



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2011 TMOB 194
Date of Decision: 2011-10-18

**IN THE MATTER OF AN OPPOSITION
by Fuji Television Network, Inc. to
application No. 1,303,714 for the trade-
mark IRON CHEF in the name of
Ramesh Suri**

[1] On June 1, 2006, Ramesh Suri (the Applicant) filed an application to register the trade-mark IRON CHEF (the Mark) based on use in Canada since June 1, 2006 in association with “bar-be-que (designed and built for kitchen); stainless steel backsplash for any kitchen”, as amended (the Wares).

[2] The application was advertised for opposition purposes in the *Trade-marks Journal* of March 14, 2007.

[3] On August 14, 2007, Fuji Television Network, Inc. (the Opponent) filed a statement of opposition. The grounds of opposition can be summarized as follows:

- non-compliance with s. 30(b) of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) on the basis that the Applicant has not actually used the Mark in Canada since June 1, 2006 as claimed in the application.
- the Applicant is not entitled to registration of the Mark pursuant to s. 16(1)(a) of the Act since at the claimed date of first use, the Mark was confusing with the Opponent’s trade-mark IRON CHEF which had been previously used in Canada in association with a television program featuring cooking competitions; kitchen related products, including knives, mugs and glasses; clothing and food products.

- the Mark is not distinctive in that it is not adapted to distinguish the Wares from those of the Opponent.

[4] The Applicant served and filed a counter statement in which it denied the Opponent's allegations and put the Opponent to the strict proof thereof.

[5] In support of its opposition, the Opponent filed an affidavit of Yukio Sonobe, sworn May 15, 2008 with Exhibits A-C as its evidence pursuant to r. 41 of the *Trade-marks Regulations* SOR/96-195 (the Regulations). Mr. Sonobe was not cross-examined on his affidavit. Mr. Sonobe is the Senior Director of Fuji Creative Corporation (FCC), an entity which is generally responsible for licensing and merchandising trade-marks owned by the Opponent.

[6] In support of its application, the Applicant filed the affidavit of Ramesh Suri, sworn December 29, 2008 with Exhibits A – E. Mr. Suri was not cross-examined on his affidavit. Mr. Suri, is President and Owner of Swift Canada Inc. (Swift), he is also the Applicant. Mr. Suri states that Swift was incorporated in British Columbia on November 4, 2002 and is in the business of designing, manufacturing, distributing, marketing and selling kitchen appliances and products, namely, “natural gas barbecues, propane barbecues, natural gas and propane barbecues, ceramic electric cook tops, coil element electric cook tops, copper backsplash, stainless steel backsplash and garbage bins”. In his affidavit, Mr. Suri states that he, the Applicant, “came up with” the Mark and licensed it to Swift for use in Canada. Mr. Suri states that most of Swift's products are sold under the SWIFT trade-mark but that Swift's premium line of products are sold under the Mark.

[7] The Applicant filed an amended application revising the Wares as set out above, on March 16, 2010. The amended application was accepted on April 26, 2010.

[8] Both parties filed written arguments. An oral hearing was held at which only the Opponent was represented.

Onus and Material Dates

[9] The Applicant bears the legal onus of establishing, on a balance of probabilities, that its application complies with the requirements of the Act. However, there is an initial evidential burden on the Opponent to adduce sufficient admissible evidence from which it could reasonably

be concluded that the facts alleged to support each ground of opposition exist [see *John Labatt Limited v. The Molson Companies Limited* (1990), 30 C.P.R. (3d) 293 (F.C.T.D.) at 298].

