

**IN THE MATTER OF AN OPPOSITION
by Salter Street Films Limited to
application No. 1,083,747 for the trade-
mark PYRAMID PRODUCTIONS filed by
Pyramid Productions Inc.**

On November 23, 2000, the applicant, Pyramid Productions Inc., filed an application to register the trade-mark PYRAMID PRODUCTIONS. The application is based upon use of the trade-mark in Canada in association with “production of television shows and of videos” since as early as December 1995. The applicant has disclaimed the right to the exclusive use of the word PRODUCTIONS, apart from the trade-mark.

The application was advertised for opposition purposes in the Trade-marks Journal of March 7, 2001. The opponent, Salter Street Films Limited, filed a statement of opposition on August 7, 2001. However, this statement of opposition required amendment before it could be served on the applicant. The amended statement of opposition, which was filed on October 24, 2001, raised the following grounds of opposition:

1. The application does not comply with s. 30(i) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”) because:
 - i) the applicant has not itself used the alleged trade-mark in Canada in the ordinary course of trade in association with the production of television shows and of videos since December 1995;
 - ii) the applicant could not have used the mark as alleged since it did not exist as of December 1995;
 - iii) the applicant’s claimed date of first use is not supportable in that the applicant did not draw the mark to the attention of the public in association with the name of the applicant.

2. The application does not comply with s. 30(b) of the Act because the applicant cannot be satisfied that it is entitled to use the trade-mark in Canada in association with the services listed in the application; the opponent puts the applicant to the strict proof of having used PYRAMID PRODUCTIONS as a trade-mark, i.e. as defined in s. 2 of the Act, for the purpose of distinguishing or so as to distinguish the applicant’s services from those of others, on the claimed date of first use.

3. The trade-mark is not distinctive of the applicant because it does not actually distinguish, nor is it adapted to distinguish the services of the applicant from the wares and services of others, provided in Canada in association with the trade-mark and/or trade-name PYRAMID. The opponent provides examples of 17 trade-names/business names that incorporate the word PYRAMID, which it will rely on as evidencing non-distinctiveness. In addition, in support of this ground, the opponent repeats the factual assertions set out in its first ground of opposition.

The applicant filed and served a counter statement in which it denied each allegation made by the opponent. In its denial, the applicant referred to the first ground of opposition as being pursuant to s. 30(b), not s. 30(i) as listed in the statement of opposition. I agree that the first ground resembles a s. 30(b) ground of opposition, more than a s. 30 (i) ground of opposition. As the applicant clearly understood the correct basis of the first ground and raised no objection to the error in the opponent's pleading, I will treat the error as a typographical one.

The second ground refers to s. 30(b) but it appears to be more appropriately pleaded under s. 30(i), else duplication with the first ground would occur. For the purposes of my analysis below, I have considered the first ground to be pleaded under s. 30(b) and the second ground under s. 30(i).

The opponent filed as its evidence the affidavits of Laurel Murdoch, Linda Victoria Thibeault and Harry Davies.

As its evidence, the applicant filed the affidavit of Larry Day. The opponent obtained an order for the cross-examination of Mr. Day on his affidavit but a cross-examination was not conducted.

Only the applicant filed a written argument. In its argument it treated the statement of opposition as raising three grounds of opposition: s. 30(b), s. 30(i) and distinctiveness.

Both parties were represented at an oral hearing.

Onus

Although the applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act, there is an initial burden on the opponent to

adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist. [see *John Labatt Limited v. The Molson Companies Limited*, 30 C.P.R. (3d) 293 at 298; *Dion Neckwear Ltd. v. Christian Dior, S.A. et al.* (2002), 20 C.P.R. (4th) 155 (F.C.A.)]

Material Dates

The material dates with respect to the grounds of opposition are as follows: s. 30 - the date of filing of the application [see *Georgia-Pacific Corp. v. Scott Paper Ltd.*, 3 C.P.R. (3d) 469 at 475]; non-distinctiveness - the date of filing of the opposition [see *Metro-Goldwyn-Meyer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.T.D.) at 324].

Opponent's Evidence

Murdoch Affidavit

Ms. Murdoch, a librarian employed by the opponent's law firm, provides copies of certain advertisements of Alliance Atlantis Communications Inc. dated April 23, 2001 or earlier. This evidence does not advance the opponent's case because the mark used by Atlantis Alliance is at least as much a stylized A as it is a stylized pyramid design.

