



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

**Citation: 2014 TMOB 160**  
**Date of Decision: 2014-07-29**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Tasty Burger Corporation. against  
registration No. TMA301,181 for the trade-mark TASTY  
BRAND BEEF BURGERS in the name of Maple Leaf  
Foods Inc./Les Aliments Maple Leaf Inc.**

The Proceedings

[1] On September 11, 2012, at the request of Tasty Burger Corporation (the Requesting Party) the Registrar forwarded a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Maple Leaf Foods Inc./ Les Aliments Maple Leaf Inc. (the Registered Owner), the registered owner of the trade-mark TASTY BRAND BEEF BURGERS (the Mark).

[2] The Mark is registered for use in association with frozen hamburger patties (the Wares).

[3] In response to the notice, the affidavit of Gordon McLennan has been furnished together with Exhibits A to C. Both parties filed written arguments; however only the Requesting Party was represented at the hearing.

The Law

[4] The notice under section 45 of the Act required the Registered Owner to show whether the Mark had been used in Canada in association with the Wares 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. The relevant period in this case is any time from September 11, 2009 to September 11, 2012 (the Relevant Period).

[5] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such, the threshold test to establish use is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[6] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Wares within the meaning of section 4(1) of the Act. There is no need for evidentiary overkill. However any ambiguity in the evidence filed shall be interpreted against the Registered Owner [See *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980) 53 CPR (4th) 62 (FCA)].

[7] Therefore, I have to determine if I am satisfied that the evidence to be described below enables me to conclude that the Mark was used by the Registered Owner in Canada in association with the Wares during the Relevant Period.

#### The evidence

[8] Mr. McLennan describes himself as the Director of Sales for the Registered Owner and in charge of the M&M Meat Shops Ltd. (the Licensee) account. He further states that he is familiar with the facts set forth in his affidavit, either from his personal knowledge or from information derived from the records of the Registered Owner and its Licensee.

[9] Mr. McLennan filed as Exhibit A to his affidavit a copy of an extract of the Canadian Trade-marks Database for registration TMA301,181.

[10] Mr. McLennan affirms that the Registered Owner has licensed the Mark to the Licensee under an exclusive license. He alleges that under the terms and conditions of the license, the Registered Owner maintains control over the character and quality of the Wares sold in association with the Mark.

[11] Mr. McLennan asserts that during the Relevant Period the Mark was used continuously across Canada by the Licensee in association with the Wares in three varieties: (i) uncooked 16 pack; (ii) fully cooked 16 pack; and (iii) fully cooked 150 pack.

[12] Mr. McLennan filed as Exhibit B to his affidavit two photographs that he alleges to be 'dated' October 11, 2012 showing packaging for the Licensee's Wares for its uncooked 16 pack of frozen hamburger patties. There is no date on the pictures and therefore I can only assume that they were taken on that date.

[13] On the packaging in the first picture we see the Licensee's name as well as 'Tasty Burgers' on one line and underneath it 'Burgers Tasty'. Underneath those two inscriptions is written 'Seasoned Tasty Brand Beef Burgers' in much smaller script followed by an asterisk and on the next line in same size script 'Burgers de boeuf assaisonnés marque Tasty'.

[14] The packaging in the second picture shows the list of ingredients and a notice that the trade-mark 'Seasoned Tasty Brand Beef Burgers' is a 'registered trademark of Maple Leaf Consumers Foods Inc'. Mr. McLennan alleges that such notice indicates that the Mark is a registered trade-mark of the Registered Owner, 'through its affiliate, Maple Leaf Consumer Foods Inc.' (Maple Leaf Consumer).

[15] Mr. McLennan goes on to state that the Wares bearing the Mark are offered for sale and sold in Canada in the normal course of the Licensee's business through the Licensee's network of over 400 M&M Meat Shops stores located in every province across Canada.

[16] Mr. McLennan filed as Exhibit C to his affidavit the Licensee's sales figures for the Wares in Canadian dollars and units sold for the years 2010 to 2012 across Canada. For each of those years sales have always exceeded 4 million dollars representing more than 200,000 units sold each year.

#### Analysis of the evidence filed

[17] In order to determine if the Registered Owner has met its evidential burden to prove use of the Mark in Canada in association with the Wares during the Relevant Period I need to address each of the following issues raised by the Requesting Party:

- a) Did Mr. McLennan have personal knowledge of the matters contained in his affidavit?
- b) Does the evidence filed demonstrate use of the Mark as registered?
- c) Which entity uses the Mark and does such use inure to the benefit of the Registered Owner?

a) *Hearsay issue*

[18] The Requesting Party argues that, despite the statement made by Mr. McLennan that his affidavit is based on his personal knowledge or from information derived from the records of the Registered Owner and its Licensee, there is no indication as to what is based on personal knowledge and what is derived from the Licensee's files. The Requesting Party argues that Mr. McLennan does not disclose with reasonable precision the source of the documentation or information relating to the sales figures provided and the labels filed.

