

IN THE MATTER OF AN OPPOSITION by Grandma Food Products Ltd./Les Produits Alimentaires Grandma Ltée to application No. 654,414 for the trade-mark **GRANDMA'S SPICES & FOODS** filed by Impact Imports Ltd.

On April 2, 1990, Impact Imports Ltd. filed an application to register the trade-mark **GRANDMA'S SPICES & FOODS** based upon proposed use of the trade-mark in Canada in association with the following wares:

SPICES: namely Cumin, Coriander, Chilies, Tumeric, Black-pepper, Cloves, Masala (mixed spices), Fennel, Fennergreek, Cinnamon, Ginger, Garlic, Curry-powder, Paprika, Pickling sauce, Amchuur (mango powder), Tamarind, Poppy seeds, Saffron, and other spices.

FOODS: namely Beans, Lentils, Seeds, Peas, Rice & Nuts.

PICKLES: namely Mango, Chile, Lime, Ginger, Garlic, Cauliflower, and mixed vegetables.

BEVERAGES: namely Juices, and Sherbets of Mango, Rose, Guava, Lime, Orange, and mixed fruits.

SNACKS: namely Fried and Roasted Beans, Nuts, Lentils, and a mixture of these.

INDIAN CANDY: namely Revedi(sesame-coated sugar balls), Sugar-coated Peas, Peanuts, and Rice.

FOOD RELATED UTENSILS: namely Heavy-bottom steel and aluminum cooking and serving pots, cooking and serving gadgets namely Plastic Strainers, Rice-serving spoons, & Soup spoons, and Steel accessories namely plates & bowls

At the examination stage, the applicant disclaimed the right to the exclusive use of **SPICES & FOODS** apart from its trade-mark.

The present application was advertised for opposition purposes in the Trade-marks Journal of July 3, 1991 and Grandma Food Products Ltd./Les Produits Alimentaires Grandma Ltée filed a statement of opposition on July 16, 1991 in which it alleged the following grounds:

(a) The present application does not comply with Section 30 of the *Trade-marks Act* in that, as of the filing date of the present application, the applicant knew or should have known that its trade-mark was confusing with the opponent's following trade-marks which were used by the opponent in Canada prior to April 2, 1990 in association with the same general class of wares as those specified in the present application:

<u><i>Trade-mark</i></u>	<u><i>Registration No.</i></u>
GRANDMA'S & Design	131,045

GRANDMA'S & Design	165,527
GRANDMERE	140,522
GRANDMA	212,619
GRANDMA'S	147,846
GRANDMERE & Design	166,046
GRANDMA & Design	246,412
GRANDMA & Design	246,411
GRANDMA & Design	245,247
GRANDMA & Design	246,410
GRANDMA & Design	246,409
GRANDMA & Design	246,742
GRANDMA & Design	245,724
GRANDMA & Design	245,245
GRANDMA & Design	245,246
GRANDMA & Design	242,267
GRANDMA & Design	245,723
GRANDMA & Design	247,046
GRANDMA'S OLD FASHIONED	TMDA55956
GRANDMA 'FFIN	353,448
SPICAROMA	328,938

With respect to the Section 30 ground, the opponent further alleged that the mark is not a trade-mark as defined in Section 2 of the Act in that the mark cannot be used for the purpose of distinguishing or so as to distinguish the wares of the applicant from the wares of the opponent.

(b) The trade-mark GRANDMA'S SPICES & FOODS is not registrable in view of the provisions of Section 12(1)(d) of the *Trade-marks Act* in that the trade-mark is confusing with the opponent's registered trade-marks identified above;

(c) The applicant is not the person entitled to registration of the trade-mark GRANDMA'S SPICES & FOODS in that, as of the filing date of the present application, the applicant's trade-mark was confusing with the opponent's trade-marks referred to above which had previously been used in Canada by the opponent;

(d) The trade-mark GRANDMA'S SPICES & FOODS is not distinctive in that it does not distinguish the applicant's wares from the wares of others and, in particular, from the wares of the opponent.

The opponent filed as its evidence the affidavit of Bernard L. Cayen, Executive Vice-President of the opponent, while the applicant filed as its evidence the affidavit of Akash Sablok, President of the applicant. The opponent alone filed a written argument and the opponent alone was represented at an oral hearing.

With respect to the first ground of opposition, there is an initial evidential burden on the opponent in respect of its Section 30 ground even though the legal burden is upon the applicant to show that its application complies with Section 30 of the Act [see *Joseph E. Seagram & Sons Ltd. et al v. Seagram Real Estate Ltd.*, 3 C.P.R. (3d) 325, at pp. 329-330]. In the present case, the opponent failed to adduce any evidence in relation to its Section 30 ground, nor have any of the

statements made by Mr. Sablok in his affidavit been challenged by cross-examination or contradicted by way of admissible evidence from the opponent. Furthermore, no submissions were made by the opponent in relation to this ground either by way of written argument or at the oral hearing. I have therefore dismissed the first ground for failure of the opponent to meet the evidential burden upon it.

As its second ground, the opponent alleged that the applicant's trade-mark GRANDMA'S SPICES & FOODS is not registrable in that it is confusing with its registered trade-marks identified above. In determining whether there would be a reasonable likelihood of confusion between the trade-marks at issue within the scope of Section 6(2) of the *Trade-marks Act*, the Registrar must have regard to all the surrounding circumstances including, but not limited to, those which are specifically enumerated in Section 6(5) of the Act. As well, the Registrar must bear in mind that the legal burden is upon the applicant to establish that there would be no reasonable likelihood of confusion between the trade-marks at issue as of the date of decision, the material date for assessing a Section 12(1)(d) ground of opposition [see *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd. and The Registrar of Trade Marks*, 37 C.P.R. (3d) 413 (FCA)].