Thibeault Affidavit

Ms. Thibeault, a trade-mark searcher, conducted searches on or about July 5, 2002 of the Canadian Trade-marks Office's records to locate all trade-marks incorporating the word PYRAMID and all trade-marks indexed under the heading "pyramid" design in connection with entertainment wares and services, computer wares and services, and telecommunications wares and services. She provides copies of the applications and registrations that she located.

In its written argument, the applicant objected to parts of Ms. Thibeault's evidence as hearsay because copies of the trade-mark applications/registrations that she located in her searches were made by Grace Douglas. I will not however deal with this objection as I consider Ms. Thibeault's evidence to be of little assistance, regardless of its admissibility. I reach this conclusion because 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 and Ms. Thibeault's evidence does not show large numbers of relevant registrations. [see *Ports International Ltd. v. Dunlop Ltd.* (1992), 41 C.P.R. (3d) 432 (T.M.O.B.); *Del Monte Corporation v. Welch Foods Inc.* (1992), 44 C.P.R. (3d) 205 (F.C.T.D.); *Kellogg Salada Canada Inc. v. Maximum Nutrition Ltd.* (1992), 43 C.P.R. (3d) 349 (F.C.A.)]

Davies Affidavit

Mr. Davies is the Vice President and Director of Operations of Advocate Investigation Services Limited. In 2002, he conducted investigations with respect to the use of the word PYRAMID alone and/or in conjunction with a "pyramid" design in the entertainment/media/computer industries. I will discuss his evidence below in the context of whether the opponent has met its initial burden with respect to its distinctiveness ground of opposition.

Applicant's Evidence

Day Affidavit

Mr. Day is the Executive Vice President of the applicant, which was known as Larry Day Productions Ltd. prior to January 18, 1996. I will summarize below the key points of his evidence that precede the material dates.

In about December 1995, in anticipation of its name change, the applicant had PYRAMID PRODUCTIONS printed on business cards, letterhead and fax cover sheets. Mr. Day attests that the applicant began at that time to generate and distribute written materials, including publicity materials displaying PYRAMID PRODUCTIONS, but none of those 1995 materials are in the applicant's possession. The earliest item that the applicant has been able to provide is an invoice dated March 21, 1996 for previously rendered services. That invoice displays the words PYRAMID PRODUCTIONS INC. at the top, with each word in the same script and font size, followed by the applicant's address and telephone and fax numbers. The invoice therefore shows trade-name, not trade-mark, use. [see *Smith, Lyons, Torrance, Stevenson & Mayer v. Pharmaglobe Laboratories Ltd.*, (1996), 75 C.P.R. (3d) 85 (T.M.S.H.O.); *Road Runner Trailer Mfg. Ltd. v. Road Runner Trailer Co. Ltd. et al.* (1984) 1 C.P.R. (3d) 443 (F.C.T.D.)]

The applicant produces television shows. The first show that it produced was *The Movie Show*. This show started in 1983 and the applicant has continuously produced it and its successor show INSIDE ENTERTAINMENT since that date. Mr. Day provides a copy of a license document dated March 27, 1996 with respect to this show but the trade-mark PYRAMID PRODUCTIONS does not appear thereon (instead the trade-name Pyramid Productions Inc. appears).

Mr. Day states that, starting in April 1996, the applicant delivered episodes of THE MOVIE SHOW with the trade-mark PYRAMID PRODUCTIONS appearing on the “credits” portion at the end of the episode. He provides a digital photo of such a screen and I agree that this shows trade-mark use.

In paragraph 9, Mr. Day informs us that in about April 1996, around the same date that the applicant shipped *The Movie Show* episodes with PYRAMID PRODUCTIONS in the credits, it also started to display the trade-mark PYRAMID PRODUCTIONS on wrappers affixed to video cassettes which contained episodes of its television series. A photo of a cassette cover used in conjunction with a video dated April 3, 1996 has been provided. Again, I agree that this shows trade-mark use.

