



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 244

Date of Decision: 2021-11-02

IN THE MATTER OF AN OPPOSITION

2572951 Ontario Inc.

Opponent

and

**Tibet Green Tea Restaurant
Management Co., Ltd.**

Applicant

1,751,368 for Chinese Characters

Application

INTRODUCTION

[1] 2572951 Ontario Inc. (the Opponent) opposes registration of the trademark Chinese Characters (the Mark), shown below, which is the subject of application No. 1,751,368 (the Application) by Qinsong Wang (Mr. Wang or the Original Applicant):



[2] The transliteration provided for the Chinese Characters is LV CHA CAN TING and the translation of same is "Green Tea Restaurant".

[3] The Application is based on a claim of use in Canada in association with the following services (the Services) since January 5, 2015:

Business management of hotels; commercial administration of the licensing of the goods and services of others; presentation of goods on communication media, for retail purposes, namely, electronic billboard advertising of the goods and services of others; providing marketing strategies for others; Marketing services namely developing marketing strategies and marketing concepts for others; personnel management consultancy; updating and maintenance of data in computer databases; drawing up of statements of accounts; rental of vending machines; rental of sales stands

Canteens; restaurants; Accommodation bureaux namely brokering reservations for hotels and boarding houses; cafeterias; food and drink catering; hotel reservations; motels; hotels; snack-bars; rental of cooking apparatus; bar services

[4] The grounds of opposition pleaded by the Opponent are based on non-distinctiveness and on technical grounds based on non-compliance of the Application under section 30 of the *Trademarks Act*.

[5] For the reasons that follow, the opposition is rejected.

THE RECORD

[6] The Application was filed on October 21, 2015, and an assignment was subsequently recorded such that the Application currently stands in the name of Tibet Green Tea Restaurant Management Co., Ltd. (Tibet Green Tea or the Applicant).

[7] The Application was advertised for opposition purposes in the *Trademarks Journal* of February 14, 2018. On March 13, 2018, the Opponent filed a statement of opposition under section 38 of the Act. The grounds of opposition pleaded by the Opponent are based on sections 30(a), 30(b), 30(i), 30(g), and 2 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). As the Act was amended on June 17, 2019, all references in this decision are to the Act as amended, with the exception of references to the grounds of opposition (see section 70 of the Act, which provides that section 38(2) of the Act as it read prior to June 17, 2019 applies to applications advertised before this date).

[8] The Applicant filed and served a counter statement denying the grounds of opposition.

[9] In support of its opposition, the Opponent filed the affidavit of Manlin Xi (sworn September 4, 2018), a director and shareholder of the Opponent. Tibet Green Tea elected not to file any evidence. Neither party filed written representations, and no hearing was held.

LEGAL ONUS AND EVIDENTIAL BURDEN

[10] The Applicant bears the legal onus of establishing, on a balance of probabilities, that the Application complies with the requirements of the Act. However, the Opponent must first adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support each ground of opposition exist [*John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Dion Neckwear Ltd v Christian Dior, SA et al* (2002), 20 CPR (4th) 155 (FCA)].

PRELIMINARY REMARKS

[11] In the absence of written representations and a hearing, it is difficult to assess the position of each party in the context of an adversarial process. It is not up to the Registrar to envision all possible arguments that each party could raise under a specific ground of opposition. With this in mind, I shall limit my analysis of the grounds of opposition raised by the Opponent to those that are directly in line with the evidence filed, and will refer only to those portions of the evidence that are relevant.

[12] Further, to the extent that the Opponent's evidence contains argument or opinion, I have disregarded it. I also note that requests in the Opponent's affidavit that I access the internet to view certain social media platforms (Facebook and Instagram) cannot be complied with, since in opposition proceedings, the Registrar will have regard only to certain limited subject matter in the absence of it properly being proven in evidence (such as a dictionary definition).

ANALYSIS OF THE GROUNDS OF OPPOSITION

Section 2 ground of opposition

[13] The Opponent has pleaded that the Mark is not distinctive because it is not capable of distinguishing the Applicant's Services from the goods and services of others, including the Opponent. The Opponent alleges that it has used the trademark GREEN TEA RESTAURANT and its equivalent in Chinese characters in association with restaurant services in Canada since at least as early as 2017.