With respect to the inherent distinctiveness of the trade-marks at issue, the applicant's trade-mark GRANDMA'S SPICES & FOODS as applied to the wares covered in the present application possesses some measure of inherent distinctiveness when considered in its entirety even though SPICES & FOODS is descriptive of the applicant's spices and food products. Likewise, the opponent's trade-marks possess some measure of inherent distinctiveness when considered in their entireties.

The Cayen affidavit points to there having been more than \$35,000,000 in sales of its wares in association with its GRANDMA trade-marks during the five year period prior to the date of his affidavit. While the opponent's evidence fails to specifically indicate which wares and which of its numerous trade-marks were identified with these sales, it would appear that the vast majority of the opponent's sales involved molasses and that the trade-mark GRANDMA was associated with these sales. I have therefore concluded that the opponent's trade-mark GRANDMA has become relatively

well known in Canada in association with molasses. However, no evidence has been furnished by the opponent relating to its use of the trade-mark SPICAROMA in association with spices or seasonings. Further, the Sablok affidavit is silent as to there having been any use by the applicant of its trade-mark GRANDMA'S SPICES & FOOD in Canada in association with any of the wares covered in the present application. As a result, both the extent to which the trade-marks have become known and the length of use of the trade-marks at issue weigh in the opponent's favour in respect of its use of the trade-mark GRANDMA in association with molasses.

The applicant's spices, foods, pickles, beverages and snacks and the opponent's molasses, syrups and sugars covered in its registrations fall within the general category of food or food-related products although the wares of the parties differ. Further, the applicant's food-related utensils bear little similarity to the opponent's wares. As for the nature of the trade associated with the wares of the parties, the applicant's spices, foods, pickles, beverages and snacks and the opponent's molasses, syrups and sugars would normally be sold through grocery stores, supermarkets and the like, as would the opponent's molasses, syrups and sugars. Further, as no evidence has been furnished by the applicant as to the channels of trade associated with any of its wares, I must assume that the applicant's spices, foods, pickles, beverages and snacks could be sold in close proximity to the opponent's molasses, syrups and sugars in grocery stores and supermarkets. On the other hand, I do not consider that the channels of trade which the average consumer would consider as normally being associated with the applicant's utensils would overlap the opponent's channels of trade.

The applicant's trade-mark GRANDMA'S SPICES & FOOD includes the entirety of the opponent's trade-mark GRANDMA'S and is very similar in appearance, sounding and in the ideas suggested to the opponent's trade-mark GRANDMA. On the other hand, the applicant's mark bears no similarity in appearance, sounding on in the ideas suggested to the opponent's trade-mark SPICAROMA.

Having regard to the above, and bearing in mind the degree of resemblance between the applicant's trade-mark GRANDMA'S SPICES & FOOD and the opponent's registered trade-marks and the fact that the applicant's spices, foods, pickles, beverages and snacks and the opponent's

molasses, syrups and sugars travel through the same channels of trade and could be sold in close proximity to each other, I have concluded that the applicant has failed to meet the legal burden upon it in respect of the issue of confusion in relation to these wares. On the other hand, I do not consider that there would be any reasonable likelihood of confusion between the applicant's trade-mark GRANDMA'S SPICES & FOOD as applied to food-related utensils and any of the opponent's trade-marks.

In view of the above, the applicant's trade-mark GRANDMA'S SPICES & FOOD as applied to spices, foods, pickles, beverages and snacks is not registrable in view of the provisions of Section 12(1)(d) of the *Trade-marks Act*. I therefore refuse the applicant's application in relation to:

SPICES: namely Cumin, Coriander, Chilies, Tumeric, Black-pepper, Cloves, Masala (mixed spices), Fennel, Fennergreek, Cinnamon, Ginger, Garlic, Curry-powder, Paprika, Pickling sauce, Amchuur (mango powder), Tamarind, Poppy seeds, Saffron, and other spices.

FOODS: namely Beans, Lentils, Seeds, Peas, Rice & Nuts.

PICKLES: namely Mango, Chile, Lime, Ginger, Garlic, Cauliflower, and mixed vegetables.

BEVERAGES: namely Juices, and Sherbets of Mango, Rose, Guava, Lime, Orange, and mixed fruits.

SNACKS: namely Fried and Roasted Beans, Nuts, Lentils, and a mixture of these.

INDIAN CANDY: namely Revedi(sesame-coated sugar balls), Sugar-coated Peas, Peanuts, and Rice.

and otherwise reject the opponent's opposition to registration of the trade-mark GRANDMA'S SPICES & FOOD in relation to the applicant's:

FOOD RELATED UTENSILS: namely Heavy-bottom steel and aluminum cooking and serving pots, cooking and serving gadgets namely Plastic Strainers, Rice-serving spoons, & Soup spoons, and Steel accessories namely plates & bowls

pursuant to Section 38(8) of the *Trade-marks Act*. In this regard, I would note the finding of the Federal Court, Trial Division in respect of there being authority to render a split decision in *Produits Ménagers Coronet Inc. v. Coronet-Werke Heinrich Schlerf GmbH*, 10 C.P.R. (3d) 492.

DATED AT HULL, QUEBEC THIS 29th DAY OF FEBRUARY, 1996.

G.W.Partington,
Chairman,
Trade Marks Opposition Board.