Paragraph 26 of Mr. Day’s affidavit reads, “The Applicant has also displayed the trade-mark PYRAMID PRODUCTIONS in credits and on labeling affixed to the outside of video cassettes produced for corporate clients on up to 10,000 videos in the period from late 1995 to date.” The phrase “in the period from late 1995 to date” is open to interpretation but it is not clearly inconsistent with the applicant’s claim of use of its trade-mark since as early as December 1995.

Mr. Day states that in January 1996, the applicant placed a large interior sign on the door of its office premises, which stated the words PYRAMID PRODUCTIONS. However, the photo that he provides only shows the one word PYRAMID. He also states “that sometime during the period of December of 1995 to April of 1996, and probably in the early part of that period, the Applicant placed a large sign in an exterior window..., which stated the words: PYRAMID PRODUCTIONS.” No photo has been provided of this sign and so we are left to wonder if it, like the interior sign, really only displayed the single word PYRAMID.

Mr. Day closes up his affidavit by stating that much of the evidence that the applicant had was discarded both because of the usual process of discarding old records and the discarding of various items when the applicant moved offices.

Section 30(b) Ground of Opposition

At the oral hearing, the opponent made it clear that one of its main arguments is that the applicant has not used PYRAMID PRODUCTIONS as a trade-mark since its claimed date of first use, but rather has used it as a trade-name. There is an initial evidential burden on the opponent respecting the issue of the applicant's non-compliance with s. 30(b), but this burden is a light one [see *Tune Masters v. Mr. P's Mastertune*, 10 C.P.R. (3d) 84 at 89]. This burden can be met by reference not only to the opponent's evidence but also to the applicant's evidence [see *Labatt Brewing Company Limited v. Molson Breweries, a Partnership* (1996), 68 C.P.R. (3d) (F.C.T.D.) 216 at 230]. However, while the opponent may rely upon the applicant's evidence to meet its evidential burden in relation to this ground, the opponent must show that the applicant's evidence is clearly inconsistent with the applicant's claims as set forth in its application.

The applicant's agent has submitted that paragraph 5 of Mr. Day's affidavit is clear and uncontroverted evidence of the applicant's use of the applied for trade-mark as of the claimed date of first use. I reproduce that paragraph below:

5. I verily believe that in about December of 1995 the Applicant had the words: PYRAMID PRODUCTIONS printed on business cards, letterhead and fax cover sheets (internally produced) and possibly on other corporate documentation it used. I verily believe that in about December, 1995, the Applicant commenced to use the name PYRAMID PRODUCTIONS on written materials it generated and distributed to inform potential networks of the show produced by the Applicant, and of shows it could produce for them. The written materials would have included letters describing the show, and publicity materials (documents containing the title, the description of the series, and the contact information of the Applicant). The Applicant does not now have in possession any of those written materials.

I note that there are ambiguities in the wording of paragraph 5, such as the reference to "about December 1995" that could be interpreted as after December 1995. The applicant further points out that Mr. Davies may very well be employing the words "use the name PYRAMID

PRODUCTIONS” in the colloquial sense, rather than as defined in s. 4 of the Act. Moreover, it points to elsewhere in the affidavit where Mr. Davies uses similar wording but then proceeds to provide an allegedly corroborating document which in fact shows use of the trade-name Pyramid Productions Inc. rather than the trade-mark PYRAMID PRODUCTIONS. See for example paragraph 6, which provides an invoice dated March 21, 1996 that Mr. Davies attests is “using the name PYRAMID PRODUCTIONS”. As discussed earlier, such invoice (exhibit “B”) clearly shows trade-name use, not trade-mark use. It is therefore difficult to accept that Mr. Davies understands the difference between trade-mark and trade-name use. Nevertheless, based in part on Mr. Davies’ paragraph 26, I find that the applicant’s evidence is not clearly inconsistent with its use claim. That paragraph contains a clear statement that PYRAMID PRODUCTIONS has appeared in credits and on labelling affixed to the outside of video cassettes produced for corporate clients from late 1995. That type of trade-mark use is shown in exhibits “D” and “E”, albeit as of April 1996.

It was open to the opponent to cross-examine Mr. Davies on his affidavit in order to clarify any ambiguities that exist in his evidence. The opponent chose to not proceed with a cross-examination and it cannot satisfy its evidential burden by pointing to ambiguities.

