IN THE MATTER OF AN OPPOSITION
by Imperial Feather Corporation
(Toronto) Limited to application
No. 577,841 for the trade-mark
SUPREME DREAMS filed by
Wink Industries Ltd.

On February 9, 1987, the applicant, Wink Industries Ltd., filed an application to register the trade-mark SUPREME DREAMS based on proposed use in Canada for the following wares:

> bedding accessories, namely: pillows, comforters, duvets, cushions, sleeping bags, mattress pads, comforters that can also be worn as garments exposing only the face.

The application was advertised for opposition purposes on November 11, 1987.

The opponent, Imperial Feather Corporation (Toronto) Limited, filed a statement of opposition on December 11, 1987, a copy of which was forwarded to the applicant on January 11, 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 SWEET DREAMS registered under No. 278,181 for "bedding and linens."

The applicant filed and served a counter statement. As its evidence, the opponent filed the affidavit of Steven Mlotek. The applicant filed the affidavits of Aaron Bassel and John D. Miller. Both parties filed written arguments but no oral hearing was conducted.

As for the opponent's ground of opposition based on its registered trade-mark SWEET DREAMS, the material time for considering the circumstances respecting the issue of confusion with a registered trade-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 between the marks of the parties. 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 is inherently distinctive. However, it is not inherently strong since the words SUPREME DREAMS are somewhat suggestive of the character or quality of the applicant's wares. In his affidavit, Mr. Bassel indicates that the applicant commenced using its trade-mark and he provides a sales total for the period up to and including the date of his affidavit (April 10, 1989). However, since Mr. Bassel did not provide any breakdown of those sales by month or by year, I can only ascribe a limited portion of the total sales to the period up to and including the filing of the opposition. Thus, I must conclude that the applicant's mark had not become known at all in Canada as of the material time.

The opponent's mark is also inherently distinctive although it, too, is not inherently strong in view of the suggestive nature of the words SWEET DREAMS when used in association with wares in the nature of bedding. However, the Mlotek affidavit establishes that the opponent had effected substantial sales of its bedding products

throughout Canada for the period 1983 to 1987. I am thus able to conclude that the opponent's mark had become known throughout Canada as of the material time.

The length of time the marks have been in use clearly favors the opponent. The wares of the parties are virtually identical and presumably the trades of the parties would be the same.

The marks at issue bear a fair degree of resemblance in all respects. Both marks comprise a second component consisting of the word DREAMS and a first component commencing with the letter S. Both marks suggest the idea of pleasant dreams.

The applicant submitted that the state of the trade-marks register was a mitigating factor in the present case. In this regard, the Miller affidavit evidences five third party registered trade-marks including the word DREAM or DREAMS for beds, mattresses or bedding. Only three of those registrations cover bedding. The applicant has not evidenced any use of these third party marks in the marketplace.

It is the applicant's contention that the foregoing establishes that the word DREAM or DREAMS is a common component of trade-marks in the bedding trade. I do not agree. The existence of three (or even five) registrations does not allow me to infer that any of these marks is in use in the marketplace.

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 similarities between the wares, trades and marks of the parties and the extent to which the opponent's mark has become known, I find that the applicant has failed to satisfy the onus on it to show no reasonable likelihood of confusion. The opponent's ground of opposition based on its registered mark SWEET DREAMS is therefore 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 30th DAY OF November, 1990.

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