IN THE MATTER OF AN OPPOSITION by Cargill Limited - Cargill Limitée to application No. 661,978 for the trade-mark NUTRI-FLAX Design filed by Omega Nutrition Canada Inc.

On July 12, 1990, Omega Nutrition Canada Inc. filed an application to register the trade-mark NUTRI-FLAX Design, a representation of which appears below, based upon use of the trade-mark in Canada since January 1989 in association with "edible flax seed meal".

The opponent, Cargill Limited - Cargill Limitée, filed a statement of opposition on August 11, 1992 in which it alleged that the applicant's trade-mark NUTRI-FLAX Design is not registrable and not distinctive, and that the applicant is not the person entitled to its registration, in that the applicant's trade-mark is confusing with the opponent's registered trade-mark NUTRI-FLOCK, registration No. 336,052 for use in association with feed supplements.

The applicant submitted a document identified as being a counter statement in which it asserted that its trade-mark would not be confusing with the trade-mark NUTRI-FLOCK.

The opponent filed as its evidence the affidavits of Richard W. Sinclair and Jennifer Leah Stecyk while the applicant submitted the affidavit of Anne R. Skipsey, a Marketing Representative of the applicant. As evidence purportedly in reply, the opponent filed the affidavit of Tracey Leigh Orr. However, the Orr affidavit is not confined to matter in reply to the Skipsey affidavit and is therefore not proper reply evidence in this proceeding.

Both parties submitted written arguments and both were represented at an oral hearing.

With respect to the ground of opposition based on Section 12(1)(d) of the Trade-marks Act, the material date is the date of my decision [see Park Avenue Furniture Corp. v. Wickes/Simmons Bedding Ltd. et al, 37 C.P.R. (3d) 413 (F.C.A.) and Conde Nast Publications, Inc. v. The Canadian Federation of Independent Grocers, 37 C.P.R. (3d) 538 (TMOB)]. The material dates with respect to the non-entitlement and non-distinctiveness grounds are, respectively, the applicant's claimed date of first use [January 1989] and the date of opposition (August 11, 1992). In determining whether there would be a reasonable likelihood of confusion between the applicant's trade-mark NUTRI-FLAX Design and the registered trade-mark NUTRI-FLOCK, the Registrar must have regard to all the surrounding circumstances including, but not limited to, those specifically enumerated in Section 6(5) of the Trade-marks Act. Furthermore, 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.

While the opponent filed a certified copy of its registration as an exhibit to the Orr affidavit, that affidavit was found not to be proper reply evidence in this proceeding. Nevertheless, the Registrar does have the discretion, in view of the public interest to maintain the purity of the register, to check the register in order to confirm the existence of the registration relied upon by the opponent [see Quaker Oats of Canada Ltd./ La Compagnie Quaker Oats du Canada Ltée v. Menu Foods Ltd., 11 C.P.R. (3d) 410]. In doing so, I noted that registration No. 336,052 for the trade-mark NUTRI-FLOCK is still in force and covers wares identified as "Feed supplements".

With respect to the inherent distinctiveness of the trade-marks at issue, the applicant's trade-mark NUTRI-FLAX Design is highly suggestive of "nutritious flax" and therefore possesses little inherent distinctiveness as applied to "edible flax seed meal". The opponent's trade-mark NUTRI-FLOCK as applied to "feed supplements" is suggestive of nutritious animal feed in that the word FLOCK suggests an assemblage of animals while the element NUTRI suggests that the wares are nutritious. As a result, the trade-marks at issue possess relatively little inherent distinctiveness.

Having regard to the evidence of the parties, neither the extent to which the trade-marks have become known in Canada nor the length of use of the trade-marks at issue favours either party in this opposition. In this regard, the Skipsey affidavit is silent as to the volume or dollar value of sales of the applicant's NUTRI-FLAX Design flax meal product. Moreover, the Sinclair affidavit provides no evidence of use of the trade-mark NUTRI-FLOCK in Canada. The opponent submitted at the oral hearing that the Registrar, in exercising his discretion to confirm the existence of its registration, should also have regard to the fact that the registration points to a declaration of use of the trade-mark NUTRI-FLOCK having been filed by the opponent on November 9,1987. However, in view of the provisions of Section 54(2) of the Trade-marks Act, it is only when a certified copy of a registration has been filed as evidence in the opposition that the Registrar can conclude that there is evidence of the facts set forth in the registration. In the present case, a certified copy of the opponent's registration has not been filed as admissible evidence in this proceeding. Accordingly, I am not prepared to conclude that the opponent has used its trade-mark in Canada since November 9,1987. In any event, and even were I to have regard to such facts as are set forth in the opponent's registration, I would not have been prepared to conclude from the mere filing of a declaration of use that there has been anything more than de minimus use by the opponent of its trade-mark NUTRI-FLOCK in Canada as of November 9, 1987.

The wares covered in the opponent's registration for the trade-mark NUTRI-FLOCK are "feed supplements" which are animal food products. The wares covered in the present application are defined as "**edible**" flax seed meal which indicates that the applicant's wares are intended primarily for human consumption. As these wares are intended for human consumption, the applicant's edible flax seed meal would be sold to the public in retail outlets such as health food stores, drug stores, and grocery stores which sell health food products. In her affidavit, Ms. Skipsey states the following:

> "Omega's manufacturing also includes a ground flax powder called "**Nutri-Flax**". In March 1987, a flax meal product was developed by Omega Nutrition Canada Inc. to be marketed through Health Food Stores and Naturopathic Physicians for human consumption. This product is sold primarily as a bulk regulator. Omega has since improved the original product by fortifying it with zinc and B vitamins in order to provide customers with the nutrients that are important for their bodies. Sold in health food stores, it is utilized by both humans and pets, including horses."

The opponent has submitted that the above paragraph indicates that the applicant's wares are used for pets, including horses, and that the wares of the parties overlap. However, the fact that some consumers may purchase food products intended for human consumption and feed them to their pets does not point to there being any overlap in the channels of trade of the parties. As noted above, the applicant's wares would be sold in health food stores, drug stores or the like whereas the opponent's feed supplements would be sold through pet stores or animal feed stores. As a result, I do not consider there to be any overlap in the channels of trade associated with the wares of the parties.

With respect to the degree of resemblance between the trade-marks at issue, the marks NUTRI-FLAX Design and NUTRI-FLOCK bear a fair degree of similarity both in appearance and in sounding when considered in their entireties as a matter of immediate impression. Further, to the extent that both marks suggest that the wares of the parties are nutritious, there is some similarity in the ideas suggested by them.

In view of the differences in the wares and channels of trade of the parties, I have concluded that the applicant has met the legal burden upon it of establishing that there would be no reasonable likelihood of confusion between its trade-mark NUTRI-FLAX Design as applied to edible flax seed meal and the opponent's registered trade-mark NUTRI-FLOCK as applied to feed supplements. Accordingly, I reject the opponent's opposition pursuant to Section 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 28th DAY OF APRIL,1995.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.