[14] For the ground of opposition pleaded under section 2, there is an initial burden on the Opponent to establish that as of the date of filing of the opposition (March 13, 2018), its trademark or trade name was known to a sufficient extent that could negate the distinctiveness of the Mark [*Bojangles' International LLC v Bojangles Café Ltd* (2006), 48 CPR (4th) 427 (FC)]. To do so, the Opponent must establish that its trademark is either known to some extent in Canada or is well known in a specific area of Canada [*Bojangles* at paras 33-34].

[15] As previously indicated, the Opponent's evidence consists of the affidavit of Ms. Manlin Xi. Ms. Xi explains that the Opponent operates a restaurant under the name Green Tea Restaurant in Markham, Ontario, and that she is also a manager of the restaurant. Ms. Xi states that the Opponent has used the trademarks GREEN TEA RESTAURANT and GREEN TEA and the Chinese characters equivalent in association with restaurant services in Canada since at least as early as 2017.

[16] Ms. Xi states that the Green Tea Restaurant is a full-size fine dining establishment that currently seats 120 guests. Exhibit A contains copies of photographs showing the exterior of the Opponent's restaurant featuring signage bearing the trademark GREEN TEA RESTAURANT and the Chinese characters equivalent. Exhibit C contains copies of the Opponent's menu displaying the trademarks GREEN TEA and the Chinese characters equivalent. Exhibit B is a copy of the Opponent's business license for 2018.

[17] Ms. Xi states that since its opening "in 2017", the Opponent's Green Tea Restaurant has achieved an excellent reputation. In support, Ms. Xi notes that as of August 27, 2018:

- on the Google Canada website *google.ca*, the Green Tea Restaurant garnered at least 163 customer reviews with an average of 3.6 out of 5 stars. Exhibit D is a screen shot with information on the Green Tea Restaurant on the Google Canada website. In the body of her affidavit, Ms. Xi reproduces five (undated) customer reviews that she indicates are from the Google Canada website.
- The Green Tea Restaurant garnered a rating of 3 out of 5 stars based on 78 reviews on the crowd-sourced review website Yelp at *www.yelp.ca*. Exhibit E is a printout displaying

five customer reviews on Yelp website, two of which are dated December 2017. The remaining reviews fall outside the material date.

- The Green Tea Restaurant garnered a rating of 3.8 out of 5 stars based on 9 (undated) reviews on the social networking platform Facebook. I note that no printouts from Facebook are provided.
- Ms. Xi also refers to “hundreds of photographs” taken at the Green Tea Restaurant and posted by users on the social networking platform Instagram. However, no further details or exhibits are provided.

[18] I find that Ms. Xi’s evidence fails to establish that as of the date of filing of the opposition (March 13, 2018), its trademarks were known to some extent in Canada or well known in a specific area of Canada. Leaving aside the hearsay issues, much of the evidence of customer reviews, which is itself very minimal, cannot be taken into account as it is either undated or falls outside the material date. While Ms. Xi indicates that the Opponent’s restaurant opened in 2017, there is no indication of the month of opening. The two customer reviews (dated December 2017) that pre-date the material date suggest that the restaurant opened in December 2017. Coupled with the 2018 business license, it would appear that as of the material date, the Opponent’s restaurant had not been in operation for any significant period of time. Moreover, no evidence of sales figures or advertising expenditures have been provided, making it difficult to get a sense of the number of customers that may have visited the restaurant or encountered advertising for it.

[19] Accordingly, the Opponent has failed to meet its initial burden and this ground of opposition is rejected.

Section 30(a) ground of opposition

[20] The Opponent has pleaded that contrary to sections 38(2)(a) and 30(a) of the Act, the Application does not contain a statement in ordinary commercial terms of the specific goods or services in association with which the Mark has allegedly been used or is proposed to be used.

[21] The Opponent bears the initial burden, and there is nothing in the Opponent's evidence that addresses this issue. In the absence of evidence, written or oral representations on this issue, I find that the Opponent has not met its initial burden. Accordingly, this ground of opposition is rejected.

