



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

**Citation: 2014 TMOB 229**  
**Date of Decision: 2014-10-21**

**IN THE MATTER OF A SECTION 45  
PROCEEDING requested by Schwan's  
IP, LLC against registration  
No. TMA586,123 for the trade-mark  
BON APPETIT Design in the name of  
COFACO AÇORES – Industria de  
Conservas, S.A.**

[1] This decision pertains to a summary expungement proceeding with respect to registration No. TMA586,123 for the trade-mark BON APPETIT Design, as shown below, owned by COFACO AÇORES – Industria de Conservas, S.A.

[2] The wares listed in the registration are “canned fish”.

[3] For the reasons that follow, I conclude that the registration ought to be maintained.

#### The Proceeding

[4] On May 24, 2012, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to COFACO AÇORES – Industria de Conservas, S.A. (the Registrant). This notice was sent at the request of Schwan's IP, LLC (the Requesting Party).

[5] The notice required the Registrant to furnish evidence showing that it had used the trade-mark BON APPETIT Design (the Mark) in Canada, at any time between May 24, 2009 and May 24, 2012, in association with the wares specified in registration No. TMA586,123. If the Mark had not been so used, the Registrant was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[6] In this case, the use of the Mark in association with the registered wares is governed by section 4(1) of the Act, which reads:

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.

[7] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary and expeditious procedure for clearing the register of “deadwood”. Mere claims of use are insufficient to show the use of the trade-mark [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the criteria for establishing use are not very demanding and an overabundance of evidence is not necessary, sufficient facts must be presented to enable the Registrar to conclude that the trade-mark has been used in association with each ware or service mentioned in the registration during the relevant period [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[8] In response to the Registrar’s notice, the Registrant furnished an affidavit of António Luis de Magalhães Tavares, Chairman of the Board of the Registrant, with its Exhibits A-1 to A-8.

[9] Only the Registrant filed written representations and was represented at the hearing.

#### Analysis of the Evidence

[10] Absent representations from the Requesting Party, I agree with the Registrant that it has furnished adequate evidence of use of the Mark in association with “canned fish” in its normal course of trade during the relevant period.

[11] For one thing, the testimony of Mr. António Luis de Magalhães Tavares clearly establishes that the Registrant has sold canned fish (the Wares) in association with the Mark in Canada during the relevant period through its distributor Ferma Food Products div. of Unibel Company Ltd. (Ferma). Also, the affiant explains that, in the normal course of trade, the Wares are sold by the Registrant to Ferma who in turn sells the Wares to Canadian retailers consisting of grocery stores, fish markets and supermarkets.

[12] Finally, the documentary evidence filed to support the affiant's testimony includes:

- photographs showing the Mark displayed on packaging for the Wares. Those photographs show the Wares as sold in Canada in the Registrant's normal course of trade during the relevant period; and
- a sampling of representative invoices issued during the years 2009 to 2012 by the Registrant to Ferma with respect to the sales of the Wares.

[13] In the end, I am satisfied that the evidence shows use of the Mark during the relevant period in Canada, within the meaning of sections 4(1) and 45 of the Act, in association with "canned fish".

#### Disposition

[14] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, registration No. TMA586,123 will be maintained.

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Céline Tremblay  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office