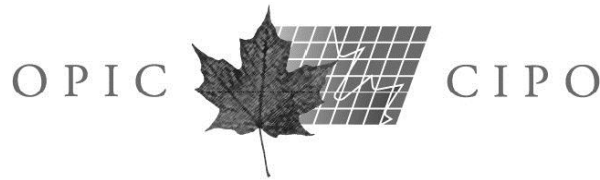


## Translation



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

**Reference: 2013 TMOB 8**  
**Date of Decision: 15/01/2013**

**IN THE MATTER OF THE SECTION 45 PROCEEDINGS, undertaken at the request of Hudson's Bay Co. regarding Registration No. TMA436,529 of the BAYARD PRESSE trade-mark and design in the name of Bayard-Pressé, business corporation with executive board.**

[1] On January 25, 2011, at the request of Hudson's Bay Co. (the Requesting Party), the registrar sent the notice stipulated in Section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Bayard-Pressé, business corporation with executive board, (the Registered Owner) in order to prove use of the BAYARD PRESSE & Dessin trade-mark as presented below:



BAYARD PRESSE  
(the Mark)

in association with:

Artificial resins in raw state, ground fertilizer (natural or artificial); industrial adhesives (glues); stains, varnishes, lacquers; anti-rust and wood preservatives; natural resins, sheet and powder metals for painter-decorators, printers and artists; soaps; perfumes, essential oils, hair lotions; toothpastes; candles, wicks; medical dietary products, specifically: pre-cooked meals, frozen meals, food bars used as meal substitutes or food complements, capsules, fruit sugars, dietary fibre, laxative wafers and crispbread, vitamin bars,, wheat germ, wheat bran; baby

foods; plasters, teeth filling and dental imprint materials; disinfectants; metal construction materials, moveable metal structures; metallic materials for railways; non-electrical metal cables and wires; metal pipes; strong boxes; minerals; engines (excluding engines for ground vehicles); couplings and pulley belts (excluding for ground vehicles); egg incubators; cutlery; knives, razors; teaching materials, specifically: pre-recorded audio and video cassettes (in italics as I am unsure that the mark was used in association with these wares), equipment used in language laboratories, specifically audio and video monitors, headsets, machines for recording and playing sound and/or pictures, films, video and animated drawings; machines for recording, transmitting, replaying sound or pictures, magnetic recording media, acoustic disks; prepayment machines, cash registers, calculating machines and information processing equipment, specifically: computer systems hardware and software able to read, process and interpret digital data; fire extinguishers; firearms; ammunition and projectiles; fireworks; precious metals and alloys, jewels, precious stones, clocks and chronometric instruments, specifically: watches, clocks, alarm clocks, chronometers, compasses; jewelry, specifically: rings, bracelets, necklaces, earrings, charms, chains, fine chains, medals, brooches, hair clips; printed products, specifically: magazines, books, revues, newspapers, periodicals, agendas, directories, guides, almanacs, street maps, maps, file cards, calendars, playing cards, printouts; photographs, household or paper adhesives (glues), paint brushes, typewriters; stationery items, specifically: pencils, pens, pencil sharpeners, erasers, guillotines, pencil holders, pen holders, paperweights, drawing rulers, bookends, blotting pads; plastic materials for packaging (not included in other classes), playing cards, block letters, printing plates; rubber, gutta-percha, gum, asbestos, mica; non-metallic flexible pipes; leather and imitation leather, animal skins; trunks and suitcases, umbrellas, parasols and canes; whips; non-metallic construction materials, non-metallic rigid pipes for construction, asphalt, pitch and bitumen, non-metallic moveable structures, non-metallic monuments; mirrors, frames, combs and sponges; brushes; steel wool, uncut or partially worked glass (excluding construction glass); cord, string, nets, tents, tarpaulins, covers; raw fibre textiles; textile threads; fabrics, bed covers and tablecloths; lace and embroidery, ribbons and laces; buttons, hooks and eyelets, pins and needles; artificial flowers; carpets, mats, basket weave, linoleum, wall hangings other than textile; games, specifically: board games; toys, specifically: dolls, balls and beach accessories (spade, bucket, rake) and Christmas tree decorations; meat, fish, poultry and game; meat extracts; conserved, dried and cooked fruit and vegetables; jellies, jams; eggs, milk, edible oils and fats, salad dressings; conserves; coffee, tea, cacao, sugar, rice, tapioca, sago, coffee substitutes; flour, bread, pastries, edible ices; honey, molasses; yeast, raising agent; salt, mustard; vinegar, sauces other than salad dressings; spices; ice cubes; live animals; fresh fruit and vegetables; seeds, plants and natural flowers; pet food, malt; beers, mineral and sparkling waters, fruit drinks and fruit juices; syrups; tobacco, matches (the Wares);

