IN THE MATTER OF AN OPPOSITION by All Treat Farms Limited to application No. 694,934 for the trade-mark GOLDEN TREAT filed by A.L. Schutzman Company, Inc.

On December 5, 1991, the applicant, A.L. Schutzman Co., filed an application to register the trade-mark GOLDEN TREAT based on proposed use in Canada in association with "bird food".

The application was advertised for opposition purposes in the ***Trade-marks Journal*** of July 1, 1992 and the opponent, All Treat Farms Limited, filed a statement of opposition on December 1, 1992, a copy of which was forwarded to the applicant on December 15, 1992. During the opposition, the applicant requested that its original identification be corrected to A.L. Schutzman Company, Inc. and submitted the affidavit of Robert L. Titley in support of the request. The amendment correcting the name of the applicant was accepted on behalf of the Registrar of Trade-marks by way of the Office letter of November 19, 1993. On November 29, 1993, the opponent requested and was subsequently granted leave to file a revised statement of opposition in view of the amendment made by the applicant to its name.

The applicant filed and served a counter statement in which it denied all of the allegations contained in the statement of opposition. The opponent submitted at its evidence the affidavits of George H. White, Laverne White, and Freda Jane White, together with certified copies of the following registrations:

Trade-mark	Registration No.	Wares
GARDEN TREAT	111,075	Fertilizer
GARDEN TREAT	292,589	Manures, potting soil
BIRD TREAT	194,450	Feed for birds, bird seed, bird feed in the form of suet cakes, and bird feed in the form of suet cakes in open containers for outdoor bird feeding
ALL TREAT	149,181	Bird food, plant food, garden food, and worm food, pet food and cat litter
WORM-TREAT	188,573	Worm bedding, worm bedding containing nutrients and worm food for the raising of worms, and worm bedding including nutrients for the raising of worms on a commercial scale

As its evidence, the applicant filed the affidavit of Melissa T. Reischer. The opponent alone filed a written argument and no oral hearing was conducted.

The first ground of opposition is that the present application did not, at the date of filing, comply with the requirements of Section 30(i) of the ***Trade-marks Act***. Although the onus or legal burden is on the applicant to show its application complies with the provisions of Section 30 of the Act, there is an evidential burden on the opponent to prove the allegations of fact being relied upon by it in support of this ground [see ***Joseph Seagram & Sons v. Seagram Real Estate***, 3 C.P.R.(3d) 325 at pp. 329-330; and ***John Labatt Ltd. v. Molson Companies Ltd.***, 30 C.P.R.(3d) 293 (F.C.T.D.)]. In other words, the opponent must make out a 'prima facie' case that the applicant has not complied with the provisions of Section 30(i) of the Act. In support of this ground, the opponent has alleged that the applicant could not have been satisfied that it was entitled to use the trade-mark GOLDEN TREAT because it is confusing with the opponent's registered trade-marks identified above which had been used and made known in Canada prior to the filing date of the present application, as well as being confusing with the opponent's unregistered design trade-mark consisting of the words ALL TREAT and the design of a bird and a tree.

As the applicant has formally complied with the provisions of Section 30(i) of the ***Trade-marks Act*** by including the required statement in its application, the issue arises as to whether or not the applicant has substantively complied with that section, that is, was the statement true when the application was filed? The opponent contends that the statement could not have been true because the applicant's trade-mark GOLDEN TREAT was confusing with its trade-marks which had been used and made known in Canada prior to the applicant's filing date. However, the opponent has not alleged that the applicant was aware of its trade-marks nor has it filed any evidence in support of its allegation that the applicant could not have been satisfied that it was entitled to use the applied for trade-mark in Canada. Accordingly, it has failed to meet the evidentiary burden upon it in respect of this ground. In any event, and even had the applicant been aware of the opponent's trade-marks prior to filing the present application, such a fact is not inconsistent with the statement in the

application that the applicant was satisfied that it was entitled to use the trade-mark GOLDEN TREAT in Canada on the basis *inter alia* that its mark is not confusing with the opponent's trade-marks. Thus, the success of this ground is contingent upon a finding that the trade-marks at issue are confusing [see ***Consumers Distributing Co. Ltd. v. Toy World Ltd.***, 30 C.P.R.(3d) 191, at p. 195; and ***Sapodilla Co. Ltd. v. Bristol-Myers Co.***, 15 C.P.R.(2d) 152, at p. 155]. I therefore will consider the issue of confusion in relation to the other grounds of opposition.

The second ground of opposition is that the applicant's trade-mark GOLDEN TREAT is not registrable in view of the provisions of Section 12(1)(d) of the ***Trade-marks Act*** in that it is confusing with one, or more, of the registered trade-marks identified above. With respect to the Section 12(1)(d) ground, the material date is the date of my decision [see ***Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks***, 37 C.P.R. (3d) 413 (F.C.A.)]. Furthermore, in assessing whether there would be a reasonable likelihood of confusion between the trade-marks at issue, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in Section 6(5) of the ***Trade-marks Act***. Also, the Registrar must bear in mind that the legal burden is on the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue.

As for Section 6(5)(a) of the Act, the applicant's trade-mark GOLDEN TREAT as applied to "bird food" and the opponent's registered trade-marks ALL TREAT and BIRD TREAT as applied to bird and pet food possess some measure of inherent distinctiveness when considered in their entireties even though the word TREAT suggests a type of enjoyable snack for a bird or pet. Likewise, the opponent's trade-marks GARDEN TREAT, LAWN TREAT and WORM-TREAT in association with the wares covered in these registrations possess some measure of inherent distinctiveness.

