

**IN THE MATTER OF AN OPPOSITION by Silver
Bridge Restaurant Ltd. to application no.
801,373 for the trade-mark CHINA HOUSE
filed by B. K. Sethi Marketing Ltd.**

On January 5, 1996, the applicant, B. K. Sethi Marketing Ltd., filed an application to register the mark CHINA HOUSE, based on proposed use in Canada, in association with the wares

food products, whether dried, preserved, packaged or processed;
and condiments, whether dried, preserved, packaged or processed.

In response to objections at the examination stage, the word CHINA was disclaimed apart from the mark as a whole, and the wares were revised to those enumerated below:

Food products, whether dried, preserved, packaged or processed, namely:

rice, namely, bastami rice, parboiled rice and long grain white rice;

beans, namely red kidney beans, black eye beans, and lima beans;

peas, namely, pigeon peas and chick peas; bamboo shoots; water chestnuts;

juices and nectars of vegetables, namely, tomatoes, parsnips, pumpkins, squashes, cucumbers, carrots, cauliflowers, celeries, cabbages, beets, and avocados;

juices and nectars of fruits, namely, watermelons, strawberries, raspberries, pineapples, plums, pears, peaches, oranges, loganberries, lemons, gooseberries, grapes, grapefruits, rhubarbs, currants cantaloupes, cranberries, cherries, blackberries, blueberries, bananas, apples, apricots, muskmelons, nectarines, and tangerines;

preserved vegetables, namely, artichokes, asparagus, kidney beans, lima beans, soya beans, navy beans, string beans, beet greens, beets, brussel sprouts, cabbages, carrots, cauliflowers, celeries, chards, corns, cucumbers, egg plants, lentils, mushrooms, okras, olives, onions, parsnips, peas, potatoes, sweet potatoes, peppers, hominies, pumpkins, radishes, rutabagas, sauerkraut, spinaches, squashes, turnips, and watercress;

coconut milk and coconut cream; and

condiments, spices, seasonings and herbs, whether dried, preserved, packaged or processed, namely, pickles and chutneys; and

spice, namely, allspice, anise, caper, apsicum, caraway, cardamon, cayenne pepper, cinnamon, clove, coriander, cubeb, curry, dill, fennel, ginger, mace, marjoram, mustard, nutmeg, paprika, pepper, sage, thyme, and turmeric, and

condiments and pungent seasonings, namely, mustard, garlic, salt, leeks, onions, shallots, poppy seeds, caraway seeds, anise, and bay leaves, and herbs, namely mint, basil, thyme, parsley, sage, tarragon, dill, cress and savory.

In the absence of any limiting or qualifying conditions on the above wares, I assume that the

applicant intends to sell its wares, under the applied for mark CHINA HOUSE, to both the wholesale and retail markets.

The subject application was advertised for opposition purposes in the *Trade-marks Journal* issue dated October 16, 1996 and was opposed by Silver Bridge Restaurant Ltd. on November 12, 1996. A copy of the statement of opposition was forwarded to the applicant on November 26, 1996. The applicant responded by filing and serving a counter statement. The opponent subsequently amended its statement of opposition and the applicant amended its counter statement in response.

The first ground of opposition alleges that the applicant is not the person entitled to register the applied for mark, pursuant to Section 16(3)(a) of the *Trade-marks Act*, because at the date of filing the application, the applied for mark CHINA HOUSE was confusing with the opponent's marks CHINA HOUSE and CHINA HOUSE TAVERN which had been previously used and made known in Canada by the opponent and its predecessor in title in association with the provision of restaurant and take-out services.

The second ground alleges that applicant is not the person entitled to register the applied for mark, pursuant to Section 16(3)(c) of the *Trade-marks Act*, because at the date of filing the application, the applied for mark CHINA HOUSE was confusing with the opponent's trade-names CHINA HOUSE and CHINA HOUSE TAVERN which had been previously used and made know in Canada by the opponent and its predecessor in title in association with the provision of restaurant and take-out services.