[10] The material dates that apply to the grounds of opposition are as follows:

- s. 38(2)(a)/30(b) - the date the application was filed [see *Georgia-Pacific Corp. v. Scott Paper Ltd.* (1984), 3 C.P.R. (3d) 469 at 475 (T.M.O.B.) and *Tower Conference Management Co. v. Canadian Exhibition Management Inc.* (1990), 28 C.P.R. (3d) 428 at 432 (T.M.O.B.)].
- s. 38(2)(c)/16(1)(a) - the claimed date of first [see s. 16(1) of the Act].
- s. 38(2)(d)/2 - the date of filing of the opposition [see *Metro-Goldwyn-Mayer Inc. v. Stargate Connections Inc.* (2004), 34 C.P.R. (4th) 317 (F.C.)].

Section 30(b) Ground

[11] The Opponent may rely on the Applicant's evidence to meet its initial burden in relation to this ground [see *Molson Canada v. Anheuser-Busch Inc.*, (2003), 29 C.P.R. (4th) 315 (F.C.T.D.), and *York Barbell Holdings Ltd. v. ICON Health and Fitness, Inc.* (2001), 13 C.P.R. (4th) 156 (T.M.O.B.)]. However, the Opponent is under an obligation to show that the Applicant's evidence is "clearly inconsistent" with the Applicant's claims as set forth in its application [see *Ivy Lea Shirt Co. v. 1227624 Ontario Ltd.* (1999), 2 C.P.R. (4th) 562 at 565-6 (T.M.O.B.), *aff'd* 11 C.P.R. (4th) 489 (F.C.T.D.)].

[12] In his affidavit, Mr. Suri states that Swift's first presence in the Canadian marketplace was its participation in a Home and Garden Show in Vancouver B.C. in February 2004. Mr. Suri states that around 2005 Swift began marketing products in association with the Mark and sending samples to distributors. Mr. Suri states that sales of the products sold under the Mark began in late 2005 with increased sales in 2006 and onwards.

[13] Mr. Suri states that in May 2005 and April 2006 Swift exhibited barbecues and backsplashes in association with the Mark at the Kitchen and Bath Industry Show and Conference in Las Vegas, Nevada and Chicago, Illinois, respectively.

[14] Mr. Suri states that the Mark is marked on products in one of two ways, either: stamped on the product itself or marked on a sticker which is then attached to the product. For example,

Mr. Suri states that the Mark is stamped in the metal of Swift's barbecues. Mr. Suri attaches to his affidavit a photograph of a barbecue which shows the Mark stamped into the lid (Exhibit B). Mr. Suri states that for the backsplashes, a sticker bearing the Mark is attached to the backsplash. Mr. Suri provides a copy of a page of stickers bearing the Mark (Exhibit C) as well as photographs of a kitchen display in Swift's Richmond, B.C. store (Exhibit D) showing how the stickers displaying the Mark are attached to the backsplashes in the lower right hand corner. I note that due to the poor quality of the photocopy I have been provided, I am unable to see the Mark in the photograph. That said, I am willing to accept Mr. Suri's statements that the Mark is displayed on the Wares.

[15] Mr. Suri states that the Mark is also used in identifying the Wares in invoices issued to customers. Mr. Suri attaches to his affidavit representative invoices for sales from 2005-2008 (Exhibit E). I note that Mark is used in the descriptions of the products listed in each of the invoices.

[16] I note that the invoices provided by the Applicant evidence sales made by Swift, not the Applicant. In his affidavit, Mr. Suri states that he has licensed the use of the Mark to Swift. The Opponent is correct in submitting that the Applicant has failed to provide any evidence of details regarding this license or any evidence of the degree of care and control being exercised by the Applicant over the character or quality of the Wares. That said, however, the Applicant operates as the President and Owner, and presumably controlling mind, of Swift, the licensee. As a result, an inference can be made that the Applicant has control over the character or quality of the Wares. In this regard, I rely on the case *Petro-Canada v. 2946661 Canada Inc.* (1998), 83 C.P.R. (3d) 129 (F.C.T.D.). Based on the foregoing, I am satisfied that the Applicant may rely on sales made by Swift as inuring to it.