Section 30(b) ground of opposition

[22] The Opponent has pleaded that contrary to sections 38(2)(a) and 30(b) of the Act, at the date of filing of the Application (the material date), the Original Applicant had not used the Mark as alleged, or at all, or had subsequently abandoned the Mark. More particularly, the Opponent alleges the following:

“...The applicant Qinsong Wang who lives in China alleges in the trademark application that he/she had used the trademark in Canada since January 5, 2015 in association with the Services. It is submitted that the applicant (Qinsong Wang) had not used the Mark as alleged, or at all, or had subsequently abandoned the Mark in Canada. If the applicant had indeed used the Mark in Canada with any of the services, then he/she should have had at least an address for an office or a place of business in Canada. In the Application, the applicant did not provide any business address in Canada. Instead, the applicant's address is in a residential apartment building in Zhejiang Province, China.”

[23] The evidential burden on an opponent respecting the issue of an applicant's non-compliance with this section of the Act is a light one [*John Labatt Ltd v Molson Companies Ltd.* (1990), 30 CPR (3d) 293 (FCTD) at 298; *Corporativo de Marcas GJB, SA de CV v Bacardi & Company Ltd*, 2014 FC 323 at paras 33-38]. If an opponent meets its evidential burden, an applicant must prove, on a balance of probabilities, that it has used the trademark as of the date claimed.

[24] The Opponent has filed evidence to attempt to meet its burden. Specifically, Ms. Xi states that she “conducted searches online using the Google search engine” and could not find any evidence that the Original Applicant has:

- used the Mark in association with the alleged Services in Canada.
- had any business address in Canada.
- operated any restaurant or any of the alleged businesses in Canada.

[25] Ms. Xi states that she conducted similar searches with respect to Tibet Green Tea, and could not find any evidence that Tibet Green Tea has any business address in Canada or has operated any restaurant or any of the other alleged businesses in Canada. Ms. Xi also conducted a search of the Corporations Canada website to try to locate a listing for Tibet Green Tea. Her search for federal corporations (attached as Exhibit F) yielded no results. In addition, Ms. Xi states that she conducted searches of the British Columbia Corporate Registry and the Alberta Business Registry Database online and located no results (no search results attached). Further, Ms. Xi called the Ontario Corporate Registry and was advised by a customer service representative (by phone) that he could not find Tibet Green Tea in the Ontario Corporate Register Database.

[26] As Ms. Xi has provided no indication of when her Google searches were performed and the precise parameters of the searches, and as no copies of the search results are provided, these findings are of no probative value. Similarly, the corporate registry searches are not particularly helpful as the dates of the searches are not provided, Ms. Xi did not actually perform one of the searches (the Ontario search results that she refers to came from an unnamed customer service representative that she spoke with by phone), and only a copy of the Federal Corporate search results are provided.

[27] That said, even assuming that the Original Applicant was not physically based in Canada at the material date, this does not necessarily lead to the conclusion that the Original Applicant had not used the Mark as of the claimed date of January 5, 2015. For instance, the Mark could have been used by the Original Applicant through a licensee. In this regard, I note that section 30(b) of the Act does not require an applicant to specify whether the trademark has been used by the applicant itself or by a licensee. Further, the Opponent has adduced no evidence from which I could infer that no licensing arrangement was in place at the material date. For the same reason, assuming that Tibet Green Tea is not physically based in Canada, this does not in and of itself support an allegation that it has not continuously used the Mark. Accordingly, this ground of opposition is rejected.

Section 30(i) ground of opposition

[28] The Opponent has pleaded the Application does not comply with sections 38(2)(a) and 30(i) of the Act in that neither the Original Applicant nor the assignee (and current owner) Tibet Green Tea could have been satisfied that he or she or it was entitled to use the Mark in Canada in association with the Services. The Opponent alleges that “additionally, the trademark assignment document submitted by the individual applicant (Qinsong Wang) to CIPO is improper and invalid, at least because the applicant had not used the Mark as alleged in the Application, or at all, or had subsequently abandoned the Mark in Canada”.