The third ground of opposition alleges that the applied for mark is not distinctive of the applicant's wares in view of the opponent's use of its above-mentioned trade-marks and trade-names.

The fourth ground of opposition, pursuant to Section 12(1)(d) of the *Act*, alleges that the applied for mark is not registrable because it is confusing with the opponent's mark CHINA

HOUSE TAVERN, regn. no. 485,482, covering the wares

prepared take out entrees and dishes containing meats and/or vegetables

and the services

operation of a restaurant and provision of dining services
specializing in Chinese cuisine and prepared dishes, including
provision of take-out services.

As the opponent has not evidenced its registration, I have exercised my discretion, in the public interest, to verify that registration no. 485,482 is extant: see *Quaker Oats Co. of Canada v. Menu Foods Ltd.* (1986), 11 C.P.R.(3d) 410 at 411 (TMOB).

The opponent's evidence consists of the affidavit of Kenneth W. K. Chan, President and one of the principal managers of the opponent company. The applicant elected not to file evidence in support of its application. Only the opponent filed a written argument, however, both parties attended at the oral hearing.

Each of the grounds of opposition turn on the issue of confusion between the applied for mark and one, or both, of the opponent's trade-marks or trade-names. The earliest material date to consider the issue of confusion is the date of filing of the subject application while the latest material date is the date of my decision. However, in the circumstances of this case, nothing turns on whether the issue of confusion is assessed at any particular material date.

In accordance with the usual rules of evidence, there is an evidential burden on the opponent to prove the facts inherent in the allegation that the applied for mark CHINA HOUSE is confusing with the opponent's trade-marks and trade-names. The presence of an evidential burden on a party with respect to a particular issue means that in order for the issue to be considered at all, there must be sufficient evidence from which it could reasonably be concluded that the facts alleged to support that issue exist: see *Joseph E. Seagram & Sons v. Seagram Real Estate Ltd.* (1984), 3 C.P.R.(3d) 325 at 329-30 (TMOB), and see *John Labatt Ltd. v. Molson Companies Ltd.* (1990), 30 C.P.R.(3d) 293 at 297-300 (F.C.T.D.). Mr. Chan's comprehensive evidence of use and advertising of the opponent's marks and trade-names in association with the

opponent's wares and services establishes that the opponent's marks and trade-names had, at all material times, acquired a significant reputation in the city of Toronto. Further, Mr. Chan's evidence is sufficient to meet the opponent's evidential burden in respect of each of the grounds of opposition pleaded.

The test for confusion is one of first impression and imperfect recollection. Factors to be considered, in making an assessment as to whether two marks (or a mark and a trade-name) are confusing, are set out in Section 6(5) of the *Act*: the inherent distinctiveness of the marks and the extent to which they have become known; the length of time each has been in use; the nature of the wares, services or business; the nature of the trade; the degree of resemblance in appearance or sound of the marks or in the ideas suggested by them. This list is not exhaustive; all relevant factors are to be considered. All factors do not necessarily have equal weight. The weight to be given to each depends on the circumstances: see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1996), 66 C.P.R.(3d) 308 (F.C.T.D.).

In assessing the likelihood of confusion I have considered in particular the identity or near identity of the applied for mark and the opponent's marks and trade-names, the reputation acquired by the opponent's marks and trade-names, the overlap in the parties' wares, and that the applicant has not filed any evidence to support its case. I find that, on a balance of probabilities, it is likely the public will assume the applicant's goods are approved, licensed, or sponsored by the opponent. It follows that the applied for mark is confusing with the opponent's trade-marks and trade-names:

see Glen-Warren Productions Ltd. v. Gertex Hosiery Ltd. (1990), 29 C.P.R.(3d) 7 at 12
(F.C.T.D.).

In view of the above, the applicant's application is refused.

DATED AT HULL, QUEBEC, THIS 13th DAY OF NOVEMBER, 1998.

Myer Herzig,
Member,
Trade-marks Opposition Board