[17] The Applicant has provided the following relevant invoices which the Applicant alleges evidence sales of the Wares prior to the claimed date of first use:

- a. September 22, 2005 for "IRON CHEF CHARCOL BARBQUE" (the September Invoice);
- b. January 16, 2006 for "IRON CHEF EURO 36 N/P" (the January Invoice);

- c. February 6, 2006 for “IRON CHEF COAL BBQ (SAMPLES)” (the February 6 Invoice);
- d. February 10, 2006 for “IRON CHEF BACKSPLASH” (the February 10 Invoice);
- e. March 22, 2006 for “IRON CHEF ‘Wave’ Pattern Wallsplash” (the March Invoice); and
- f. May 31, 2006 for “IRON CHEF 54” x 28” Wave Pattern Wallsplash” (the May Invoice).

[18] The Opponent raises a number of technical objections to these invoices, as follows:

- a. With respect to the September and February 6 Invoices, the Opponent points out that the barbecues listed in the invoices are “charcoal” or “coal” and that such barbecues would not be meant for indoor use, as suggested by the Wares (“bar-be-que (designed and built for kitchen)”). Based on this observation, the Opponent submits that these invoices do not evidence sales of the Wares. I am not convinced that the Opponent’s technical objection to these invoices, in the absence of supporting evidence, is sufficient to support a finding that these invoices are clearly inconsistent with a claim to use of the Mark in association with the Wares.
- b. With respect to the January Invoice, the Opponent submits that the nature of the wares identified in this invoice is not clear and thus it cannot evidence sales of the Wares. I agree with the Opponent’s submission and find that this invoice cannot be used to support the Applicant’s claimed first use date.
- c. With respect to the March and May Invoices, the Opponent submits that the use of the term “wallsplash” as opposed to “backsplash”, as identified in the Wares and as used in other invoices, renders these invoices incapable of evidencing sales of the “stainless steel backsplash for any kitchen” identified in the Wares. I do not agree with the Opponent’s submission. There is no reason, based on a review of the evidence as a whole, to find that “wallsplash” means anything other than “backsplash”.

- d. With respect to the February 6 Invoice, the Opponent submits that the use of the word “Samples” in the description of the wares and the corresponding price of the claimed barbecue being \$5 suggests that this invoice does not evidence a sale of an actual barbecue. I agree with the Opponent’s submissions and find that this invoice cannot be used to support the Applicant’s claimed date of first use.
- e. Finally, with respect to the September, February 6 and 10 and May Invoices, the Opponent submits that the fact that the customers were located in the United States renders these invoices incapable of evidencing use of the mark in Canada. In its written argument, the Opponent submits that since the sales represented by these invoices “were made in the United States, and made by the Applicant itself, they do not fall within the s. 4(3) definition of deemed use”. I do not agree. At the oral hearing, the Opponent clarified that its submission was that these invoices could not evidence deemed use pursuant to s. 4(3) of the Act as there was no evidence suggesting that these invoices were delivered with the wares. I am not persuaded by this submission either as I have been provided with evidence that the Wares themselves are marked with the Mark. Ultimately, I am satisfied that these invoices, when viewed in association with the remainder of the Suri affidavit, could qualify as evidence of use of the Mark pursuant to s. 4(3) of the Act.

[19] I am not satisfied that the Opponent’s objections to the invoices are sufficient to render the Applicant’s evidence clearly inconsistent with the claimed date of first use for the Wares. Specifically, I find that the Applicant has provided an invoice evidencing sales of barbecues (September Invoice) and three invoices evidencing sales of backsplashes (February 10, March and May Invoices). When these invoices are viewed in association with the remainder of the Suri affidavit, I find that they are sufficient to support the Applicant’s claim to use of the Wares since June 1, 2006.

[20] Based on the foregoing, the ground of opposition based on s. 30(b) of the Act is dismissed as a result of the Opponent’s failure to meet its evidential burden.