The first ground of opposition is dismissed on the basis that the opponent has not satisfied its initial burden.

Section 30(i) Ground of Opposition

Section 30(i) requires that a trade-mark application contain a statement that the applicant is satisfied that he is entitled to use the trade-mark in Canada in association with the wares or services described in the application. The present application contains such a statement and is therefore technically in compliance with s. 30(i). In the absence of evidence of bad faith on behalf of the applicant, I will not delve into the alleged inappropriateness of the statement. The second ground of opposition is therefore dismissed.

Distinctiveness Ground of Opposition

In order to meet its evidential burden, the opponent’s evidence must show that third party PYRAMID names had become known sufficiently in Canada as of the material date to negate the

distinctiveness of the applicant's mark. [see *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.) at 58]

In its written argument, the applicant submits that the opponent cannot rely on any third party use of PYRAMID trade-names that are not specifically listed in the pleadings. However, the evidence of the various PYRAMID business names is properly before us. The statement of opposition was clear in indicating that the opponent did not restrict itself to the names listed in the pleadings. Moreover, on the basis of the evidence filed, the applicant knew the case that it had to meet. [see *Novopharm Ltd. v. AstraZeneca AB et al.* (2002), 21 C.P.R. (4th) 289 (F.C.A.); *Novopharm Ltd. v. Ciba-Geigy Canada Ltd.*; *Novopharm Ltd. v. Astra Aktiebolag* (2001), 15 C.P.R. (4th) 327 (F.C.A.)]

Mr. Davies' evidence purports to show that the word "pyramid" is a common component of business names in Canada. However, the majority of his evidence cannot be given much weight because it does not show use (as opposed to registration) of PYRAMID names in the applicant's field of activity prior to the filing of the statement of opposition.

Mr. Davies identifies the following names/marks as having been used or promoted in Canada prior to the filing of the statement of opposition in association with what he categorizes as the entertainment/media/computer industry:

1. Pyramid Productions Inc. – a Vancouver film production company
2. 4th Pyramid Productions Inc. – a Toronto music producer
3. Pyramid AV (Canada) Inc. – an Ontario company dealing in Indian language CDs, music and videos
4. Pyramid Cabaret – a Manitoba nightclub
5. Pyramid Press – an Alberta printing company
6. Pyramide Relations Publiques Inc. – a Quebec public relations company
7. Pyramid Traffic Inc. – an Ontario company that provides traffic information services
8. Pyramid Sound – an Ontario company in the musical instrument repair business
9. Pyramid Motion Picture & Image – an Ontario business providing video production and taping services

I consider those businesses identified as numbers 4 through 8 to be in fields that are sufficiently different from that of the applicant to not be worthy of further comment.

The first company in the list, the Vancouver-based film production company, Pyramid Productions Inc., is the most pertinent. I will set out in detail the information provided by Mr. Davies concerning this entity:

1. A B.C. Online Companies-Corporate Search dated as of June 25, 2002 lists the B.C. company Pyramid Productions Inc. with an incorporation date of May 31, 1995.
2. Five pages printed July 3, 2002 from the website www.homestead.com/horseythemovie/horseynecorporated show two references to Pyramid Productions Inc.: “PYRAMID PRODUCTIONS INC. & CRAIG GRONDAHL proudly present ‘horsey’” and “Contact Info: Pyramid Productions Inc.” Otherwise, the pages discuss the movie “horsey”, with statements that it is a Canadian feature film from 1997 and that it would be available for purchase on video in Canada from December 2000.
3. Photocopies of what appear to be the outside packaging of a video of the “horsey” film, which reads in one location, “PYRAMID PRODUCTIONS INC. and CRAIG GRONDAHL presents...” There is no explanation of where or when this piece of evidence was obtained.
4. Pages printed July 3, 2002 from the website www.playbackmag.com/articles/magazine, which show an article dated July 3, 1995 in which there is reference to “a new Vancouver-based production company, Pyramid Productions” and its film “horsey”.
5. Two pages purporting to provide circulation information for the August 7, 2000 issue of PLAYBACK magazine.

In its written argument, the applicant submitted that the Davies affidavit is hearsay with regard to website screen prints because those are material published by others and the authors of that information cannot themselves be cross-examined. I agree to the extent that the contents of the websites cannot be treated as true. The evidence is however reliable in so far as showing that these websites, with these words on them, were accessible when Mr. Davies did his searches. This does not assist the opponent however because Mr. Davies’ searches were conducted after the material date.