and in association with:

Distribution of prospectuses, samples; rental of advertising equipment; businesses involved in statistics, tabulators, stenography work; accounting; document copying; investment offices; rental of typewriters and office equipment; insurance; pledge loans; debt recovery; lotteries; issue of travellers' cheques and letters of credit; real estate agencies (sale and rental of businesses and buildings); real estate expertise; building management; building construction; steam-fitting, painting, plastering, plumbing, roofing business; public works; rural works;

rental of construction equipment and tools, bulldozers, tree stump extractors; building, premises, ground maintenance or cleaning (facades, disinfection, rodent control); maintenance and cleaning of various items (laundry); repairs, transformation of clothing; tire retreading; vulcanization; shoe repairs; furniture repairs, instruments, tools; press and information agencies; radio, telegraph or telephone communications; teleprinter; transmission of messages, telegrams; water and electricity distribution; furniture removals; operation of ferries; maritime towing, ship unloading, salvage; travel information; rental of horses, transportation vehicles; storage; storage of wares in a warehouse for the purpose of preservation or safeguarding; storage, safeguarding of outer clothing; vehicle garage; rental of refrigerators; rental of garages; processing of third-party food products (winemaking, distillation, threshing, fruit pressing, milling, etc.); sawmill, planing; embroidery, sewing; dye work; metal cutting, polishing, coating; preservation services during which the item undergoes a change; fabric or clothing dye work; fabric mothproofing; fabric waterproofing; document binding; tinning; air purification and regeneration; book and magazine publishing; newspaper subscriptions; book loans; animal training; shows; radio or television entertainment; film production; artist agencies; rental of films, sound tracks, cinema projectors and accessories, stage sets; newspaper distribution; organization of educational and entertainment contests; hostelry, restaurants; convalescence and rest homes; nurseries; social support; marriage agencies; beauty salons, hairdressers; funeral homes, crematorium ovens; hotel room reservations for travellers; engineers' work, professional consultations and establishment of drawings unrelated to business operations; engineering work (not for construction); prospection; drilling; materials testing; laboratories; rental of equipment for farming operations, clothing, bed linen, vending machines; printing (the Services).

[2] Section 45 of the Act requires the Registered Owner to show that it has used its trade-mark in Canada in association with each of the Wares and/or Services specified in the registration at any given time during the three years preceding the date of the notice or, if not, provide the date on which it was last used and the reason for its absence of use since this date. The relevant period in this case is therefore from January 25, 2008 to January 25, 2011 (the Relevant Period).

[3] The procedure pursuant to Section 45 is simple and expeditious, and serves to clear “deadwood” from the register. Accordingly, the threshold for establishing use of the Mark, within the meaning of Section 4 of the Act, during the Relevant Period is not very high [see *Woods Canada Ltd v. Lang Michener* (1996), 71 CPR (3d) 477 (CF)].