Non-entitlement Ground – Section 16(1) of the Act

[21] Despite the onus of proof on the Applicant to establish, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's IRON CHEF trade-mark, the Opponent has the initial onus of proving that the trade-mark alleged in support of its ground of opposition based on s. 16(1) of the Act was used in Canada prior to the Applicant's claimed date of first use (June 1, 2006) and had not been abandoned at the date of advertisement of the application for the Mark (March 14, 2007) [s. 16(5) of the Act].

[22] In his affidavit, Mr. Sonobe states that the Opponent produces a television program entitled IRON CHEF which has aired in Japan since October 1993 and an English-dubbed version which has aired in Canada since 1999. Mr. Sonobe explains that the television program features two chefs who cook a series of dishes which are judged at the end of the show. The chefs are given one hour to complete as many dishes as possible, all of which must include a "secret" food ingredient which is unveiled at the beginning of each show. Approximately 300 episodes of the original IRON CHEF television program were produced. Mr. Sonobe states that the last new episode of the IRON CHEF television program aired in Japan in September 1999 but that re-runs of these original episodes have been aired on The Food Network Canada since 1999.

[23] In addition to the original IRON CHEF television program, since January 2005, a new television program entitled IRON CHEF AMERICA has been produced under license from the Opponent and has aired on The Food Network Canada.

[24] Mr. Sonobe states that each of the IRON CHEF television programs prominently feature the IRON CHEF trade-mark.

[25] Mr. Sonobe attaches documentary evidence in support of his claims regarding the availability of the IRON CHEF television programs in Canada.

[26] Firstly, Mr. Sonobe attaches to his affidavit a bundle of documents which he states demonstrate the current availability of The Food Network Canada in major markets across Canada (Exhibit A). Mr. Sonobe provides printouts from the TV Guide website for Toronto, Montreal, Vancouver, Ottawa, Calgary, Edmonton, Quebec City, Winnipeg, Halifax and Victoria

which were printed on May 2, 2008. All of these print outs show The Food Network Canada as an available network in each of these jurisdictions. Furthermore, I note that in each of these jurisdictions, with the exception of Toronto, the IRON CHEF AMERICA television program is listed as airing on The Food Network Canada in the portion of the schedule which has been printed. I note that Internet evidence of this nature constitutes hearsay [see *Candrug Health Solutions Inc. v. Thorkelson* (2007), 60 C.P.R. (4th) 35 (F.C.T.D.), reversed (2008), 64 C.P.R. (4th) 431 (F.C.A.)].

[27] Secondly, Mr. Sonobe attaches to his affidavit a bundle of reports from Nielsen Media Research which he states evidences the airtimes for the IRON CHEF and IRON CHEF AMERICA television programs in Canada from 2001 to the date of swearing his affidavit (Exhibit B). Having been prepared by a third party, this airtime data is hearsay [see *R. v. Khan*, [1990] 2 S.C.R. 531].

[28] Although much of the evidence provided by Mr. Sonobe is hearsay, I am willing to place some weight on it for the following reasons. Firstly, I note that the data provided in both the TV Guide website printouts and the Nielsen Media Research charts are not in contradiction with each other for the year 2008 (the only overlapping year). Furthermore, I note that Mr. Sonobe was not cross-examined on his affidavit. Lastly, I note that the Applicant has not adduced any evidence which contradicts a finding that the IRON CHEF television program has been available in Canada since 1999. In the absence of cross-examination, and where it is not contradicted by the Applicant's evidence, I am prepared to accept Mr. Sonobe's testimony as I see no reason to doubt Mr. Sonobe's sworn statements that the Opponent has aired the IRON CHEF and IRON CHEF AMERICA television programs in Canada on The Food Network Canada since 1999 and 2005, respectively.

[29] Based on the foregoing, I am satisfied that the Opponent has offered a television cooking program in association with the IRON CHEF trade-mark in Canada since 1999.

