IN THE MATTER OF AN OPPOSITION by JAKQUMAR AG to application No. 748,057 for the trade-mark NEUTRA AIR filed by RECKITT & COLMAN (OVERSEAS) LIMITED, and presently standing in the name of RECKITT BENCKISER (CANADA) INC.

On February 17, 1994, the applicant, RECKITT & COLMAN (OVERSEAS) LIMITED, filed an application to register the trade-mark NEUTRA AIR based on proposed use of the trade-mark in Canada by the applicant itself or through a licensee, or by the applicant itself and through a licensee, in association with "Air fresheners, rug and room deodorizers for household use". The applicant disclaimed the right to the exclusive use of the word AIR apart from its trade-mark. Further, during the opposition, RECKITT & COLMAN (OVERSEAS) LIMITED transferred the present application to RECKITT BENCKISER (CANADA) INC., the current applicant of record.

The present application was advertised for opposition purposes in the ***Trade-marks Journal*** of May 24, 1995 and the opponent, JAKQUMAR AG, filed a statement of opposition on November 23, 1998, a copy of which was forwarded to the applicant on December 7, 1998. The applicant served and filed a counter statement in response to the statement of opposition on December 17, 1998. Neither the applicant nor the opponent submitted evidence in this proceeding. Further, the applicant alone submitted a written argument and neither party requested an oral hearing

The following are the grounds of opposition asserted by the opponent in its statement of opposition:

> **a)** The present application does not conform with the requirements of section 30 of the ***Trade-marks Act*** in that, as of the filing date of the application, the applicant could not have stated that it was satisfied that it was entitled to use the trade-mark NEUTRA AIR in Canada because the applicant, a United Kingdom corporation, was well aware at the time that the application was filed of the existence of the opponent's trade-mark NEUTRADOL which had been registered in 1983 in the United Kingdom in respect of deodorants (not for personal use). The applicant should have known that the opponent would assert its rights in Canada, having regard to its United Kingdom registration and, as such, the applicant should have known that it was not entitled to use its trade-mark in Canada in association with the wares covered in the present application.
>
> **b)** The trade-mark NEUTRA AIR is not registrable having regard to the provisions of paragraph 12(1)(b) of the ***Trade-marks Act*** in that the mark is either clearly descriptive or deceptively misdescriptive of the character and/or quality of the wares in association with which it is proposed to be used. Specifically, the trade-mark when taken as a whole, is descriptive of the characteristic that the wares will

"neutralize the air", that is, the wares will remove odour from the air or freshen the air, whether applied by being sprayed into the air or by being applied to rugs, carpets, and/or furniture found in a room. If they do not accomplish that goal, then the trade-mark is deceptively misdescriptive.

c) Having regard to the provisions of paragraph 38(2)(c) of the ***Trade-marks Act***, and specifically having regard to the provisions of section 16, the fact is that the opponent herein has registered its trade-mark NEUTRADOL in the United Kingdom under United Kingdon registration No. 1,209,879 on December 29, 1983, some twelve years prior to the filing of the present application.

d) The applied for trade-mark is not distinctive of the applicant and the applicant's wares. The opponent is the owner of the trade-mark NEUTRADOL. The only prospectively distinctive portion of the applicant's mark is the initial portion NEUTRA, the word AIR having been disclaimed. Further, the word NEUTRA is a diminution of the word "neutral" or the word "neutralize". Especially when taken together with the word AIR, the trade-mark NEUTRA AIR is not distinctive because it clearly sets forth that the wares covered in the present application will neutralize the air.

The first ground of opposition is based on section 30 of the ***Trade-marks Act***. While the legal burden is on the applicant to show that its application complies with section 30 of the ***Trade-marks Act***, there is an initial evidential burden on the opponent to adduce sufficient admissible 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]. However, no evidence has been furnished by the opponent in support of its allegation that the applicant could not have been satisfied that it was entitled to use its trade-mark NEUTRA AIR in Canada. In this regard, the existence of the opponent's registration of its trade-mark NEUTRADOL in the United Kingdom is of no relevance to the issue of the applicant's entitlement to use its trade-mark NEUTRA AIR in Canada. As a result, this ground of opposition is unsuccessful.

As for the second ground, the issue as to whether the trade-mark NEUTRA AIR is clearly descriptive of the character or quality of the applicant's wares must be considered from the point of view of the average user of those wares. Further, in determining whether the trade-mark NEUTRA AIR is 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]. While the legal

burden is on the applicant to show that its trade-mark is registrable, there is an initial evidential burden on the opponent to adduce sufficient admissible evidence which, if believed, would support the truth of its allegations that the trade-mark NEUTRA AIR is either clearly descriptive or deceptively misdescriptive of the character or quality of the applicant's wares. However, no evidence has been presented by the opponent in support of this ground. In any event, I do not consider the trade-mark NEUTRA AIR to be either descriptive or misdescriptive of the character or quality of air fresheners or deodorizers. Rather, the applicant's mark is at most suggestive of the result achieved from using an air freshener or deodorizers. I have therefore dismissed the second ground of opposition.

The third ground relates to the applicant's entitlement to registration of its trade-mark NEUTRA AIR in Canada. However, the opponent's allegations do not support a ground of opposition under subsection 16(3) of the ***Trade-marks Act***. As a result, this ground is also unsuccessful.

As its final ground, the opponent has alleged that the applicant's trade-mark NEUTRA AIR is not distinctive in that the applicant's mark does not actually distinguish the applicant's wares. However, no evidence has been furnished by the opponent to show that it has used its trade-mark NEUTRADOL at any time in Canada. Moreover, no evidence has been furnished by the opponent in support of its allegation that the applicant's mark clearly describes the character or quality of its wares. The opponent has therefore failed to meet its evidential burden in relation to this ground and it too is therefore unsuccessful.

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

DATED AT HULL, QUEBEC THIS 29th DAY OF JANUARY, 2001.

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