

Consommation  
et Corporations Canada

Consumer and  
Corporate Affairs Canada

Ottawa / Hull, Canada  
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June 26 1987

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Toronto, Ontario.  
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Gentlemen:

Re: SECTION 44 PROCEEDINGS  
Registration No. UCA 45377  
Trade Mark: COUNTRY INN

At the request of Messrs. Stitt, Baker & McKenzie, acting on behalf of Effem Foods Ltd., the Registrar issued a s. 44 Notice dated October 16, 1985 to Sears Canada Inc., the registered owner of the above referenced trade mark registration.

The mark COUNTRY INN was registered on October 20, 1952 for use in association with the following wares and services:

Wares: (1) candies, (2) wine jellies, jams, preserves, cakes, box chocolates and cheeses, (3) cookies.

Services: restaurant services.

In response to the Registrar's Notice, the registrant furnished the affidavit of its National Merchandise Manager, Mr. Gordon J. Aston, along with Exhibits A through F thereto. Further to the filing of this evidence, the requesting party requested an oral hearing which was scheduled for April 14, 1987 but postponed at the request of both parties. A hearing was re-scheduled for June 2, 1987 and the parties again requested a postponement. However; the second postponement was refused on the grounds that the parties had had over one year to negotiate an amicable settlement and that the Registrar did not have the authority to grant stays in s. 44 proceedings; as discussed in *Anheuser-Busch*<sup>1</sup>.

At the hearing, learned counsel for the requesting party argued at length that the evidence filed was insufficient to show use of the mark in association with its registered services and at best only showed use in association with the wares "cakes".

While it is true that the evidence furnished presents certain technical shortcomings, in my respectful opinion, the objections raised by counsel are either not convincing or raise issues which are outside the scope of s. 44 proceedings. Section 44 simply requires that the registered Owner furnish an affidavit or a statutory declaration showing that the trade mark is in use. It is not designed nor intended as a procedure for adjudicating disputes between competing interests; the whole as discussed by the Federal Court in several cases, the most recent being *Anne Roebuck and Anessence Inc. v. Registrar of Trade Marks and Rogers, Bereskin & Parr* (May 1, 1987) yet unreported, FCTD file T-2101-86.

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1. *Anheuser-Busch Inc. v. Carling O'Keefe Breweries of Canada Ltd.* (1982) 69 C.P.R. (2d) 136.

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At the hearing, counsel for the registrant produced complete Sears catalogues in an effort to clarify paragraph 6 of the affidavit and Exhibit E thereto. However counsel for the requesting party objected to the production of this material on the ground that it was an attempt to file additional or supplementary evidence out of statutory delays, and I felt duty-bound to agree.

In the course of the hearing, counsel for the requesting party dissected the Aston affidavit paragraph by paragraph and alleged shortcomings in all of them: The main criticism, as I understand it, was that the omission of the specification "in Canada" on several activities discussed therein, renders the affidavit a bare allegation of facts of the type discussed in *Plough Canada*<sup>2</sup>. With all due deference, I can see no substantive similarity in the affidavit of use filed in the *Plough* case and the one filed in the instant case.

I can agree that paragraph 2 of the Aston affidavit is somewhat ambiguous and could easily have been more specific and informative. However, in my opinion it is not patently ambiguous and bears no similarity to the dog in a manger attitude discussed in *American Distilling*<sup>3</sup>. Having given an opportunity to counsel for the registrant, at the hearing, to elucidate on the meaning of the second sentence of paragraph 2, without success, I can now only give it a fair reading within the context of the affidavit as a whole.

As I understand the situation, Sears Canada operates restaurants in several of its department stores in Canada and in so doing uses its mark COUNTRY INN in the advertisement and the performance of this service; as shown by paragraphs 8, 9 and 1a of the affidavit and Exhibit F thereto. I find this evidence sufficient to satisfy the requirements of the Act in regard to restaurant services. Sears Canada also operates candy sections within its stores where candies are sold by the pound. Paragraphs 3, 4 and 5 of the affidavit, along with Exhibits A, B, C and D also satisfy me that the mark is in use in association with the wares "candies". Sufficient facts have been established to allow me to conclude that the requirements of s-8. 4(1) have been met in regard to candies.

The only possible point of contention, in my respectful opinion, stems from the wording of the second sentence of paragraph 2. Given a fair reading, this sentence leads me to believe that the mark was not in use with "wine jellies, jams, preserves and cookies" as of and immediately prior to the notice date. The catalogue pages filed as Exhibit E are of little assistance in this determination since they are undated. Yet paragraph 7 seems to suggest that revenues were derived from the advertisement and sale of these particular wares in 1985. Counsel for the requesting party argued that the dictum expressed in *Rainier*<sup>4</sup> should be followed in this case.

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2. *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1981) 53 C.P.R. (2d) 62.
5. *American Distilling Co. v. Canadian Schenley Distilleries Ltd.* (1977) 38 C.P.R. (2d) 60.
4. *John Labatt Ltd. v. Reinier Brewing Co.* (1984) 80 C.P.R. (2d) 228.

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Upon due consideration, I find the circumstances in Rainier different from the present. In Rainier the evidence made it clear that the trade mark was in recent use with beer only and that it had never been used with the other registered wares. In the instant case, continuous and active commercial use has been established over a period of several years, leaving a question mark on use within the last nine months on some of the wares only. I am not convinced that these circumstances should lead to a conclusion of non-use within the meaning of the Act. Again, I do not believe that it is the intent or purpose of s. 44 of the Act to monitor use of trade marks so closely-that a stoppage in use on some of the registered wares for a very short period of time should be sanctioned by expungement.

Should the requesting party wish to argue abandonment, it should proceed under the provisions of s. 57 of the Act.

Therefore, by reason of the evidence filed in these proceedings, bearing in mind the arguments presented by both counsels and of the most recent pertinent jurisprudence enunciated by the Federal Court. I have concluded that the subject trade mark is in use in Canada with all of its registered wares. Consequently, its registration ought to be maintained as it presently appears on the register.

Registration UCA 45377 will be maintained accordingly, in compliance with the provisions of s-s. 44(5) of the Trade Marks Act.

Yours truly

**J. P. D'Aoust**

Senior Hearing Officer  
for Registrar of Trade Marks

JPD:sl

c.c. Messrs. Stitt, Baker & McKenzie  
(JFC)

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