[30] With respect to the kitchen-related wares alleged to have been sold by the Opponent in association with the IRON CHEF trade-mark I note that Mr. Sonobe states that given the popularity of the Opponent's IRON CHEF and IRON CHEF AMERICA television programs which feature cooking contests, it was natural for the Opponent to sell and license others to sell

food and cooking related wares. Mr. Sonobe states that all of these wares were marketed and sold in association with the IRON CHEF trade-mark.

[31] More specifically, Mr. Sonobe states that the wares sold in association with the IRON CHEF trade-mark include: cutlery, carving knives; chefs' knives; flatware, namely, forks, knives and spoons; clothing, namely aprons, t-shirts and sweatshirts; food products, namely salad dressings, sauces, vinegars, pastas, spices, chocolate; gift baskets comprised primarily of sauces, chocolates, pasta, and spices; computer software for video and computer games in the field of cooking and cooking instructions; and computer peripherals (the Opponent's Wares). Mr. Sonobe attaches to his affidavit photocopies of photographs of some of these wares and their packaging showing the IRON CHEF trade-mark (Exhibit C). I note that the quality of the photocopies provided is in some cases so poor that I am unable to determine the nature of the wares in the photographs. That said, I have been provided with clear photocopies for the following wares, all of which display the IRON CHEF trade-mark either on the wares themselves or their packaging: knives, knife sets, glasses, sauces, soup mixes, DVDs, t-shirts, hats and aprons.

[32] Mr. Sonobe states that according to the business records of FCC, IRON CHEF kitchen-related items like knives, mugs, glasses and food products have been shipped to and sold in Canada. Mr. Sonobe states that additional souvenir clothing bearing the IRON CHEF mark has also been shipped to Canada. Mr. Sonobe states that thousands of such items have been sold to Canadians. I note that Mr. Sonobe has not provided any dates, detailed sales figures or invoices to support this statement.

[33] Mr. Sonobe states that the Opponent has established substantial goodwill for its IRON CHEF trade-mark as a result of the IRON CHEF and IRON CHEF AMERICA television programs. Mr. Sonobe states that given that these are cooking competitions, it would be natural for consumers of cooking related wares and services, such as kitchen appliances, to assume that cooking related wares marked with the IRON CHEF mark originate with or are authorized by the Opponent as the producer of the IRON CHEF television program. I will not refer to or place any weight on these statements made by Mr. Sonobe which constitute opinions on issues that go to the merit of the opposition [see *British Drug Houses Ltd. v. Battle Pharmaceuticals* (1944), 4

C.P.R. 48 at 53 and *Les Marchands Deco Inc. v. Society Chimique Laurentide Inc.* (1984), 2 C.P.R. (3d) 25 (T.M.O.B.).

[34] While there are a number of deficiencies in the Opponent's evidence, as highlighted above, I am ultimately satisfied that the Opponent has established use of the IRON CHEF trade-mark in Canada prior to the claimed date of first use for the Mark and non-abandonment as of the date of advertisement of the application for the Mark. Based on the foregoing, I am satisfied that the Opponent has met its evidential burden. I must now assess whether the Applicant has met its legal burden.

[35] The test for confusion is one of first impression and imperfect recollection. Section 6(2) of the Act indicates that use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

[36] In applying the test for confusion, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in s. 6(5) of the Act, namely: (a) the inherent distinctiveness of the trade-marks and the extent to which they have become known; (b) the length of time each has been in use; (c) the nature of the wares, services or business; (d) the nature of the trade; and (e) the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them. These enumerated factors need not be attributed equal weight. [See, in general, *Mattel, Inc. v. 3894207 Canada Inc.* (2006), 49 C.P.R. (4th) 321 (S.C.C.).]

[37] In most instances, the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested is the dominant factor and other factors play a subservient role in the overall surrounding circumstances [see *Beverly Bedding & Upholstery Co. v. Regal Bedding & Upholstery Ltd.* (1980), 47 C.P.R. (2) 145, conf. 60 C.P.R. (2d) 70 (F.C.T.D.)].