[4] A simple claim of use of the Mark is not sufficient to establish its use in association with the Wares and Services in compliance with the provisions of sections 4(1) and (2) of the Act. There is no requirement to produce abundant evidence. However, any ambiguity in the evidence

will be interpreted against the Registered Owner of the Mark [see *Plough (Canada) Ltd v. Aerosol Fillers Inc* (1980) 53 CPR (4th) 62 (CAF)].

[5] In reply to the notice, the Registered Owner submitted the affidavit of Hubert Chicou, executive director of the Registered Owner. The Registered Owner alone submitted written representations. A hearing was not held.

[6] First of all, it is important to stress that Mr. Chicou states in paragraph 8 of his affidavit that the Registered Owner consents to having the following wares and services being expunged from the registration TMA436,529:

Artificial resins in raw state, ground fertilizer (natural or artificial); industrial adhesives (glues); stains, varnishes, lacquers; anti-rust and wood preservatives; natural resins, sheet and powder metals for painter-decorators, printers and artists; soaps; perfumes, essential oils, hair lotions; toothpastes; candles, wicks; medical dietary products, specifically: pre-cooked meals, frozen meals, food bars used as meal substitutes or food complements, capsules, fruit sugars, dietary fibre, laxative wafers and crispbread, vitamin bars, wheat germ, wheat bran; baby foods; plasters, teeth filling and dental imprint materials; disinfectants; metal construction materials, moveable metal structures; metallic materials for railways; non-electrical metal cables and wires; metal pipes; strong boxes; minerals; engines (excluding engines for ground vehicles); couplings and pulley belts (excluding for ground vehicles); egg incubators; cutlery; knives, razors;

equipment used in language laboratories, specifically audio and video monitors, headsets, machines for recording and playing sound and/or pictures, films, video and animated drawings; machines for recording, transmitting, replaying sound or pictures, magnetic recording media, acoustic disks; prepayment machines, cash registers, calculating machines and information processing equipment, specifically: computer systems hardware and software able to read, process and interpret digital data; fire extinguishers; firearms; ammunition and projectiles; fireworks; precious metals and alloys, jewels, precious stones, clocks and chronometric instruments, specifically: watches, clocks, alarm clocks, chronometers, compasses; jewelry, specifically: rings, bracelets, necklaces, earrings, charms, chains, fine chains, medals, brooches, hair clips;

photographs, household or paper adhesives (glues), paint brushes, typewriters;

plastic materials for packaging (not included in other classes), playing cards, block letters, printing plates; rubber, gutta-percha, gum, asbestos, mica; non-metallic flexible pipes; leather and imitation leather, animal skins; trunks and suitcases, umbrellas, parasols and canes; whips; non-metallic construction materials, non-metallic rigid pipes for construction, asphalt, pitch and bitumen, non-metallic moveable structures, non-metallic monuments; mirrors, frames, combs and sponges; brushes; steel wool, uncut or partially worked glass (excluding construction glass); cord, string, nets, tents, tarpaulins, covers; raw fibre textiles; textile

threads; fabrics, bed covers and tablecloths; lace and embroidery, ribbons and laces; buttons, hooks and eyelets, pins and needles; artificial flowers; carpets, mats, basket weave, linoleum, wall hangings other than textile; games, specifically: board games; toys, specifically: dolls, balls and beach accessories (spade, bucket, rake) and Christmas tree decorations; meat, fish, poultry and game; meat extracts; conserved, dried and cooked fruit and vegetables; jellies, jams; eggs, milk, edible oils and fats, salad dressings; preserves; coffee, tea, cacao, sugar, rice, tapioca, sago, coffee substitutes; flour, bread, pastries, edible ices; honey, molasses; yeast, raising agent; salt, mustard; vinegar, sauces other than salad dressings; spices; ice cubes; live animals; fresh fruit and vegetables; seeds, plants and natural flowers; pet food, malt; beers, mineral and sparkling waters, fruit drinks and fruit juices; syrups; tobacco, matches;

