan Foods, Inc. in the United States of America. However, the representation of the trade-mark appearing in the advertisement bears no similarity to either of the trade-marks at issue. Moreover, the advertisement is dated about nine months after the material dates for considering the non-distinctiveness grounds of opposition in both oppositions and is therefore of little relevance to the determination of the final grounds. I have therefore dismissed the non-distinctiveness grounds of opposition.

Having been delegated authority by the Registrar of Trade-marks pursuant to Subsection 63(3) of the *Trade-marks Act*, I reject the opponents' oppositions 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.