

IN THE MATTER OF AN OPPOSITION by
Kraft Limited (now Kraft General Foods
Canada Inc.) to application No. 511,243
for the trade-mark JIFFY WHIP filed by
Eden Manufacturing Company Limited

On October 26, 1983, the applicant filed an application to register the trade-mark JIFFY WHIP for a long list of food products based on proposed use in Canada. The application was amended to include a disclaimer to the word WHIP and was subsequently advertised for opposition purposes on January 27, 1988. At a late stage in this proceeding, the applicant's statement of wares was amended to read as follows:

liquid and powdered food products of the kind generally found in supermarkets, namely: cream toppings, namely whipped or homogenized cream and imitation cream for garnishing sundaes, desserts, cakes, ice-creams and puddings; and instant cream.

The opponent, Kraft Limited (now Kraft General Foods Canada Inc.), filed a statement of opposition on May 26, 1988, a copy of which was forwarded to the applicant on June 16, 1988. The grounds of opposition include, among others, 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 MIRACLE WHIP registered under No. UCA 3315 for "salad dressings" and the opponent's trade-mark WHIP registered under No. 264,536 for "salad dressings."

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Fred L. Johnson. The applicant did not file evidence. Only the opponent 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 material time for considering the circumstances respecting the issue of confusion with a registered trade-mark is as of the date of my decision: see the opposition decision in The Conde Nast Publications Inc. v. The Canadian Federation of Independent Grocers (1991), 37 C.P.R.(3d) 538. 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 applicant's mark JIFFY WHIP is highly suggestive of the character of the applied for wares, namely that they comprise whipped cream products that can be prepared in a jiffy. Thus, the applicant's mark is inherently weak. There being no evidence from the applicant, I must conclude that its mark has not become known at all in Canada.

The opponent's registered marks possess a greater degree of inherent distinctiveness than the applicant's mark although neither mark is inherently strong. The word WHIP is suggestive of one possible step in the manufacture of the opponent's salad dressings.

The Johnson affidavit evidences very extensive sales and advertising of the opponent's MIRACLE WHIP product for over fifty years. Thus, I am able to conclude that

the trade-mark MIRACLE WHIP has become very well known in Canada. The trade-mark WHIP has been used as a subsidiary mark on the opponent's MIRACLE WHIP product since 1981. However, the appearance of the mark WHIP on the opponent's product is relatively inconspicuous and there is no indication in the evidence that the opponent brings that mark to the public's attention in its advertising materials. Thus, I can only assume that the opponent's trade-mark WHIP has become known to some extent.

The length of time the marks have been in use overwhelmingly favors the opponent. The wares of both parties are food products although they would appear to be somewhat different in nature. The applicant's proposed wares appear to be whipped cream toppings whereas the opponent's product is a mayonnaise-type salad dressing. There are, however, some similarities between the wares of the parties as revealed by the advertising materials appended as an exhibit to the Johnson affidavit. The applicant's statement of wares states that its products are to be used to garnish desserts, cakes and the like. The opponent's advertisements illustrate the use of its product to garnish various food products. As well, some of the opponent's ads include recipes and some of those recipes list the opponent's MIRACLE WHIP product and whipped cream as two of the ingredients.

Presumably there would be some overlap between the trades of the parties since the respective wares are both food products and would therefore both be sold through retail grocery stores. Since the wares at issue are somewhat different in nature, it may be that they would be sold in distinct sections of retail grocery stores. However, the onus is on the applicant to evidence any such possible distinctions and the applicant chose not to do so.

As for Section 6(5) (e) of the Act, there is a fairly high degree of resemblance between the applicant's proposed mark JIFFY WHIP and the opponent's registered mark WHIP, the applicant having adopted the entirety of the opponent's mark as a component of its mark. There is also some resemblance between the applicant's mark and the opponent's registered mark MIRACLE WHIP.

In applying the test for confusion, I have considered that it is a matter of first impression and imperfect recollection. As previously noted, the onus or legal burden is on the applicant to show no reasonable likelihood of confusion between the marks at issue. What that means is that if after all the evidence has been considered I am left in a state of doubt as to whether the marks are confusing, I must resolve that doubt against the applicant.

In view of my conclusions above, and particularly in view of the possible connections between the wares and trades of the parties, the fame of the mark MIRACLE WHIP, the degree of resemblance between the applicant's mark and the registered mark WHIP and the fact that the application is based on proposed use only, I find that I am left in a state of doubt respecting the issue of confusion with both of the opponent's registered marks. I must therefore resolve that doubt against the applicant and find that the ground of opposition based on Section 12(1) (d) of the Act is successful in respect of both of the opponent's registered marks. It is therefore unnecessary to consider the remaining grounds of opposition.

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

DATED AT HULL, QUEBEC, THIS 31ST DAY OF DECEMBER 1991.

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