[29] Where an applicant has provided the statement required by section 30(i) in its application, a ground of opposition based upon this section should only succeed in exceptional cases such as where there is evidence of bad faith on the part of an applicant [*Sapodilla Co Ltd v Bristol-Myers Co* (1974), 15 CPR (2d) 152 (TMOB) at 155]. At the date of filing of the Application, the Original Applicant provided the necessary statement, and the Opponent has not filed any evidence to demonstrate that this is an exceptional case. I do not consider the alleged impropriety and invalidity of the assignment to be a factor impacting the Original Applicant’s satisfaction of its entitlement to use the Mark at the date of filing the application (October 21, 2015) as the assignment, dated May 24, 2017, falls outside the material date (that is, the date of filing of the Application) and does not appear to be a retroactive assignment (Xi affidavit, Exhibit G, which consists of a copy of the file history for the Application including the assignment document). Accordingly, this ground of opposition is rejected.

Section 30(g) ground of opposition

[30] The Opponent has pleaded that the Application does not comply with sections 38(2)(a) and 30(g) of the Act in that the Original Applicant had no office or place of business in Canada, and the appointed Canadian representative for service Global IP Law Ltd. does not exist. The Opponent further alleges that the address for the non-existent representative for service is merely a virtual office address.

[31] Section 30(g) of the Act requires the applicant to provide the address of its principal office or place of business in Canada, if any, and if the applicant has no office or place of

business in Canada, the address of its principal office or place of business abroad. In the subject Application, the Original Applicant has provided the address of its principal office or place of business abroad. The Opponent has introduced no evidence establishing that this is not the case.

[32] With respect to the allegations regarding Global IP Law Ltd. (the Representative for service at the date of filing of the Application) not being in existence, I assume that the Opponent has attempted to establish this through Ms. Xi's search of the Federal Corporate register which yielded no result for Global IP Law Ltd. (Xi affidavit, Exhibit H), and a confirmation by phone by a customer service representative at the Ontario corporate register that he (the representative) could not find Global IP Law Ltd. in the Ontario corporate register database. However, as the results of the Ontario corporate search are hearsay, I am not giving any weight to it considering that the Opponent has provided no explanation as to why it is necessary and reliable hearsay evidence. Further, there is nothing in the evidence to suggest that this entity does not constitute a firm.

[33] Regarding the allegation that the address affiliated with Global IP Law Ltd. is simply a "virtual office address", Ms. Xi states that the Toronto, Ontario address listed in the Application corresponds to a virtual address operated by Telsec, a company that offers mail forwarding services. Included as Exhibit I is an undated printout titled "Telsec Business Centres Virtual Office Solutions" which describes virtual office solutions including mail and phone service. However, this printout comprises hearsay evidence. In any event, the address listed appears to be a complete address. Based on the foregoing, the Opponent has not met its initial burden and this ground of opposition is rejected.

[34] The Opponent has included as a further allegation that the Application and related correspondence to CIPO appears to have been filed by an entity known as Beijing Fu Tian International IP Agency Co., Ltd (Beijing FuTian) located in Beijing, China, which the Opponent alleges can be seen by reviewing the complete file of the Application at CIPO (Exhibit G, Xi affidavit). The Opponent alleges that Beijing FuTian is not a trademark agent or firm authorized by CIPO, and so because the Application was filed neither by the Original Applicant himself nor by an authorized trademark agent/firm, the entire Application is invalid.

[35] In my view, an allegation that the Application was not filed by a person authorized to act contrary to the *Trademarks Regulations* is not a proper ground of opposition under section 30 of the Act [see by analogy *Effigi Inc v ZAM Urban Dynamics Inc*, 2010 TMOB 214 at para 50 where a pleading that an application does not conform to section 30 of the Act as it was amended contrary to section 31(e) of the *Trademarks Regulations* was held not to be a proper ground of opposition].

DISPOSITION

[36] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

Jennifer Galeano
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE: No hearing held

AGENTS OF RECORD

Yunwei (Edmund) Xie

For the Opponent

Miltons IP/P.I.

For the Applicant