[38] Recently, in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 96 C.P.R. (4th) 361 (S.C.C.), the Supreme Court of Canada discussed the importance of the s. 6(5)(e) factor in

conducting an analysis of the likelihood of confusion between the parties' marks in accordance with s. 6 of the Act (see para 49):

...the degree of resemblance, although the last factor listed in s. 6(5), is the statutory factor that is often likely to have the greatest effect on the confusion analysis ... if the marks or names do not resemble one another, it is unlikely that even a strong finding on the remaining factors would lead to a likelihood of confusion. The other factors become significant only once the marks are found to be identical or very similar... As a result, it has been suggested that a consideration of resemblance is where most confusion analyses should start...

[39] Under the circumstances of the present case, I consider it appropriate to analyse the degree of resemblance between the parties' marks first.

Section 6(5)(e) – the degree of resemblance between the trade-marks in appearance or sound or in the ideas suggested by them

[40] The parties' marks are identical and as a result this factor overwhelmingly favours the Opponent.

[41] Having found that the parties' marks are identical, I must now assess the remaining relevant surrounding circumstances to determine whether any of these other factors are significant enough to shift the balance of probabilities in favour of the Applicant [see *Masterpiece, supra* at para 49].

Section 6(5)(a) – the inherent distinctiveness of the trade-marks and the extent to which they have become known

[42] Both parties' marks are suggestive of the nature of the parties' wares since both parties' wares, and the Opponent's television programs, relate to cooking. Given that the marks are identical, I assess the inherent distinctiveness as being the same.

[43] The strength of a trade-mark may be increased by means of it becoming known in Canada through promotion or use. I will now turn to the extent to which the trade-marks have become known in Canada.

[44] While the Applicant has provided some evidence demonstrating that the Applicant has sold barbecues and backsplashes in association with the Mark, I have not been provided with any

sales figures or other evidence to enable me to make a determination on the extent to which the Mark has become known.

[45] While the Opponent has provided evidence demonstrating that the Opponent has offered television programs in association with the IRON CHEF and IRON CHEF AMERICA trade-marks in Canada since 1999 and 2005, respectively, and has sold licensed kitchen-related wares, there is no evidence of record establishing the extent to which the Opponent's television programs have been viewed by Canadians or sales figures for the Opponent's Wares. As a result, I am unable to come to any conclusion regarding the extent to which the Opponent's IRON CHEF trade-mark has become known.

Section 6(5)(b) – the length of time each has been in use

[46] The Applicant has sold the Wares in association with the Mark in Canada since 2005.

[47] The Opponent has aired television programs in Canada since approximately 1999 and offered kitchen-related wares for sale since sometime after that.

Section 6(5)(c)– the nature of the wares

[48] The Applicant submits that the Wares are “specialized kitchen products” and thus not the type of products that one would expect to find as “spin off merchandising” from a television cooking program. I am not satisfied that there is sufficient evidence of record to support the Applicant's submission on this point. Specifically, I have not been provided any evidence regarding what types of wares would be expected to be “spin off merchandising” from a television cooking program. As a result, I am disregarding the Applicant's submission on this point.

[49] While the parties' wares are not identical, both parties' wares relate to cooking and the kitchen. Based on the foregoing, I find that there is some similarity in the nature of the parties' wares.

[50] With respect to the Opponent's television program services, obviously these differ in nature from the Wares, however, in light of the direct connection to cooking and the kitchen, I find that there is some relationship between the Opponent's services and the Wares.

Section 6(5)(d) – nature of the trade

[51] With respect to the nature of the parties' trades, the Applicant submits that customers shopping for the Wares would be "careful shoppers" who take time to review the products in the marketplace before making their purchases and that this would decrease the likelihood of confusion between the parties' marks.

