



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

Citation: 2012 TMOB 2
Date of Decision: 2012-01-13

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Blake Cassels & Graydon LLP against
registration No. TMA546,011 for the trade-mark
COUNTRY FRESH & Design in the name of Country
Fresh Enterprises Inc.**

[1] At the request of Blake Cassels & Graydon LLP (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on May 7, 2009, to Country Fresh Enterprises Inc., the registered owner (the Registrant) of registration No. TMA546,011 for the following trade-mark (the Mark):



[2] The Mark is registered for use in association with “*Baked goods, namely: breads, rolls, buns, muffins, cookies, waffles, cakes, cereals, pizza shells and croissants; and bread crumbs, candies, nut butters, jams, salad dressings.*”

[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 and/or services 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 for showing use is any time between May 7, 2006 and May 7, 2009 (the Relevant Period).

[4] The relevant definition of “use” in the present case is set out in s. 4(1) of the Act as follows:

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] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing deadwood from the register. It was established in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 (F.C.A.) that assertions of use as a matter of law are insufficient to demonstrate use. A recipient of a s. 45 notice must put forward evidence showing how it has used the trade-mark in order that the Registrar may assess if the facts qualify as use of the trade-mark pursuant to s. 4 of the Act. However, it has also been held that evidentiary overkill is not required when use can be shown in a simple, straightforward fashion [see *Union Electric Supply Co. v. Registrar of Trade Marks* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)].

[6] In response to the Registrar’s notice, the Registrant furnished the affidavit of Paul Dhanoa, together with Exhibits A through L. Both parties filed written submissions and were represented at an oral hearing.

[7] In his affidavit, Mr. Dhanoa identifies himself as the president of the Registrant, explaining that he has been the owner and president of the Registrant since 1994. He describes the Registrant as a Canadian food products manufacturer that has been manufacturing baked goods, cereals and nut butters since at least 1994. He states that during the Relevant Period, the

Registrant produced, offered for sale, and sold breads, cookies, cereals and nut butters (the Products) in association with the Mark.

[8] The following is a summary of what I consider to be the relevant evidence in this case:

- Exhibits E, F, G, H, and K: representative package labels and packaging used in the sale of cereal, nut butters, cookies, and bread during the Relevant Period.
- Exhibits I, J, and L: a sampling of invoices showing sales made by the Registrant of each of the Products in Canada during the Relevant Period.

[9] To begin with, I note that the affidavit is silent with respect to “*rolls, buns, muffins, waffles, cakes, pizza shells and croissants; and bread crumbs, candies, jams, salad dressings*”. As there is neither evidence nor submissions with respect to use of the Mark in association with these wares or of special circumstances that would excuse the absence of such use, these wares will be deleted from the registration.

[10] With respect to the remaining wares, namely, “*breads, cookies, cereals, and nut butters*” (referred to above in Mr. Dhanoa’s affidavit as the Products), the Requesting Party submits that the evidence is ambiguous. In particular, it argues that it is unclear if the representative package labels and packaging were used *in Canada* during the Relevant Period. Furthermore, the Requesting Party submits that none of the labels or product packages display a date that one would expect to see on such packaging (e.g. a best before date or production date), perhaps required by labelling legislation. Thus, it argues that the evidence does not support the Registrant’s claim that the Products were sold *during the Relevant Period*.

[11] However, insofar as the Requesting Party’s submission that labelling legislation may require the Registrant’s product packaging to include a best before date or production date, I note that compliance with statutes other than the Act is not a relevant consideration in proceedings under s.45 of the Act [see *Lewis Thomson & Sons Ltd. v. Rogers, Bereskin & Parr* (1988), 21 C.P.R. (3d) 483]. Furthermore, absent evidence to the contrary, I accept the affiant’s sworn statements at face value, that such evidence is representative of that which was used *during the Relevant Period* [*Rubicon Corp. v. Comalog Inc.* (1990), 33 C.P.R. (3d) 58 (T.M.O.B.)].

[12] As for whether these labels/packages are representative of those which were used *in Canada* during the Relevant Period, the proper approach is to view the evidence in its entirety [see *Nissan Jidosha Kabushiki Kaisha v. MAAX Canada Inc.* (2007), 65 C.P.R. (4th) 99 (T.M.O.B.)]. In this regard, I note that Mr. Dhanoa provides a link in his affidavit between the Products associated with the representative labels/packages and those listed in the invoices. For example, he first identifies the specific Products associated with the representative labels/packages as the “Cereal”, the “Nut Butters”, the “Cookies” and the “Bread”. Each of these pre-defined products is then clearly referred to by Mr. Dhanoa as being listed on the invoices, which clearly demonstrate sales of such products made by the Registrant *in Canada* during the Relevant Period. This linkage also serves to overcome a further submission of the Requesting Party, namely, that the goods listed on the invoices may not be Products sold by the Registrant in association with the Mark since there is no reference to the Mark itself on the invoices.

[13] At the oral hearing, the Requesting Party brought up an additional argument: that the representative labels and packaging are irrelevant since the balance of evidence deals with sales to retailers/distributors, but the packaging is for end consumers. Consequently, if I understand correctly, it argues that there is no evidence that the Mark was shown to the retailer/distributor at the time of transfer.

[14] However, the evidence clearly demonstrates that the Mark was displayed on the Products at the time of transfer in the course of genuine commercial transactions along the Registrant’s chain of sales and distribution. For the purposes of s. 45, that is all that is required [see *Philip Morris Inc. v. Imperial Tobacco Ltd. et al* (1987), 13 C.P.R. (3d) 289 (F.C.T.D.) and s. 4(1) of the Act]. Thus, I am satisfied that the Registrant has shown use of the Mark in association with “*bread, cookies, cereals and nut butters*” in the manner prescribed by s. 4(1) and s. 45 of the Act.

Disposition

[18] Having regard to the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be amended to delete the following wares: “*rolls, buns, muffins,*

waffles, cakes, pizza shells and croissants; and bread crumbs, candies, jams, salad dressings” in compliance with the provisions of s. 45 of the Act.

Kathryn Barnett
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

