

**IN THE MATTER OF AN OPPOSITION by  
Green Cuisine Inc. to application No. 873,428  
for the trade-mark GREEN CUISINE  
filed by Société des Produits Nestlé S.A.**

**On March 26, 1998, the applicant, Société des Produits Nestlé S.A., filed an application to register the trade-mark GREEN CUISINE based upon proposed use of the trade-mark in Canada in association with frozen, chilled or dehydrated prepared foods consisting primarily of combinations of meat, poultry, fish, pasta, rice, vegetables or sauce as main meal courses, side dishes and frozen prepared entrees for breakfast, lunch and dinner. The applicant disclaimed the right to the exclusive use of the word CUISINE, apart from the trade-mark.**

**The application was advertised for opposition purposes in the Trade-marks Journal of December 20, 2000. On May 18, 2001, the opponent, Green Cuisine Inc., filed a statement of opposition. The applicant filed and served a counter statement.**

**The opponent filed two affidavits of Andrew John Cunningham as its rule 41 evidence. It also requested leave to file an amended statement of opposition and such leave was granted by letter dated November 8, 2002.**

**The applicant obtained an order to cross-examine Mr. Cunningham but ultimately decided not to proceed with a cross-examination.**

**The applicant elected to not file any evidence in support of its application.**

Each party filed a written argument. I note that the applicant has discussed the state of the register in its written argument; this portion of its written argument will be disregarded because there is no evidence of the state of the register in these proceedings.

In its amended statement of opposition, the opponent pleads five grounds of opposition, which are summarized as follows:

1. the application does not comply with paragraph 30(i) of the *Trade-marks Act* because the applicant could not properly have been satisfied that it was entitled to use the trade-mark in Canada in association with the wares described in the application;
2. the application is not registrable in view of paragraph 12(1)(c) of the Act because the word CUISINE is the name, in the French language, of the category of wares in connection with which the mark is proposed to be used;
3. the applicant is not the person entitled to registration of the proposed trade-mark in view of paragraph 16(3)(a) of the Act because, at the date of filing of the application, the proposed trade-mark was confusing with the trade-mark GREEN CUISINE which the opponent had previously used in Canada in association with bread, soy food products, vegetarian, vegan and organic food products, restaurant and catering services, and cooking classes;
4. the applicant is not the person entitled to registration of the proposed trade-mark in view of paragraph 16(3)(c) of the Act because, at the date of filing of the application, the proposed trade-mark was confusing with the trade-name GREEN CUISINE which the opponent had previously used in Canada in association with bread, soy food products, vegetarian, vegan and organic food products, restaurant and catering services, and cooking classes;
5. the trade-mark applied for is not distinctive because it is not capable of distinguishing the applicant's wares from those of others, particularly bread, soy food products, vegetarian, vegan and organic food products, restaurant and catering services, and cooking classes sold by the opponent in association with the trade-mark GREEN CUISINE, nor is it adapted to so distinguish them.

**Before proceeding to discuss the evidence, I can dispense of the first two grounds of opposition.**

**The first ground fails because the opponent has not alleged that the applicant was aware of any facts that would make it incapable of stating that it was satisfied that it was entitled to use the mark.**

**The second ground fails because paragraph 12(1)(c) of the Act is only breached if a trade-mark, in its entirety, is the name of the wares in connection with which the mark is proposed to be used.**

### **Opponent's Evidence**

**Mr. Cunningham, the opponent's President, provides details of his company's activities in association with GREEN CUISINE. I will summarize some of the more pertinent details below.**

**Mr. Cunningham, who is also a professional vegetarian chef, opened the Green Cuisine Vegetarian Restaurant in Victoria, B.C. in November 1990. He operated this business as a proprietorship initially but transferred all assets, including the trade-mark and trade-name GREEN CUISINE, to the corporation Nirvana Natural Foods Inc. when it was incorporated in September 1992. Nirvana Natural Foods Inc. changed its name to Green Cuisine Inc. in May 1995. Mr. Cunningham attests that use of the GREEN CUISINE trade-mark and trade-name has been continuous by the opponent, or its predecessor in title, in association with restaurant and catering services since November 1990.**

**The opponent decided to capitalize on the success of its restaurant by selling its products outside of its restaurant. In about April 1995, the opponent began to sell organic bread at local food markets in association with the GREEN CUISINE trade-mark and trade-name. In or about the summer of 1998, the opponent began to manufacture and distribute prepared packaged food products throughout Western Canada in association with its GREEN CUISINE trade-mark and trade-name. In 1999, the opponent purchased the assets of a natural foods manufacturing business, Sooke Soy Foods, and began selling products, which had previously been sold under Sooke Soy's trade-marks, under the GREEN CUISINE trade-mark commencing in 2000. The opponent's GREEN CUISINE food products are sold through retail food stores.**

**Mr. Cunningham has provided his company's GREEN CUISINE labels and packaging, advertisements, sales figures, invoices, etc.**

### **Entitlement**

**The material date for determining the likelihood of confusion with respect to entitlement under subsection 16(3) is the filing date of the application, March 26, 1998. There is a legal burden on the applicant to establish, on a balance of probabilities, that there would be no reasonable likelihood of confusion between the marks in issue. However, the opponent has an initial burden to show that it had used GREEN CUISINE before March 26, 1998. In addition, subsections 16(5) and 17(1) of the *Trade-marks Act* place a burden on the opponent to establish non-abandonment of its mark/name as of the date of advertisement of the applicant's application. I am satisfied that the opponent has met its burden under subsections 16(5) and 17(1). However, the opponent has**

