

IN THE MATTER OF AN OPPOSITION by  
Young Drivers of Canada Enterprises Ltd. to  
application No. 691,363 for the trade-mark  
J P DEFENSIVE DRIVING SCHOOL & Design  
filed by John Chan

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On October 15, 1991, the applicant, John Chan, filed an application to register the mark J P DEFENSIVE DRIVING SCHOOL & Design, illustrated below, based on use of

the mark in Canada since at least as early as August 1, 1991 in association with  
driver training, education and testing.

The words DEFENSIVE, DRIVING and SCHOOL are disclaimed apart from the mark as a whole and colour is claimed as a feature of the mark. The colour red is background to the letter J and the colour blue is background to the letter P. The subject application was advertised for opposition purposes in the Trade-marks Journal issue dated May 27, 1992 and was opposed by Young Drivers of Canada Enterprises Ltd. on October 26, 1992. A copy of the statement of opposition was forwarded to the applicant on November 23, 1992. The applicant responded by filing and serving a counter statement.

The first ground of opposition is that the application does not comply with Section 30(i) of the Trade-marks Act because the applicant was aware of the opponent's mark YD & Design, illustrated below.

The second ground [pursuant to Section 30(a)] is that the applicant has not used the applied for mark since the date of first use claimed in the subject application. The third ground alleges that Mr. Chan “is not a proper applicant within the meaning of the Trade-marks Act.” The third and fourth grounds, pursuant to Sections 12 and 16, are that the applied for mark is not registrable and that Mr. Chan is not the person entitled to register the mark, because the applied for mark is confusing with the opponent’s mark YD & Design, regn. No. 334, 367, previously used by the opponent in association with similar services. The fifth and final ground is that the applied for mark is not distinctive of the applicant’s services in view of the foregoing.

The opponent’s evidence consists of the affidavit of Peter R. Christianson, President of the opponent company, while the applicant’s evidence consists of the affidavit of Mr. Chan. Both parties filed a written argument and both were represented at an oral hearing. The opponent did not evidence its trade-mark registration relied upon in the statement of opposition and I have therefore exercised my discretion, in the public interest, to check the register to ensure that the registration pleaded is extant: see *Quaker Oats Co. of Canada Ltd. v. Menu Foods Ltd.* (1986), 11 C.P.R. (3d) 410 at pg. 411.

With respect to the first ground of opposition, the opponent’s evidence is that Mr. Chan was employed by the opponent as a driving instructor in Westminster, British Columbia, from August 1989 to July 1991. Further, Mr. Chan, by his own admission, was aware of the opponent’s mark YD & Design. Mr. Chan started up his own driver training business under the applied for mark when he was laid off by his former employer (the opponent) in the summer of 1991 for lack of work. The evidence establishes that Mr. Chan was aware of the opponent’s mark and therefore the success of the first ground is contingent on a finding that the applied for mark is confusing with the opponent’s mark: see *Consumer Distributing Co. Ltd. v. Toy World Ltd.*, 30 C.P.R. (3d) 191, at pg. 195; and

*Sapodilla Co. Ltd. v. Bristol-Myers Co.*, 15 C.P.R. (2d) 152, at pg. 155.

With respect to the second and third grounds of opposition, the opponent has failed to meet its evidential burden to put the allegations pleaded in the statement of opposition in issue, and therefore the second and third grounds are rejected. The remaining grounds of opposition depend on a finding of confusion between the applied for mark and the opponent's mark YD & Design either at the date of first use of the applied for mark [August 1, 1991] in respect of the allegation of non-entitlement; or at the date of filing the statement of opposition [October 26, 1992] in respect of the allegation of non-distinctiveness; or at the date of my decision in respect of the allegation of non-registrability. The opponent's case is strongest at the time when the applied for mark had not acquired any reputation. Thus, a consideration of the issue of confusion at the earliest material date namely, August 1, 1991 will effectively decide the outcome of this proceeding.

The legal onus is on the applicant to show that there would be no reasonable likelihood of confusion, within the meaning of Section 6(2), between the applied for mark and the opponent's mark YD & Design. The presence of an onus on the applicant means that if a determinate conclusion cannot be reached once all the evidence is in, then the issue must be decided against the applicant: see *John Labatt Ltd. v. Molson Companies Ltd.* (1990) 30 C.P.R.(3d) 293 at 297-298 (F.C.T.D.). 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 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), C.P.R.(3d) 308 (F.C.T.D).

The opponent's mark is a relatively weak mark as it is composed of letters of the alphabet and design features consisting of geometrical shapes familiar to motorists; in regard to the latter, see exhibit A of Mr. Chan's affidavit. Thus, the opponent's mark has suggestive connotations in relation to driving and to traffic rules. Similarly, the applied for mark is a weak mark. The opponent's quantitative evidence relating to its business, and sales and advertising under its mark YD & Design, relate to the year 1992 and after. However, on a fair reading of Mr. Christianson's affidavit as a whole, and in the absence of cross-examination, I am prepared to infer that the opponent's mark had acquired a significant reputation in Canada in association with driver education, training and testing at the material date August 1, 1991. Of course, the applied for mark had not acquired any reputation at the material date. The opponent has been using its mark in Canada since about 1968 and therefore the length of time that the marks have been in use in Canada favours the opponent. The applicant's evidence is that he specializes "in instruction of people of Chinese background who have little or no English language skills," that he advertises only in Chinese language journals namely, *Sing Tao Daily* and *Ming Po*, published in Vancouver, and that virtually all his clients are Chinese. Of course, in assessing the issue of confusion arising pursuant to Section 16, it is the applicant's statement of services as set out in its application and the opponent's services as actually performed that govern. Since the applicant has not limited the description of its driving training services in any way in the subject application, I must consider that the parties' services and channels of trade are the same. Even if I were to take into account the distinction in the parties' present channels of trade, I would nevertheless consider that there is potential for overlap in the parties' channels of trade as there is nothing to prevent

the opponent from promoting and providing its services (in the Chinese language) in the same way that the applicant provides his services (and vice versa).

In my view the parties' marks bear little resemblance to each other visually, aside from the use of geometrical design features familiar to motorists. Orally the marks are quite different, as the applied for mark would likely be truncated to "jay pee" while the opponent's mark would be sounded as "why dee." Further, the opponent's mark often appears together with the phrase "Young Drivers Of Canada" and it is therefore not unlikely that the public has been conditioned to also associate opponent's mark YD & Design with the idea of "young drivers." The applied for mark also suggests the idea of driver training as it is comprised in part of the phrase DEFENSIVE DRIVING SCHOOL.

In view of the above, and keeping in mind that the test of confusion is one of first impression and imperfect recollection, I am satisfied that the applicant has met the onus on it to show that the marks in issue are not confusing.

The opposition is therefore rejected.

DATED AT HULL, QUEBEC, THIS 7th DAY OF FEBRUARY, 1997.

Myer Herzig,  
Member,  
Trade-marks Opposition Board