



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

**Citation: 2014 TMOB 17**  
**Date of Decision: 2014-01-27**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Miller Canfield LLP against registration  
No. TMA545,923 for the trade-mark HEALTHY  
CREATIONS in the name of Maxim Marketing  
Corporation**

[1] On September 7, 2011 at the request of Miller Canfield LLP (the Requesting Party), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* RCS 1985, c T-13 (the Act) to Maxim Marketing Corporation (the Owner), the registered owner of registration No. TMA545,923 for the trade-mark HEALTHY CREATIONS (the Mark).

[2] The Mark is registered for use in association with the wares “pretzels”.

[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 in which use must be shown is between September 7, 2008 and September 7, 2011.

[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] 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 these proceedings 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.

[6] In response to the section 45 notice, the Owner furnished the affidavit of Eric Ison, Chief Financial Officer of the Owner. Only the Requesting Party filed written representations; an oral hearing was not held.

[7] In his affidavit, Mr. Ison states that the Owner is a California-based snack food company that imports and distributes snacks and confectionary in North America. He attests that the HEALTHY CREATIONS product line was launched in 2001 in the United States and then in Canada as a line of “health conscious pretzel snacks”.

[8] He asserts that wares bearing the Mark were sold during the relevant period through direct sales by the Owner, “based on orders placed by interested distributors in Canada and through [the Owner’s] websites”.

[9] Attached as Exhibit B to Mr. Ison’s affidavit are pictures of various flavoured pretzels snack bags that Mr. Ison attests are representative of those sold during the relevant period. I note that the Mark appears near the top of each bag.

[10] As evidence of transfers of the wares in Canada during the relevant period, attached as Exhibit C to Mr. Ison’s affidavit are two invoices from “Maxim Manufacturing & Marketing” to “SIMPLY CANDY”. He attests that both invoices “make reference to the sale of Wares bearing the HEALTHY CREATIONS trade-mark to Canadian consumers” and that “these invoices are representative of invoices for the sale of HEALTHY CREATIONS Wares in Canada during the

relevant period.” As noted by the Requesting Party, Mr. Ison does not clearly state that the invoices were issued by the Owner, nor does he explain the relationship, if any, between the Owner and “Maxim Manufacturing & Marketing”. Indeed, Mr. Ison’s affidavit is generally lacking in clear statements regarding the Owner’s normal course of trade in Canada during the relevant period. Although he provides printouts of webpages from the Owner’s websites at Exhibit D, I note that nothing in those pages indicates how or even if the Owner markets its wares in Canada.

[11] More importantly, even if I were to infer that the invoices are from the Owner, I note that only one of the invoices appears to be dated within the relevant period, namely June 3, 2011. The other is dated after the relevant period, namely April 3, 2012.

[12] Evidence of a single sale may be sufficient to establish use of a trade-mark in the normal course of trade, depending on the circumstances surrounding the transaction. As stated in *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD):

Evidence of a single sale, whether wholesale or retail, in the normal course of trade may well suffice so long as it follows the pattern of a genuine commercial transaction and is not seen as being deliberately manufactured or contrived to protect the registration of the trade mark. [at 293]

[13] However, in *Guido Berlucci & C Srl v Brouillette Kosie* (2007), 56 CPR (4th) 401 (FC), the Federal Court stated the following:

...if a registered owner chooses to produce evidence of a single sale, he is playing with fire in the sense that he must provide sufficient information about the context of the sale to avoid creating doubts in the mind of the Registrar or the Court that could be construed against him. [at paragraph 20]

[14] In this case, I am not satisfied that the June 2011 invoice represents a sale that follows “the pattern of a genuine commercial transaction”. Indeed, the Requesting Party goes so far as to suggest that the two exhibited invoices “appear to be fabricated documents”. This submission is based in part on research and allegations of the Requesting Party that is not in evidence. However, upon review of the two invoices in evidence, I note that they are curiously identical in important respects, including the invoice number, purchase order number, product descriptions and ship date (being “4/8/2012” on both invoices). The information that is different – the

numbers for the quantities ordered and shipped, the total dollar values and the date – are all printed noticeably darker than the other information appearing on the “earlier” June 2011 invoice. Despite the Requesting Party questioning the validity of the invoices, the Owner chose not to respond to these allegations with its own representations.

[15] In any event, even if I were to take the June 2011 invoice at face value, as noted above the “Ship Date” indicated is well after the end of the relevant period. As such, and absent more details regarding the circumstances surrounding this transaction and the Owner’s normal course of trade in Canada, I am not satisfied that the invoices evidence a transfer in property or possession of the wares in Canada during the relevant period.

[16] Notwithstanding the invoices, Mr. Ison’s affidavit remains ambiguous with respect to whether transfers of the wares actually occurred in Canada during the relevant period in the normal course of trade. He provides “approximate North American sales” figures as follows: 2008-2009: \$10,000; 2009-2010: \$15,000; 2010-2011: \$30,000. Noting that the Owner’s products “did not perform as well as expected in the Canadian marketplace”, Mr. Ison attests that “Canadian sales of Wares bearing [the Mark] have represented, on average, a small percentage of total North American annual sales, namely, less than 5%”. I would note that “less than 5%” is an inherently ambiguous statement and can be interpreted as “zero” during the relevant period. Nothing in Mr. Ison’s statements clearly indicates that sales were actually made in Canada during the relevant period, either in the normal course of trade or otherwise.

[17] Accordingly, I cannot conclude that the Owner has demonstrated use of the Mark in association with the wares within the meaning of sections 4 and 45 of the Act.

#### Special Circumstances

[18] With respect to whether there were any special circumstances excusing non-use of the Mark during the relevant period, notwithstanding Mr. Ison’s comments regarding its HEALTHY CREATIONS brand as being of great value to the Owner, the Owner furnished no evidence and made no submissions explicitly with regards to special circumstances. As poor or unfavourable market conditions are generally not considered special circumstances excusing non-use, I cannot find that the criteria set out in *Registrar of Trade Marks v Harris Knitting Mills Ltd* (1985), 4

CPR (3d) 488 (FCA) have been satisfied in this case [see *Rogers, Bereskin & Parr v Registrar of Trade-marks* (1987), 17 CPR (3d) 197 (FCTD); *Lander Co Canada Ltd v Alex E Macrae & Co* (1993), 46 CPR (3d) 417 (FCTD)].

[19] In this respect, I note the following observation by the Federal Court of Appeal in *Plough, supra*:

There is no room for a dog in the manger attitude on the part of registered owners who may wish to hold on to a registration notwithstanding that the trade mark is no longer in use at all or not in use with respect to some of the wares in respect of which the mark is registered. [at 66]

[20] As the Owner has provided no evidence to demonstrate that the reasons for non-use of the Mark were beyond its control, I must further conclude that the Owner has not demonstrated special circumstances to justify non-use of the Mark during the relevant period within the meaning of section 45(3) of the Act.

#### Disposition

[21] In view of all of the foregoing, 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.

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