

IN THE MATTER OF AN OPPOSITION  
by 168932 Canada Ltd. trading as  
`Andy Pak to application No. 612,717  
for the trade-mark SPITZ Design filed  
by Alberta Sunflower Seeds Ltd.

On August 22, 1988, the applicant, Alberta Sunflower Seeds Ltd., filed an application to register the trade-mark SPITZ Design for "sunflower seeds, unroasted" based on use in Canada since February 11, 1986 and for "roasted and salted sunflower seeds" based on use in Canada since August 11, 1988. The application was advertised for opposition purposes on November 2, 1988.

Rede-Pak Fine Foods Ltd. filed a statement of opposition on March 2, 1989, a copy of which was forwarded to the applicant on March 31, 1989. The first ground of opposition is that the application does not comply with the provisions of Section 30(b) of the Trade-marks Act because the applicant did not use the applied for trade-mark since the dates claimed.

The second ground of opposition is that the applicant is not the person entitled to registration pursuant to Section 16(1)(a) of the Act because, as of the applicant's claimed dates of first use, the applied for trade-mark was confusing with the trade-mark SPITZ & Design previously used by the opponent in Canada for sunflower seeds. The third ground is that the applicant is not the person entitled to registration pursuant to Section 16(1)(b) of the Act because, as of the applicant's claimed dates of first use, the applied for trade-mark was confusing with the opponent's trade-mark SPITZ & Design for which an application had previously been filed (No. 594,407).

The fourth ground of opposition is that the applicant's mark is not distinctive in view of the opponent's use of its mark SPITZ & Design. By virtue of an assignment of the mark SPITZ & Design, the current opponent of record is 168932 Canada Ltd. trading as `Andy Pak.

The applicant filed and served a counter statement. Neither party filed evidence. Only the applicant 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 legal burden is on the applicant to show its compliance with the provisions of Section 30(b) of the Act. However, there is an evidential burden on the opponent to evidence the allegations of fact underlying this ground. The opponent having failed to file evidence, I find that its first ground of opposition is unsuccessful.

As for the second ground of opposition, it was incumbent on the opponent to evidence use of its trade-mark prior to the applicant's claimed dates of first use. Since the opponent did not file evidence, the second ground is also unsuccessful.

As for the third ground of opposition, the opponent's application No. 594,407 was filed on October 29, 1987 based on proposed use in Canada for sunflower seeds. Thus, the opponent has failed to satisfy the burden on it to show that its application was filed

prior to the applicant's claimed date of first use of February 11, 1986 for "sunflower seeds, unroasted." However, the opponent's application was filed prior to the applicant's claimed date of first use of August 11, 1988 for "roasted and salted sunflower seeds." Furthermore, the opponent's application was pending as of the applicant's advertisement date.

The third ground of opposition (insofar as it relates to the second basis in the applicant's application) therefore remains to be decided on the basis of confusion between the marks. Given that the wares of the parties are virtually identical and that there is a high degree of resemblance between the marks at issue, I find that the applicant has failed to satisfy the onus on it to show that the marks are not confusing. Thus, the third ground of opposition is successful in respect of the applicant's second basis for registration and is otherwise unsuccessful.

As for the fourth ground of opposition, the opponent has failed to evidence any use of its trade-mark SPITZ & Design. Thus, the fourth ground is unsuccessful.

In view of the above, I refuse the applicant's application insofar as it covers "roasted and salted sunflower seeds" and I otherwise reject the opposition.

DATED AT HULL, QUEBEC, THIS 29<sup>th</sup> DAY OF NOVEMBER 1991.

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