[19] The Requesting Party submits that Mr. McLennan's allegations concerning the labelling and the sales figures do not disclose whether such documentation forms part of the normal business files of the Registered Owner. The fact that there is a business relationship between the Registered Owner and the Licensee does not dispel the problematic fact that portions of the affidavit are likely based on hearsay.

[20] According to the Requesting Party, the language used in the affidavit strongly suggests that the affiant does not have personal knowledge of the labels and sales figures referred to within his affidavit. The language used is 'Now shown to me and marked as...'. According to the Requesting Party such language suggests that the documents presented to him as Exhibits B and C to his affidavit, originate from an outside source and were shown to him for the first time.

[21] The Requesting Party refers to case law in support of its contention that any ambiguities in an affidavit provided under section 45 are to be resolved against the Registered Owner.

[22] The Registered Owner pleads that given Mr. McLennan's responsibilities within the Registered Owner's employ and, specifically his sales role vis-à-vis the Licensee, it should be

wholly reasonable for one to accept that he has personal knowledge of the matters to which he deposes and has obtained information from the ordinary sales records of the Licensee to which he has been provided access. Because of the introductory statement made by Mr. McLennan about his personal knowledge of the facts deposed or from information derived from the records of the Registered Owner and its Licensee, it cannot be assumed that the statements made by the deponent are based upon his mere belief.

[23] The Registered Owner states that, since the deponent is the Director of Sales responsible for the Licensee's account with the Registered Owner, he has personal knowledge of: the frozen hamburger patty products produced by the Registered Owner and distributed by it to the licensee under the Mark; and the Licensee's use of the Mark in conjunction with the sale of those products.

[24] Taking into consideration that section 45 proceeding is summary in nature, I agree with the Registered Owner's position, but only to a certain extent. I accept those facts Mr. McLennan describes in his affidavit relating to the Registered Owner and/or the sales of the Licensee, but anything beyond those boundaries will be treated as hearsay evidence.

*b) Use of the Mark as Registered*

[25] The Requesting Party pleads that what appears on the packaging in Exhibit B to Mr. McLennan's affidavit is not the Mark, but rather the trade-mark TASTY BURGERS/BURGERS TASTY, written in distinctive and visually dominant lettering. It goes on to state that what is written at the bottom of the label (Seasoned Tasty Brand Beef Burgers) is descriptive terminology in view of the French language inscription 'Burgers de boeuf assaisonnés marque Tasty'.

[26] I note that the photos were taken outside of the Relevant Period. There is no indication in Mr. McLennan's affidavit that such packaging is an illustration of the packaging used during the Relevant Period. As such, these photographs fall short of demonstrating use of the Mark in Canada in association with the Wares during the Relevant Period.

[27] This conclusion should be sufficient to dispose of the matter. However I will address some of the other issues raised by the Requesting Party as they point out to more deficiencies concerning exhibit B and the evidence of use of the Mark by the Registered Owner.

[28] The Requesting Party argues that use of the trade-mark TASTY BURGERS/BURGERS TASTY does not constitute use of the Mark. In its written submissions, the Requesting Party wrote: ‘The deletion of the terms BRAND and BEEF in the middle of the English portion of the trade-mark and the addition of the ‘s’ at the end of BURGERS means that an essential dominant element of the mark has simply been deleted’. Consequently, the mark as used does not support the maintenance of the registration for the Mark as registered.

[29] The Requesting Party refers to *Canada (Registrar of Trade-marks) v Cie Internationale pour l’informatique CII Honeywell Bull Sa* (1985), 4 CPR (3d) 523 (CAF) to support its contention that the deviation from the Mark as registered is such that the Mark has lost its identity since some of the dominant features have been deleted.

[30] I agree with the Requesting Party. The use of TASTY BURGERS/BURGERS TASTY does not constitute use of the Mark. The deletion of the words ‘brand’ and ‘beef’ creates a trade-mark that is simply descriptive of the character of the Wares. Those missing words were as dominant as the other words forming the Mark. By deleting those words from the Mark, the end result is that the Mark has lost its identity.

[31] As for the inclusion on the label of ‘Tasty Brand Beef Burgers’ within the phrase ‘Seasoned Tasty Brand Beef Burgers’, the Requesting Party argues that it is being used as a descriptive phrase and does not constitute trade-mark use of the Mark. It further adds that the addition of the word ‘Seasoned’ at the beginning of the trade-mark in the same font as the remainder of the phrase alters the distinctive character of the Mark.