Distribution of prospectuses, samples; rental of advertising equipment; businesses involved in statistics, tabulator, stenography work; accounting; document copying; investment offices; rental of typewriters and office equipment; insurance; pledge loans; debt recovery; lotteries; issue of travellers' cheques and letters of credit; real estate agencies (sale and rental of businesses and buildings); real estate expertise; building management; building construction; steam-fitting, painting, plastering, plumbing, roofing business; public works; rural works; rental of construction equipment and tools, bulldozers, tree stump extractors; building, premises, ground maintenance or cleaning (facades, disinfection, rodent control); maintenance and cleaning of various items (laundry); repairs, transformation of clothing; tire retreading; vulcanization; shoe repairs; furniture repairs, instruments, tools; press and information agencies; radio, telegraph or telephone communications; teleprinter; transmission of messages, telegrams; water and electricity distribution; furniture removals; operation of ferries; maritime towing, ship unloading, salvage; travel information; rental of horses, transportation vehicles; storage; storage of wares in a warehouse for the purpose of preservation or safeguarding; storage, safeguarding of outer clothing; vehicle garage; rental of refrigerators; rental of garages; processing of third-party food products (winemaking, distillation, threshing, fruit pressing, milling, etc.); sawmill, planing; embroidery, sewing; dye work; metal cutting, polishing, coating; preservation services during which the item undergoes a change; fabric or clothing dye work; fabric mothproofing; fabric waterproofing;

tinning; air purification and regeneration;

book loans; animal training; shows;

film production; artist agencies; rental of films, sound tracks, cinema projectors and accessories, stage sets; newspaper distribution; organization of educational and entertainment contests; hostelry, restaurants; convalescence and rest homes; nurseries; social support; marriage agencies; beauty salons, hairdressers; funeral homes, crematorium ovens; hotel room reservations for travellers; engineers' work, professional consultations and establishment of drawings unrelated to business operations; engineering work (not for construction); prospection; drilling; materials testing; laboratories; rental of equipment for farming operations, clothing, bed linen, vending machines.

The registration certificate TMA436,529 will therefore be amended accordingly.

[7] Mr. Chicou claims that the Mark was used in Canada during the Relevant Period in association with the following wares and services: Printed products, specifically: magazines, books, revues, newspapers, periodicals, agendas, directories, guides, almanacs, street maps, maps, file cards, calendars, playing cards, printouts (hereinafter the Printed Products); stationery items, specifically: pencils, pens, pencil sharpeners, erasers, guillotines, pencil holders, pen holders, paperweights, drawing rulers, bookends, blotting pads (hereinafter the Stationery Items); computer systems hardware and software able to read, process and interpret digital data (hereinafter the Audiovisual Products); document binding; newspaper subscriptions; radio or television entertainment; printing (hereinafter the Remaining Services). However, it must not only be claimed but also proven, so I will examine the evidence submitted on this matter by Mr. Chicou.

[8] First, Mr. Chicou states that Bayard-Press Canada Inc., has been acting as distribution agent since January 1, 2005 for certain children's publications and since January 1, 2006 for other publications. He produced a copy of the distribution agreement binding these parties. He claims that this agreement is still in effect.

[9] As evidence of the use of the Mark in association with the Printed Products, he submitted the following exhibits:

Exhibit HC-3: Copies of religious periodicals published between July 2009 and June 2010;

Exhibit HC-4: Copies of children's magazines published between February and June 2008;

Exhibit HC-6: Cover pages of books published in 2008;

Exhibit HC-7: Excerpts from a calendar and a notebook.

[10] Mr. Chicou states that these Printed Products were sold in Canada during the Relevant Period. He provided the income generated in Canada from the sale of religious periodicals as well as the number of subscriptions in Canada for the children's publications during the Relevant Period.

[11] I should stress that the trade-mark which appears on the copies of the religious periodicals (Exhibit HC-3) is not the Mark, but rather:



BAYARD

The word PRESSE is therefore absent.

