

IN THE MATTER OF AN OPPOSITION  
by J.M. Schneider Inc. to  
application No. 619,460 for  
the trade-mark SIZZLE & BROWN  
filed by Kretschmar Inc.

On November 21, 1988, the applicant, Kretschmar Inc., filed an application to register the trade-mark SIZZLE & BROWN for "prepared meats" based on use in Canada since November 11, 1986 by the applicant's predecessor in title Loblaw Companies Limited. The application as filed included a disclaimer to the word BROWN. The application was advertised for opposition purposes on May 31, 1989.

The opponent, J.M. Schneider Inc., filed a statement of opposition on June 22, 1989, a copy of which was forwarded to the applicant on July 14, 1989. The grounds of opposition include, among others, one based on the provisions of Section 12(1)(d) of the Trade-marks Act, namely, that the applied for trade-mark is not registrable because it is confusing with the opponent's trade-mark SIZZLE 'N SERVE registered under No. 278,865 for "sausage."

The applicant filed and served a counter statement. The opponent did not file evidence. As its evidence, the applicant filed the affidavit of Alex Boyd. Only the applicant filed a written argument and no oral hearing was conducted.

As for the ground of opposition based on Section 12(1)(d) of the Act, the opponent has not evidenced its trade-mark registration. However, in accordance with the opposition decision in Quaker Oats Co. of Canada Ltd. v. Menu Foods Ltd. (1986), 11 C.P.R.(3d) 410 at 411, I have checked the trade-marks register and confirmed that registration No. 278,865 is on the register.

The material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is the date of my decision: see the decision in Conde Nast Publications Inc. v. Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538 at 541-542 (T.M.O.B.). Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. Finally, in applying the test for confusion set forth in Section 6(2) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5) of the Act.

The marks of both parties are inherently distinctive although neither mark is inherently strong. Both marks suggest the manner of preparing the associated wares. There being no evidence from the opponent, I must conclude that its mark SIZZLE 'N SERVE has not become known at all in Canada. The Boyd affidavit evidences some sales for the applicant's SIZZLE & BROWN products for the period 1987 to 1990. Thus, I am able to conclude that the applicant's mark has become known at least to a minor extent.

The length of time the marks have been in use is not a significant factor in the present case. The applicant's application claims use of its mark by a predecessor in title since November 11, 1986 and the Boyd affidavit evidences use of the mark by the applicant itself since 1987. The opponent's registration indicates that a declaration

of use was filed on February 16, 1983. However, there is no evidence of any use of the opponent's mark since that date.

The wares of the parties are overlapping, the opponent's "sausage" falling within the scope of the applicant's "prepared meats." The Boyd affidavit confirms that overlap since the actual products sold to date by the applicant are ham breakfast patties and pork breakfast patties. Presumably, the trades of the parties would be the same.

As for Section 6(5)(e) of the Act, the marks at issue bear a fairly high degree of resemblance in all respects. Both marks commence with the word SIZZLE and an abbreviation for the word AND followed by a five letter word relating to the preparation of meat products. It is not unlikely that a consumer familiar with the opponent's trade-mark SIZZLE 'N SERVE would, upon seeing or hearing the trade-mark SIZZLE & BROWN, assume that the associated prepared meat product was a new line being sold by the opponent.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. In view of my conclusions above, and particularly in view of the overlap in the wares and trades of the parties and the fairly high degree of resemblance between the marks at issue, I am left in a state of doubt respecting the issue of confusion. Since the onus or legal burden is on the applicant to show no reasonable likelihood of confusion, I must resolve that doubt against the applicant. Consequently, the ground of opposition based on Section 12(1)(d) of the Act is successful and the remaining grounds need not be considered.

In view of the above, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 26<sup>th</sup> DAY OF FEBRUARY 1993.

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