[32] The Requesting Party further argues that, where a trade-mark is subsumed into other descriptive language and is not used in a format or font which distinguishes it from the remainder of the wording, the mark is no longer being used as a trade-mark. Descriptive use of a trade-mark will not support a registration.

[33] The Registered Owner takes the position that the trade-mark ‘Seasoned Tasty Brand Beef Burgers’ includes the same dominant features of the Mark and that the differences are so minor or unimportant that the unaware consumer will not be misled. It refers to *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA). It argues that the packaging specimen shows that the trade-mark TASTY BURGERS is the dominant mark on the top cover of the packaging, while the secondary trade-mark TASTY BRAND BEEF BURGERS is displayed elsewhere on the top of the packaging in a smaller font.

[34] The Registered Owner contends that the use of the TASTY BRAND BEEF BURGERS mark in combination with the word SEASONED constitutes use of the Mark since all the features of the Mark are preserved and as a matter of first impression, the average consumer would readily perceive the word SEASONED as purely descriptive matter, wherein that word describes a feature of the product. Further it states that because all features of the Mark have been maintained, the addition of the word SEASONED in front of the Mark cannot be said to be so important that the Mark has lost its identity or that it is no longer recognizable.

[35] I agree with the Registered Owner that the issue is whether the addition of the word SEASONED to the mark TASTY BRAND BEEF BURGERS would be perceived as a substantial and more than a minor deviation from the Mark such that a member of the public would be deceived. It cites some extracts of the Registrar’s decision in *Nightingale Interloc v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TOMB).

[36] Even accepting the Registered Owner’s position that there can be use of a primary trade-mark (TASTY BURGERS) as well as a secondary mark (TASTY BRAND BEEF BURGERS), I do not consider the use of ‘Seasoned Tasty Brand Beef Burgers’ to be use of the Mark. Rather, I agree with the Requesting Party that the fact that:

- ‘Seasoned Tasty Brand Beef Burgers’ is written in the same font; and
- The word ‘Seasoned’ has been added to the Mark, the latter being highly suggestive;

makes ‘Seasoned Tasty Brand Beef Burgers’, as a whole, descriptive of the nature and character of the Wares. The Mark does not stand out and is no longer recognizable. It has become part of a generic slogan. Therefore ‘Seasoned Tasty Brand Beef Burgers’ used as described above cannot constitute use of the Mark within the meaning of section 4(1) of the Act.

*c) Ownership and control of the Mark by the registered owner*

[37] As stated previously, the packaging indicates that ‘Seasoned Tasty Brand Beef Burgers’ is a registered trade-mark of Maple Leaf Consumer, when in fact, the trade-mark owner is Maple Leaf Foods Inc./Les Aliments Maple Leaf Inc. In his affidavit, Mr. McLennan alleges that the trade-mark is a registered trade-mark of the Registered Owner, ‘through its affiliate, Maple Leaf Consumer’.

[38] As pointed out by the Requesting Party, the extract of the register filed by Mr. McLennan as Exhibit A to his affidavit indicates that the Registered Owner is the current owner of the Mark, while Maple Leaf Consumer Foods Inc. appears to be its predecessor in title. The statement made by Mr. McLennan about the ownership of the Mark is in contradiction with the content of Exhibit A. Moreover there is at least some ambiguity as to what Mr. McLennan meant by ‘... the [Mark] is a registered trademark of the [Registered Owner], through its affiliate, Maple Leaf Consumer Foods Inc.’

[39] That wording also raises the issue whether there exists a master license between the Registered Owner and Maple Leaf Consumer Foods Inc. In addition, there is no allegation in Mr. McLennan’s affidavit of a license between Maple Leaf Consumer Foods Inc. and M&M Meat Shops.

[40] Finally the reference to Maple Leaf Consumer Foods Inc. on the packaging may suggest that such packaging might originate from a period of time before the Relevant period as, according to Exhibit A, Maple Leaf Consumer Foods Inc. was the owner of the Mark since its registration, namely since March 29, 1985 up to the change in ownership that occurred on January 1, 2010. Therefore, it is possible that such packaging goes back to a date prior to the Relevant Period.



[41] All of those ambiguities must be resolved against the Registered Owner.

[42] Consequently, I conclude that the Registered Owner has failed to prove use of the Mark in Canada in association with the Wares during the Relevant Period. It also failed to provide facts that could be considered as special circumstances justifying non use of the Mark within the meaning of section 45(3) of the Act.

Disposition

[43] Pursuant to the authority delegated to me under section 63(3) of the Act, registration No. TMA301,181 will be expunged from the register in compliance with the provisions of section 45 of the Act.

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