**only demonstrated use of GREEN CUISINE in association with its services and bread prior to March 26, 1998, its first sales of other food products having commenced in June 1998.**

**The test for confusion is one of first impression and imperfect recollection. In applying the test for confusion set forth in subsection 6(2) of the *Trade-marks Act*, the Registrar must have regard to all the surrounding circumstances, including those specifically enumerated in subsection 6(5) of the Act. Those factors specifically set out in subsection 6(5) are: (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. The weight to be given to each factor depends on the circumstances [see *Gainers Inc. v. Tammy L. Marchildon and The Registrar of Trade-marks* (1966), 66 C.P.R. (3d) 308 (F.C.T.D.)].**

**The parties' marks, being identical, have the same degree of inherent distinctiveness.**

**The applicant's mark has not become known at all whereas the opponent's mark has.**

**There is no evidence of use of the applicant's mark; therefore the length of time each mark has been in use favours the opponent.**

**The opponent's services and bread are closely related to the applicant's wares, as they are all related to food. There is no evidence concerning the applicant's business or its channels of trade**

but typically one would expect food of the type described in the application to be sold through grocery or retail food stores.

There is the highest degree of resemblance possible between the parties' marks.

Another surrounding circumstance is the expansion of the opponent's use of GREEN CUISINE from bread to prepared foods. Although this expansion occurred after the material date, it does show that the area that the applicant wishes to monopolize is within the natural expansion confines of the opponent's earlier business.

Having considered all of the surrounding circumstances, I conclude that, on a balance of probabilities, there was a likelihood of confusion as of March 26, 1998 between the trade-marks GREEN CUISINE as used by the opponent and GREEN CUISINE as applied for by the applicant. My conclusion is based primarily on the fact that the parties' marks are identical, the applicant has not acquired any reputation in association with its proposed mark, and the wares and services of the parties are closely related. The applicant having not satisfied the onus on it, the paragraph 16(3)(a) ground of opposition succeeds.

### Distinctiveness

Although the legal onus is on the applicant to show that its mark is adapted to distinguish or actually distinguishes its wares from the wares and services of others throughout Canada [see *Muffin Houses Incorporated v. The Muffin House Bakery Ltd.* (1985), 4 C.P.R. (3d) 272 (T.M.O.B.)], there is an evidential burden on the opponent to prove the allegations of fact

supporting its ground of non-distinctiveness. However, the opponent need not show that its trade-mark is well known in Canada or has been made known solely by the restricted means set out in section 5 of the Act in order to meet this evidential burden [see *Motel 6, Inc. v. No. 6 Motel Ltd.*, 56 C.P.R. (2d) 44 (F.C.T.D.) at 55].

The material date with respect to the distinctiveness ground of opposition is the date of the filing of the statement of opposition [see *Re Andres Wines Ltd. and E. & J. Gallo Winery* (1975), 25 C.P.R. (2d) 126 at 130 (F.C.A.) and *Park Avenue Furniture Corporation v. Wickes/Simmons Bedding Ltd.* (1991), 37 C.P.R. (3d) 412 at 424 (F.C.A.)]. As of that date, the opponent has shown that it had used its GREEN CUISINE trade-mark in association with a number of food items, including prepared food items, in addition to its services.

Although there is no evidence that the opponent's wares are frozen, chilled or dehydrated, I do not think that this distinction is significant. Moreover, there is no reason for me to assume that the applicant's wares would travel channels of trade that are significantly different from those of the opponent. The applicant has submitted that the primary consumers of the opponent's food and restaurant services are vegetarians and vegans and that the nature of the applicant's products "is such that vegetarian and vegan consumers, who are typically very careful and judicious about the type of foods they purchase, would not, under any circumstance whatsoever, look or seek to buy the applicant's products." I do not find this argument to be persuasive. Although the wares applied for by the applicant may contain meat, poultry or fish, they also may not, which would make them suitable for vegetarians. Moreover, use of GREEN CUISINE by the applicant in association with non-vegetarian food items would still be likely to cause confusion

with the opponent's GREEN CUISINE wares because a consumer who is familiar with the opponent's GREEN CUISINE wares and services, on seeing GREEN CUISINE on the applicant's wares, is likely to infer as a matter of first impression that the opponent has expanded its line of GREEN CUISINE food items. Furthermore, I note that the applicant has not excluded vegetarian, vegan or organic food from its statement of wares.

The discussion of the subsection 6(5) factors set out under my discussion of the entitlement ground of opposition generally applies to the distinctiveness ground of opposition as well. Accordingly, I reach the same decision concerning the likelihood of confusion under this ground as I did under the entitlement ground of opposition.

The applicant having not satisfied the onus on it, the distinctiveness ground of opposition succeeds.

### **Disposition**

Having been delegated by the Registrar of Trade-marks by virtue of subsection 63(3) of the *Trade-marks Act*, I refuse the application pursuant to the provisions of subsection 38(8) of the Act.

**DATED AT TORONTO, ONTARIO THIS 28<sup>th</sup> DAY OF JUNE 2004.**

**Jill W. Bradbury  
Member  
Trade-marks Opposition Board**