No evidence has been furnished by the applicant relating to its use of the trade-mark GOLDEN TREAT and I must assume for the purposes of this opposition that it has not become known to any extent in Canada. On the other hand, the opponent submitted evidence of use of its trade-marks by way of the affidavit, George H. White, Vice President of the opponent. The opponent

also submitted the affidavits of Laverne White, father of George White and founder of the opponent's predecessor, and Freda Jane White, wife of Laverne White and Secretary-Treasurer of the opponent and of the opponent's predecessor. Laverne White and Freda Jane White essentially confirm the statements made by George White in his affidavit.

In his affidavit, George H. White states that opponent is the successor to the business founded by his father, Laverne White, in the late 1950's. According to George White, his father, who carried on business as a sole proprietor, commenced using the GARDEN TREAT trade-mark in association with a line of fertilizer products in 1957 and, since that time, use of that mark has expanded to include a variety of other horticultural products. The opponent's BIRD TREAT trade-mark was, according to George White, adopted by Laverne White in early 1963 to identify a line of bird food, bird seed, and bird feed suet cakes; and the opponent, as successor-in-title, has continued using the BIRD TREAT trade-mark in association with bird food products. Further, George White states that his father adopted and began using the trading style ALL TREAT PRODUCTS on packaging, letterhead and invoices in 1967 and, since its incorporation in 1976, the opponent has continued to use the designation ALL TREAT as a trading style. George White also notes that in the mid-1960's, Laverne White adopted the trade-mark ALL TREAT to identify *inter alia* a line of bird food and bird seed.

George White also discusses the opponent's adoption and use of the trade-marks WORM-TREAT and LAWN TREAT and the adoption of the ALL TREAT & Design trade-mark which includes a representation of a bird and a tree and which has been used by the opponent since the early 1980's on most of the its packaging associated with its TREAT trade-marks, as well as on its letterhead, envelopes, bill heads and shipping labels. Mr. White has attached to his affidavit the following: packaging of the opponent's wares which show the manner of use of its trade-marks; price lists; catalogues and photographs of store shelf displays featuring the opponent's BIRD TREAT, ALL TREAT and ALL TREAT & Design trade-marks; and representative invoices relating to sales of the opponent's bird seed products in association with its BIRD TREAT and ALL TREAT & Design trade-marks. Finally, George White states that annual sales of his company's products in association with its "TREAT" marks have been in excess of five million dollars per year for the five

years preceding the date of the affidavit while annual advertising expenditures from 1989 to 1993 were approximately $200,000. In view of the foregoing, I have concluded that the opponent has established the existence of a family of "TREAT" trade-marks which, in view of the extensive use of these marks by the opponent and its predecessor-in-title, have acquired a fairly high degree of distinctiveness.

The applicant has applied for registration of its trade-mark in association with "bird food" and the opponent's registrations for the trade-marks ALL TREAT and BIRD TREAT cover *inter alia* bird food. It therefore follows that the wares and the channels of trade associated with these marks overlap.

As for Section 6(5)(e) of the Act, there is a fair degree of resemblance between the applicant's trade-mark GOLDEN TREAT and the opponent's trade-marks when considered in their entireties in that each of the marks includes as a second element the word TREAT. The most relevant of the opponent's marks with respect to the Section 12(1)(d) ground are its registered trade-marks ALL TREAT and BIRD TREAT as these trade-mark cover *inter alia* bird food.

The applicant adduced evidence of the state of the register is an attempt to show that there has been adoption by third parties of "TREAT" trade-marks in association with pet food. The Reischer affidavit attaches copies of thirteen trade-mark registrations as applied to pet food, all of which include the word "TREAT". However, state of the register evidence is relevant only insofar as one can make inferences from it about the state of the marketplace [see ***Ports International Ltd. v. Dunlop Ltd.***, 41 C.P.R.(3d) 432; ***Del Monte Corporation v. Welch Foods Inc.***, 44 C.P.R.(3d) 205]. As well, the decision of the Federal Court of Appeal in ***Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.***, 43 C.P.R.(3d) 349 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.

In the present case, no evidence of use of any of the third party registrations has been filed by the applicant and thirteen trade-marks cannot be considered to be such a large number that an

inference can be drawn about the state of the marketplace. It is therefore not possible to conclude that trade-marks incorporating the word "TREAT" are in common use in the pet food field. In any event, the applicant has not located any other marks which incorporate the term "treat" and which are for use in association with bird food.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. Further, while I am uncertain as to whether the applicant's trade-mark would be likely to be confused with any one of the opponent's trade-marks on its own, in view of the family of trade-marks which incorporate the word TREAT which the opponent has evidenced, I believe that the average consumer would conclude that the applicant's GOLDEN TREAT mark is but another of the opponent's line of TREAT products, bearing in mind that two of the opponent's registrations cover wares identical to those of the applicant. As a result, the applicant's trade-mark is not registrable in view of the provisions of Section 12(1)(d) of the ***Trade-marks Act***.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the ***Trade-marks Act***, I refuse the applicant's application pursuant to Section 38(8) of the ***Trade-marks Act***.

DATED AT HULL, QUEBEC, THIS 22nd DAY OF JANUARY, 1997.

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