



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

Citation: 2014 TMOB 163
Date of Decision: 2014-08-11

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Miller Thomson S.E.N.C.R.L. against
registration No. TMA687,302 for the trade-mark STAR
JUICES in the name of 1307196 Ontario Inc., c.o.b. as
Bombay Bazaar Cash & Carry**

[1] At the request of Miller Thomson S.E.N.C.R.L., the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on July 24, 2012 to 1307196 Ontario Inc., c.o.b. as Bombay Bazaar Cash & Carry (the Owner), the registered owner of registration No. TMA687,302 for the trade-mark STAR JUICES (the Mark).

[2] The Mark is registered in association with the following wares: “Fruit drinks namely fruit and fruit based non-alcoholic carbonated and non-carbonated beverages”.

[3] The section 45 notice required the Owner to furnish evidence showing that it had used the Mark in Canada in association with each of the wares specified in the registration within the time period between July 24, 2009 and July 24, 2012.

[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.

Owner’s Evidence

[5] In response to the Registrar's notice, the Owner furnished the affidavit of Suleman China, sworn October 23, 2012 in Toronto, Ontario. Mr. China's affidavit is brief, as reproduced below, consisting of only the following three paragraphs and no exhibits:

1. I am a principal in 1307196 Ontario Inc., carrying on business as Bombay Bazaar Cash & Carry ("BBCC"), the owner of trade-mark "Star Juices" registered under trade-mark number TMA687,302 (the "Trade-mark") and therefore have personal knowledge of the matters hereinafter deposed to.

2. In the three (3) years period preceding July 24, 2012, BBCC used the Trade-mark in respect of fruit drinks, namely fruit and fruit based non-alcoholic carbonated and non-carbonated beverages. Specifically, BBCC produced or had produced and labeled fruit juices using the Trade-mark and distributed said product in the Canadian market. It continues to do so.

3. I swear this affidavit in response to the Section 45 Proceedings in this matter and for no other or improper purpose.

Insufficiency of Evidence

[6] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in a section 45 proceeding is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (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.

[7] In this case, in the absence of invoices or particulars regarding the Owner's distribution of its fruit drinks "in the Canadian market", I am unable to conclude that such distribution amounted to transfers in the normal course of trade or were otherwise in compliance with sections 4 and 45 of the Act. In any event, in the absence of supporting exhibits such as photographs of the Owner's labels for its fruit drinks, I am unable to conclude that the Mark was even displayed as registered at the time of any such distribution.

[8] In the absence of such supporting exhibits and further particulars, Mr. China's statements amount to a mere assertion of use only, rather than statements of fact showing use of the Mark.

[9] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered wares within the meaning of sections 4 and 45 of the Act. Furthermore, there is no evidence of special circumstances excusing non-use of the Mark before me.

Disposition

[10] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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