[52] The Supreme Court recently commented on the issue of the sophisticated consumer in *Masterpiece Inc. v. Alavida Lifestyles Inc.* (2011), 96 C.P.R. (4th) 361 (S.C.C.) where Justice Rothstein stated that the fact that wares are expensive is not a relevant factor and not something that should limit trade-mark protection. The test for confusion is one of first impression [*Polo Ralph Lauren Corp. v. United States Polo Assn.* (2000), 9 C.P.R. (4th) 51 (F.C.A.)]. Any subsequent steps taken by sophisticated consumers in an attempt remedy any such first instance confusion are irrelevant [by analogy see paragraphs 68-74 of *Masterpiece, supra*].

[53] The Applicant submits that the Wares are sold through Swift's store in Richmond B.C. and online through Swift's website (Suri affidavit, paras 3, 6). The Opponent provides a television program and sells licensed kitchen-related products. The Opponent has not provided evidence regarding the channels of trade through which the Opponent's Wares are sold.

[54] The Applicant submits that the parties' wares would be sold in different stores or in different sections if sold in the same stores.

[55] Given the Applicant's current channels of trade, it appears unlikely that the parties' channels of trade would overlap. However, in the absence of a restriction in the nature of the Applicant's channels of trade, and given the overlap in the nature of the parties' wares, I am satisfied that the parties' wares could be sold through the same channels of trade.

Additional Surrounding Circumstance – No evidence of actual confusion

[56] The Applicant further argues that another surrounding circumstance to consider is the fact that the Opponent has not provided any evidence of actual confusion despite use of the Mark by the Applicant since 2005. It is of course not necessary for the Opponent to evidence confusion in order for me to find that there is a likelihood of confusion but an absence of confusion over a relevant period of time may entitle one to draw a negative inference about the likelihood of confusion [see *MonSport Inc. v. Vetements de Sport Bonnie (1978) Lteé* (1988), 22 C.P.R. (3d) 356 (F.C.T.D.), *Mercedes-Benz A.G. v. Autostock Inc. (formerly Groupe T.C.G. (Québec) Inc.)*, 69 C.P.R. (3d) 518 (T.M.O.B.)].

[57] In the present case, I note that the evidence of record shows only a few sales of the Wares prior to the material date (i.e. the four invoices set out above in paragraph 19 of my decision). In my view, the lack of evidence that the Mark has been used in Canada to any great extent prevents me from drawing any negative inference from the Opponent's failure to file evidence of actual confusion in the marketplace.

Conclusion

[58] Having considered all of the surrounding circumstances, in particular the fact that the parties' marks are identical, I am not satisfied that the Applicant has discharged its burden of showing, on a balance of probabilities, that there is no reasonable likelihood of confusion between the Mark and the Opponent's IRON CHEF trade-mark.

[59] Based on the foregoing, I find that the non-entitlement ground of opposition is successful.

Non-distinctiveness Ground – s. 38(2)(d) of the Act

[60] In order to meet its initial burden with respect to this ground, the Opponent must establish that its IRON CHEF trade-mark was known at least to some extent in Canada as of August 14, 2007 [see *Bojangles' International LLC v. Bojangles Café Ltd.* (2006), 48 C.P.R. (4th) 427 (F.C.) and *Motel 6, Inc. v. No. 6 Motel Ltd.* (1981), 56 C.P.R. (2d) 44 (F.C.T.D.)].

[61] While the Opponent has provided evidence sufficient to support a finding that it had used the IRON CHEF trade-mark in Canada prior to the claimed date of first use for the Mark, the Opponent has not provided sufficient admissible evidence to support a finding that the IRON CHEF mark had become sufficiently known in Canada to negate the distinctiveness of the Mark as of the date of filing the statement of opposition. Based on the foregoing, I find that the Opponent has failed to meet its evidential burden for the non-distinctiveness ground and I dismiss it accordingly.

Disposition

[62] Pursuant to the authority delegated to me under s. 63(3) of the Act, I refuse the application pursuant to s. 38(8) of the Act.

Andrea Flewelling
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office