



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

**Citation: 2012 TMOB 35**  
**Date of Decision: 2012-03-16**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Shapiro Cohen against registration  
No. TMA663,284 for the trade-mark MAGGIE in the  
name of JMAX Global Distributors Inc.**

[1] On April 13, 2010 at the request of Shapiro Cohen (the Requesting Party), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* R.C.S. 1985, c. T-13 (the Act) to JMAX Global Distributors Inc. (the Registrant), the registered owner of registration No. TMA663,284 for the trade-mark MAGGIE (the Mark).

[2] The Mark is registered for use in association with the following wares: Clothing namely, t-shirts, blouses, sweaters, pants, active wear, knitwear, namely, t-shirts, sweaters, blouses, camisoles, tank tops, cardigans, coats, dresses, jackets, shawls, skirts, socks, suits and vests (the Wares).

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares listed on the registration at any time within the three-year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of use since that date. In this case, the relevant period in which use must be shown is between April 13, 2007 and April 13, 2010 (the Relevant Period).

[4] The relevant definition of “use” is set out in section 4(1) of the Act:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[5] In response to the section 45 notice, the Registrant furnished the affidavit of David Fugman, Secretary and Director of the Registrant. Only the Requesting Party filed written representations; an oral hearing was not held.

[6] In his affidavit, Mr. Fugman states that the Registrant is in the business of wholesale distribution of clothing in Canada, with offices and warehouses in four Canadian cities. In particular, he states that the Registrant “sells wares in the category of clothing, namely knitwear, t-shirts, sweaters and active wear, labelled with the trade-mark “MAGGIE”, and has sold clothing bearing labels with the trade-mark MAGGIE in Canada” during the Relevant Period.

[7] In support, attached as Exhibit A to the affidavit are two photographs of a t-shirt with a label bearing the Mark. The word JANA also appears on the label, underneath the Mark and in smaller font.

[8] The only other supporting documents are attached as Exhibit B to the affidavit, which consists of three invoices dated July 2009 from a company called Sunflower Fashions Co. Ltd. (Sunflower). The invoices show the Registrant to be the purchaser. Mr. Fugman states that Sunflower is a Canadian manufacturing company from which the Registrant orders clothing bearing the Mark. Although he acknowledges that the invoices do not refer to the Mark specifically, Mr. Fugman attests that the clothing described in the invoices, namely various colours and sizes of “sleepshirt”, “s/s crew neck top” and “s/s v neck top” all bore the MAGGIE label. He further states that the Registrant sold this MAGGIE labelled clothing at the Registrant’s clearance centre in Vancouver, B.C. in 2009 and 2010. However, no supporting evidence such as copies of invoices from the Registrant or statements regarding sales totals is provided.

[9] The Requesting Party questions several aspects of the Registrant’s evidence. First, they note that no information is provided pertaining to the word JANA that appears under the Mark on the label as it appears in Exhibit A. Since the Registrant does not explain the significance of

the word JANA, the Requesting Party submits that it calls into doubt whether the Registrant is the source of the goods. Related to this point, as the Requesting Party notes, the purchase of clothing bearing the Mark by the Registrant from Sunflower evidenced at Exhibit B does not support use of the Mark by the Registrant. In fact, it would suggest that Sunflower is the source of the goods, and that the Registrant is merely a distributor.

[10] Alternatively, the Requesting Party submits that the word JANA could be perceived as an element of a different mark, namely MAGGIE JANA. Accordingly, it submits that the use shown in Exhibit A does not constitute use of the Mark but rather shows use of the mark MAGGIE JANA.

[11] The Requesting Party further submits that the affidavit contains no discussion of the Registrant's normal course of trade. In this respect, I note that in addition to failing to clarify the relationship between it and Sunflower, the Registrant is vague regarding the nature of the sales and the identity of the ultimate consumers that would have purchased the clothing bearing the Mark in 2009 and 2010 at the Registrant's clearance centre.

[12] Even if I were to infer that Sunflower was merely a manufacturer of the clothing items on behalf of the Registrant, that the Exhibit A labels are representative of how the Mark appeared on all of the Wares and that the clothing items shown on the invoices were subsequently sold at the Registrant's clearance centre to retail customers, I find that Mr. Fugman's affidavit ultimately fails to establish use of the Mark within the meaning of s. 4 and s. 45 of the Act in this case.

[13] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding [*Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1979), 45 CPR (2d) 194, aff'd (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Lang, Michener, Lawrence & Shaw v. Woods Canada Ltd.* (1996), 71 C.P.R. (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co. v. Canada (Registrar of Trade Marks)* (1982), 63 C.P.R. (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the wares specified in the registration during the relevant period.

[14] In the present case, the reference to clearance centre sales “in 2009 and 2010” includes a period after the Relevant Period and Mr. Fugman does not provide any sales breakdown to show which of the clothing items bearing the Mark, if any, were actually sold at the clearance centre prior to April 2010. As the affidavit does not clearly specify the Wares sold during the Relevant Period, I find the Registrant has failed to establish a *prima facie* case of use. Given that evidence in s. 45 proceedings is not subject to cross-examination, in the absence of additional details, I find it appropriate that the ambiguities in the evidence should be interpreted against the interests of the Registrant in this case [see *Plough, supra*, and *Diamant Elinor Inc. v. 88766 Canada Inc.* (2010), 90 CPR (4th) 428 (FC)].

[15] Accordingly, I cannot conclude that the Registrant has demonstrated use of the Mark during the Relevant Period in association with any of the Wares within the meaning of s. 4 and s. 45 of the Act.

[16] In view of all of the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be expunged in compliance with the provisions of s. 45 of the Act.

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office