IN THE MATTER OF AN OPPOSITION
by Champion Feed Services Ltd. to application
No. 723,583 for the trade-mark CHAMPION &
Design filed by Feed-Rite Limited

On March 1, 1993, the applicant, Feed-Rite Limited, filed an application to register the trade-mark CHAMPION & Design (illustrated below) for "horse feed and horse feed supplement." The application is based on use of the mark in Canada since 1975 and was advertised for opposition purposes on February 2, 1994.

The opponent, Champion Feed Services Ltd., filed a statement of opposition on March 31, 1994, a copy of which was forwarded to the applicant on May 25, 1994. The first ground of opposition is that the applicant's application does not comply with Section 30(b) of the Trade-marks Act because the applicant did not use the applied for mark since the date claimed. The second ground is that the applicant is not the person entitled to registration of the applied for mark because it is confusing with the trade-mark CHAMPION and the trade-name Champion Feed Services Ltd. previously used in Canada by the opponent in association with animal feed.

The applicant filed and served a counter statement. As its evidence, the opponent submitted an affidavit of its President, Reinhard Muhlenfeld. As its evidence, the applicant filed the affidavits of Gil Carriere and James Tjaden. Only the opponent submitted a written argument and no oral hearing was conducted.

As for the opponent's first ground of opposition, the onus or legal burden is on the applicant to show its compliance with the provisions of Section 30(b) of the Act: see the opposition decision in Joseph Seagram & Sons v. Seagram Real Estate (1984), 3 C.P.R.(3d) 325

at 329-330 and the decision in John Labatt Ltd. v. Molson Companies Ltd. (1990), 30 C.P.R.(3d) 293 (F.C.T.D.). There is, however, an evidential burden on the opponent respecting its allegations of fact in support of that ground. That burden is lighter respecting the issue of non-compliance with Section 30(b) of the Act: see the opposition decision in Tune Masters v. Mr. P's Mastertune (1986), 10 C.P.R.(3d) 84 at 89. Furthermore, Section 30(b) requires that there be continuous use of the applied for trade-mark in the normal course of trade since the date claimed: see Labatt Brewing Company Limited v. Benson & Hedges (Canada) Limited and Molson Breweries, a Partnership (1996), 67 C.P.R.(3d) 258 at 262 (F.C.T.D.). Finally, the opponent's evidential burden can be met by reference to the applicant's own evidence: see Labatt Brewing Company Limited v. Molson Breweries, a Partnership (1996), 68 C.P.R.(3d) 216 at 230 (F.C.T.D.).

The Muhlenfeld affidavit establishes that the applicant previously filed an application (No. 682,486) to register the same mark that is the subject of the present application. That earlier application covered the same wares but claimed a date of first use of May 1, 1991 rather than 1975. Mr. Muhlenfeld states that his company opposed that earlier application which was subsequently abandoned.

Also of note is the specimen submitted by the applicant in support of the present application. That specimen is an advertising flyer which contains several photographs of products consisting of horse feed and horse feed supplements, none of which bears the applied for trade-mark. Some of the containers for horse feed supplements bear the design portion of the applied for mark but without the word component CHAMPION.

In view of the above, I find that the opponent has met its evidential burden respecting the first ground of opposition. It was therefore incumbent on the applicant to evidence its date of first use and continuous use of its mark since that date.

The applicant's evidence fails to satisfy its legal burden. Mr. Carriere states that he recalls the applicant launching a new line of horse feeds in 1976 and that the first feed was a "...complete horse pellet in the "Champion" bag." However, Mr. Carriere does not evidence

any sales of such a product and he does not indicate that the bag in question bore the applied for mark. More importantly, however, Mr. Carriere does not evidence any activities prior to 1976 which would support a date of first use in 1975 nor does he evidence any activities after 1976 which would support a finding that there has been continuous use of the applied for mark.

Mr. Tjaden's affidavit is equally vague. He states that the applicant launched a line of horse feed in 1976/77 "...under the general heading of "Champion"." Like Mr. Carriere, Mr. Tjaden does not evidence any sales of such a product nor does he evidence labels, invoices or the like bearing the applied for mark. Likewise, Mr. Tjaden does not evidence any activities in 1975 nor does he evidence continuous use of the applied for mark.

In view of the above, I find that the applicant has failed to satisfy the legal burden on it to evidence its claimed date of first use and continuous use of the applied for mark since that date. Thus, the first ground of opposition is successful.

As for the second ground of opposition, since the applicant has failed to support its claimed date of first use or any subsequent date of first use, it was only incumbent on the opponent to evidence use of its trade-mark or trade-name prior to the applicant's filing date which is March 1, 1993. Although the opponent has not evidenced prior use of its trade-mark CHAMPION, the Muhlenfeld affidavit does evidence prior use of the opponent's trade-name.

Thus, the second ground remains to be decided on the issue of confusion between the applied for mark and the opponent's trade-name Champion Feed Services Ltd. The material time for considering the circumstances respecting the issue of confusion is the applicant's filing date. 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(3) of the Act, consideration is to be given to all of the surrounding circumstances including those specifically set forth in Section 6(5).

As for Section 6(5)(a) of the Act, the applicant's mark for "horse feed and horse feed supplement" is inherently weak since it comprises a representation of a horse's head and the laudatory word CHAMPION. There being no evidence of use of the applicant's mark, I must conclude that it had not become known as of the applicant's filing date.

The opponent's trade-name Champion Feed Services Ltd. is also inherently weak for animal feed since the only distinctive component of the name is the laudatory word Champion. The Muhlenfeld affidavit evidences some sales of animal feed in association with the opponent's trade-name in western Canada. Thus, I can conclude that the opponent's trade-name had become known to a limited extent in that part of the country as of the material time.

The length of time the marks have been in use favors the opponent. The wares and trades of the parties are essentially the same. As for Section 6(5)(e) of the Act, there is a fair degree of resemblance between the applicant's mark and the opponent's name due to the common use of the word CHAMPION.

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 resemblance between the wares, trades and marks of the parties, 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 trade-name. The second ground is therefore also successful.

In view of the above, and pursuant to the authority delegated to me under Section 63(3) of the Act, I refuse the applicant's application.

DATED AT HULL, QUEBEC, THIS 15th DAY OF MAY, 1997.

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