[12] The mark appearing on exhibits HC-4, HC-6 and HC-7 is as follows:



BAYARD  
JEUNESSE

Accordingly, the word "JEUNESSE" has replaced the word "PRESSE" and is positioned immediately below and not beside the word "BAYARD."

[13] Regarding the Stationery Items, Mr. Chicou claims that the purchase of one of the books submitted as Exhibit HC-6 includes a set of colouring pencils. The illustration appearing on Exhibit HC-6 shows a set of colouring pencils which appear to be affixed to the title page of a colouring book. The BAYARD JEUNESSE mark and design illustrated above appear on the cover page of this book. Since the colouring pencils are affixed to the book and the latter carries the mark previously mentioned, I am prepared to consider that this mark is used in association with these colouring pencils. However, I have no evidence of use of the Mark or of BAYARD JEUNESSE and design or BAYARD and design in association with the other Stationery Items listed above.

[14] Regarding the Services, Mr. Chicou states:

24. With regard to the Services, in addition to the services associated with printing, publishing and binding, [the Registered Owner] was the co-producer of animated films distributed in Canada during the [Relevant] Period, specifically on the Télé-Québec television channel. To this end, I have available in Exhibit HC-8 Télé-Québec's "*bulletin des tout-petits*" [Translation: tiny tots schedule] for May 2008.

[15] However, Exhibit HC-8 makes no reference to the Registered Owner, and even less so the Mark or any other mark mentioned previously. Accordingly, I cannot conclude in the use of the Mark in association with the document binding, radio or television entertainment and printing services. Regarding the newspaper subscription services, there is a subscription form inside some of the religious periodicals submitted under Exhibit HC-3. I therefore consider that this service was offered in Canada during the Relevant Period.

[16] In light of all this evidence, I must determine whether the use of the BAYARD trade-mark and design and BAYARD JEUNESSE trade-mark and design constitute a use of the Mark. If the answer is affirmative, I will have to determine in association with which of the Wares and Services these marks were used in Canada during the Relevant Period.

[17] Is there reason to conclude that the absence of the word PRESSE in the BAYARD trade-mark and design and the presence of the word JEUNESSE instead of PRESSE in the BAYARD JEUNESSE trade-mark and design significantly alter the distinctive character of the Mark? [See *Registrar of trade-marks v. Compagnie Internationale pour l'informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523]. I do not think so. The distinctive elements of the Mark are the graphic itself and the word BAYARD. However, these two elements are found in the marks used by the Registered Owner and illustrated above. I do not consider the absence of the word PRESSE, which is descriptive of certain Wares and Services, or the replacement of this word by JEUNESSE as a significant deviation from the Mark. In effect, a consumer who knows the Mark will not be confused about the origin of wares and services offered in association with the marks illustrated above.

[18] It remains only to decide whether there is evidence of the use of the Mark in association with each of the wares covered by the terms "Printed Products," "Stationery Items" and "Audiovisual Products."



[19] With regard to the Printed Products, I have no evidence of use of the Mark in association with agendas, directories, guides, almanacs, street maps, maps, file cards and playing cards. With regard to the Stationery Items, I have no evidence of use of the Mark in Canada in association with pens, pencil sharpens, erasers, guillotines, pencil holders, pen holders, paperweights, drawing rulers, bookends and blotting pads. There is also no evidence of use of the Mark in association with the Audiovisual Products. Lastly, regarding all of these wares and the Remaining Services, with the exception of newspaper subscriptions, Mr. Chicou provided no explanation that could justify the absence of use of the Mark during the Relevant Period [see Section 45(3) of the Act].

[20] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, the registration TMA436,529 will therefore be amended such that the statement of wares reads as follows:

Printed products, specifically: magazines, books, reviews, newspapers, periodicals, calendars, printouts: stationery items, specifically: pencils.

and that of services reads as follows:

Newspaper subscriptions.

the whole pursuant to the provisions of Section 45 of the Act.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Traduction certifiée conforme  
Alan Vickers