

IN THE MATTER OF AN OPPOSITION by Cargill, Incorporated to
application No. 649,976 for the trade-mark TOP CALF filed by
Kenpal Farm Products Inc.

On January 31, 1990, Kenpal Farm Products Inc. filed an application to register the trade-mark TOP CALF based upon proposed use of the trade-mark in Canada in association with the following wares:

"All kinds of feeds, premixes and supplements for livestock, namely feeds, premixes, supplements, complete feeds, consultant formula feeds, converter feeds, customer formula feeds, macro-premixes, medicated feeds, micro-premixes, mineral feeds, mixed feeds, single ingredient feeds, tonic feeds, conditioner feeds, trace mineral salt feeds, and veterinary preparation feeds"

and proposed use of the trade-mark in association with the following services:

"Operation of a business dealing in services, marketing and manufacturing of feeds, premixes and supplements for livestock"

In its application as filed, the applicant disclaimed the right to the exclusive use of the words "CALF" and "TOP" apart from its trade-mark. However, the applicant subsequently filed an amended application in which it disclaimed only the word "CALF" apart from its trade-mark.

The opponent, Cargill, Incorporated, filed a statement of opposition on January 25, 1991, a copy of which was forwarded to the applicant on April 3, 1991. In its statement of opposition, the opponent alleged the following grounds:

- (a) That the applicant's application is not in compliance with section 30(i) of the Trade-marks Act in that the present application does not contain a statement that the applicant is satisfied that it is entitled to use the trade-mark in Canada in association with the services described in the application;
- (b) That the applicant's trade-mark is not registrable in that it is confusing with the registered trade-mark TOP HOG, registration No. 220,349, covering pig feed;
- (c) That the applicant's trade-mark is not registrable in that it is confusing with the registered trade-mark NUTRENA TOP BROILER, registration No. 219,972 covering hen feed;
- (d) That the applicant is not the person entitled to registration because at the date of filing, the applicant's trade-mark was confusing with the trade-mark TOP HOG that had previously been used in Canada in association with pig feed;
- (e) That the applicant is not the person entitled to registration because at the date of filing, the applicant's trade-mark was confusing with the trade-mark NUTRENA TOP BROILER that had previously been used in Canada in association with hen feed; and
- (f) That the applicant's trade-mark is not distinctive because it does not distinguish nor is it adapted to distinguish the applicant's wares and services from the wares or services of others, including the wares with which the opponent uses the trade-marks TOP HOG and NUTRENA TOP BROILER.

The applicant filed a counterstatement in which it asserted that the omission of the word "services" from paragraph 8 of its application was a clerical oversight in that paragraph 8 was

intended to refer to "wares and services". Further, the applicant denied the allegations of confusion between its trade-mark TOP CALF and the opponent's trade-marks TOP HOG and NUTRENA TOP BROILER as registered and previously used by the opponent.

The opponent filed as its evidence the affidavits of Larry Robert Stafford and Jennifer Leah Stecyk while the applicant submitted as its evidence the affidavits of Michael Godwin and Frank Palen. As evidence in reply, the opponent filed the affidavits of Richard W. Sinclair and Elizabeth MacPherson, as well as a second affidavit of Jennifer Leah Stecyk.

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

The opponent's first ground of opposition is based on Section 30 of the Trade-marks Act, the opponent alleging that the applicant's application is not in compliance with Section 30(i) in that the present application does not contain a statement that the applicant is satisfied that it is entitled to use the trade-mark in Canada in association with the services described in the application. However, I agree with the applicant that the omission of the word "services" from paragraph 8 of its application is merely a clerical oversight on its part. I have therefore rejected the first ground of opposition.

As its second ground, the opponent alleged that the applicant's trade-mark is not registrable in that it is confusing with the registered trade-mark TOP HOG, registration No. 220,349, covering pig feed. In assessing whether there would be a reasonable likelihood of confusion between the trade-marks at issue as of the date of decision, the material date in respect of the Section 12(1)(d) ground of opposition [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 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. Further, 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 of the material date.

Considering initially the inherent distinctiveness of the trade-marks at issue, both the applicant's trade-mark TOP CALF and the opponent's registered trade-mark TOP HOG as applied to the respective wares and services of the parties are weak marks which possess relatively little inherent distinctiveness.

As of the date of my decision, the applicant's trade-mark TOP CALF had become known to some extent in southwestern Ontario in association with feeds, feed supplements, and premixes for cows with sales exceeding \$280,000 between 1990 and 1992. Further, the opponent's trade-mark TOP HOG has become known to some extent in Canada in association with pig feed with sales of approximately 9,700 tonnes having a dollar value of \$3,500,000 between June 1984 and October 1991. The length of time that the trade-marks have been in use favours the opponent in that it has evidenced use of the trade-mark TOP HOG in Canada since at least June 1981 whereas the applicant commenced use of its trade-mark TOP CALF in 1990.

While the wares of the parties specifically differ, they are related in that they comprise feed and supplements for livestock. As well, the opponent's pig feed could be sold through a business dealing in feeds and supplements for livestock. As a result, the opponent's wares are closely related to the services covered in the present application. Further, the channels of trade associated with the wares and services of the parties would appear to overlap. In this regard, the Stafford affidavit points to the fact that the majority of the invoices adduced as evidence to his affidavit include cow or calf feed, or feed supplements for cows or calves, in addition to the opponent's TOP HOG feed. As well, the second Stecyk affidavit establishes that the applicant filed an application for the trade-mark TOP HOG as applied to pig feed, thus confirming that the wares of the parties might well be perceived by the average purchaser as emanating from the same source.

The trade-marks TOP CALF and TOP HOG are similar in ideas suggested, as well as bearing some similarity in appearance and in sounding.

As a further surrounding circumstance in respect of the issue of confusion, the applicant submitted evidence of the state of the register by way of the Godwin affidavit. The results of the search revealed several registrations for the trade-marks TOP CAT and TOP DOG for pet food which differ from livestock feed and supplements and would, in my opinion, not travel through the same channels of trade as the wares of the parties. While the applicant argued that the channels of trade associated with cat and dog food and livestock feed would overlap, no evidence to support this submission was adduced by the applicant. Further, no evidence of any of the registrations identified in the Godwin search has been adduced by the applicant and, apart from the trade-marks of the parties, none of the third party registrations includes the prefix TOP together with the name of a variety of livestock animal as applied to feed for livestock. I therefore find that little, if any, weight can be accorded the state of the register evidence adduced by the applicant.

Having regard to the degree of resemblance both in appearance and in ideas suggested between the trade-marks at issue, as well as the overlapping in the wares and services and the channels of trade of the parties, I have concluded that the applicant has failed to meet the legal burden upon it of establishing that there would be no reasonable likelihood of confusion between its trade-mark TOP CALF as applied to the wares and services covered in the present application and the opponent's registered trade-mark TOP HOG as applied to pig feed. 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.

I refuse the applicant's application pursuant to s. 38(8) of the Trade-marks Act.

DATED AT HULL, QUEBEC, THIS 30th DAY OF November, 1994.

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