I note that an undated search of Canada 411 Online Telephone Directory provided by Mr. Davies for telephone listings of company names that included the word “Pyramid” located Pyramid Productions Inc. in Calgary (the applicant) but did not locate any listing for the Vancouver company.

In addition, Mr. Day’s affidavit addresses the evidence concerning the Vancouver company by stating:

1. the services of production of independent movies is an entirely different service from the production of television shows or of corporate videos
2. the applicant’s customers are very sophisticated corporations who are careful about who they are dealing with when contracting for production services
3. the applicant does not sell or distribute for sale pre-recorded videos
4. he knows “of no other company in the area which offers television production services or video production services, or videos it produces; with the word PYRAMID in its corporate name or trade-mark”
5. the applicant’s PYRAMID PRODUCTIONS trade-mark is displayed on television show credits which reach 1.2 million viewers located across Canada per week, yet he knows “of no case in which a viewer, television production company, corporation or other person in any capacity indicated confusion or mistaken identity with another”
6. independent film production companies “are ephemeral. Typically, they are only built for the duration of the production of the film, limited in that it is just to house the one project.”

To summarize, there is evidence that another party has used the same words (Pyramid Productions) as the name of a film production business in Canada, but I cannot accord much weight to this evidence. This is because it largely takes the form of information obtained after the material date from third party websites. As indicated earlier, such exhibits are evidence that the websites existed when Mr. Davies accessed them, but they are not evidence of the truth of the statements made therein. Furthermore, there is no evidence of the extent to which, if any, these websites have been accessed by Canadians. [see *Procter & Gamble v. Hunter* (1999), 2 C.P.R. (4th) 266 (T.M.O.B.) at 273] Overall, there is no reliable evidence that the Vancouver company was using its trade-name

Pyramid Productions Inc. as of the material date and no quantitative evidence of its use at any time. Thus, the evidence does not show that the Vancouver company, Pyramid Productions Inc., had become known sufficiently to negate the distinctiveness of the applicant's mark as of the material date.

The evidence concerning the businesses identified as numbers 2, 3 and 9 on page 8 above is similarly flawed to the extent that it relies on third party websites accessed after the material date.

Regarding Pyramid AV (Canada) Inc., Mr. Davies placed a phone call to the company on July 13, 2002 and was advised that the name had been in use since prior to April 23, 2001. This of course is classic hearsay evidence. Mr. Davies also states that he further investigated the company using Select Phone Canadian Edition software and confirmed that it had a telephone number during 2000. He does not however provide a copy of his search and the reliability of that software is unknown. In any event, a single telephone listing is insufficient in itself to conclude that Pyramid AV (Canada) Inc. had become known sufficiently to negate the distinctiveness of the applicant's mark as of the material date. Added to that is the fact that there are differences both between Pyramid AV (Canada) Inc. and PYRAMID PRODUCTIONS, and their related services, that would serve to distinguish one from the other.

Regarding Pyramid Motion Picture & Image, Mr. Davies' evidence is very sparse consisting solely of a business name registration and a report indicating that it has had a telephone listing since 1995. The latter report is from software whose reliability has not been established and overall the evidence is far from sufficient to conclude that Pyramid Motion Picture & Image had become known sufficiently to negate the distinctiveness of the applicant's mark as of the material date.

In conclusion, while it appears that it may not be uncommon for a company to adopt the word PYRAMID as part of its name, there is insufficient reliable evidence to satisfy the opponent's initial burden to show that any such company had become known sufficiently in fields related to that of the applicant to negate the distinctiveness of the applicant's mark as of the material date. As stated in *Westcom Radio Group Ltd. v. CHUM Ltd.* (1998), 87 C.P.R. (3d) 185 (T.M.O.B.) at 191, "the

meeting of the opponents' evidential burden cannot be left to a matter of inference." Accordingly, the third ground of opposition is dismissed.

Disposition

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

DATED AT TORONTO, ONTARIO, THIS 16th DAY OF JANUARY 2006.

Jill W. Bradbury
Member
Trade-marks Opposition Board