

IN THE MATTER OF AN OPPOSITION
by M & D European Meats Ltd. to
application No. 574,618 for the
trade-mark M & M MEAT SHOPS & Design
filed by M & M Meat Shops Ltd.

On December 12, 1986, the applicant, M & M Meat Shops Ltd., filed an application to register the trade-mark M & M MEAT SHOPS & Design (illustrated below) for the following services:

operation of a retail outlet dealing in
meat and food products

and for the following wares:

meat, fish, poultry, seafood namely scallops,
lobster, crab, shrimp, fish based crab
substitute, quiche, pies, pizza, egg rolls,
vegetables, lasagna, hot dogs, orange juice,
cheese and desserts, namely pies, fruit
dumplings and pastries.

The application is based on use in Canada since October 5, 1980 for both wares and services. The application was amended to include a disclaimer to the words MEAT SHOPS and was subsequently advertised for opposition purposes on November 11, 1987.

The opponent, M & D European Meats Ltd., filed a statement of opposition on December 9, 1987, a copy of which was forwarded to the applicant on January 5, 1988. The first ground of opposition is that the applied for trade-mark is not registrable pursuant to Section 12(1)(d) of the Trade-marks Act because it is confusing with the opponent's trade-mark M & D MEATS registered under No. 323,425 for the following services:

meat packaging, butcher shop services and
delicatessen services

and for the following wares:

fresh meats, fresh poultry, fresh fish, smoked
meats, cooked or processed meats, cheese, salads,
sausages.

The second ground of opposition is that the applied for trade-mark is not distinctive in view of the opponent's use of its registered trade-mark.

The applicant filed and served a counterstatement. As its evidence, the opponent filed the affidavit of Richard Halenda. The applicant filed the affidavit of Michael Louis Voisin and two affidavits of Jane Clark. Both parties filed written arguments but no oral hearing was conducted.

As for the opponent's first ground of opposition, the material time for considering the issue of confusion with the opponent's registered mark is as of the filing of the opposition. Furthermore, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion. 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 opponent's mark is inherently distinctive. However, it is not a strong mark since it is comprised of the letters M and D and the non-distinctive term MEATS. The Halenda affidavit establishes that the opponent has effected fairly significant sales in association with its trade-mark for the four year period prior to the present opposition. Based on the Halenda affidavit, I am able to conclude that the opponent's mark had become known in southern Ontario as of the material time.

The applicant's mark is also inherently distinctive. However, like the opponent's mark, it is not inherently strong since it is comprised of the letters M and M and the non-distinctive wording MEAT SHOPS. The design aspect of the applicant's mark is minimal. The Voisin affidavit evidences steady sales by the applicant in association with its mark in Kitchener, Ontario for the seven year period prior to the present opposition. Thus, based on the Voisin affidavit, I am able to conclude that the applicant's mark had become known in the Kitchener area as of the filing of the opposition.

Both marks have been used since the early 1980's. The wares, services and trades of the parties are virtually identical. Furthermore, the parties have, in some instances, apparently carried on business in the same geographical areas (see paragraphs 9 and 17 of the Halenda affidavit).

The marks of the parties bear a fairly high degree of resemblance in all respects. Both marks commence with two letters joined by an ampersand, both marks commence with the letter M and both marks use similar non-distinctive wording (i.e. - MEATS and MEAT SHOPS). In actual use, the opponent's mark further resembles the applicant's mark since the letters M & D invariably appear above the word MEATS in a design format similar to the applicant's. The applicant has submitted that the actual manner of use of the opponent's mark is irrelevant since the opponent's registration is for the mark in plain block letters. I disagree since use of the opponent's mark in its design format constitutes use of the word mark as registered.

The applicant has submitted that the effect of any resemblance between the marks is mitigated by the two Clark affidavits. The first Clark affidavit evidences excerpts from telephone business directories for various major Canadian cities listing businesses appearing under such headings as "Meat Markets", "Butchers-Retail" and the like. In its written argument, the applicant makes reference to over 40 listings which include initials in the business name. The applicant submits that the public is therefore accustomed to seeing that type of name and would therefore more easily distinguish one from another. However, the vast majority of the names relied on bear no resemblance to the marks at issue. In fact, there are only two such names which commence with the letter M followed by an ampersand and another letter. In the absence of evidence of more than nominal use of those two names, I am unable to make any meaningful inference about public awareness of marks and names similar to those at issue in this case.

The applicant has also relied on the second Clark affidavit which evidences about

a dozen business name registrations and incorporation documents for businesses having names beginning with the letters M and D. The applicant submits that this evidence establishes that the letters M and D are in common use with businesses in the food industry. However, the applicant has failed to evidence that any of the enterprises listed carry on active business. Even if some of the enterprises are engaged in active business, it may be that few, if any, of the registered names have ever been used as trade-marks or trade-names. There is no indication that a business name registration necessarily implies that the name has actually been used for any purpose. Furthermore, it would appear that many of the names have been registered in association with businesses unrelated to the specific trade under consideration in this opposition. Thus, the second Clark affidavit fails to support the applicant's position.

As an additional surrounding circumstance, I have considered Mr. Halenda's statement in his affidavit that one of the opponent's suppliers mistakenly delivered goods intended for the applicant's store to the opponent's store in Whitby, Ontario. This suggests that at least one incident of actual confusion has occurred. Mr. Halenda also states that the opponent's Whitby store manager advised him that customers had been confused. However, that statement is hearsay and I have given no weight to it.

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 virtual identity between the wares, services and trades of the parties and the degree of resemblance between the two marks, I find that the applicant has failed to satisfy the onus on it to show that its mark is not confusing with the opponent's registered mark. The first ground of opposition is therefore successful and the second ground need not be considered.

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

DATED AT HULL, QUEBEC, THIS 31st DAY OF OCTOBER 1990.

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