



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

Citation: 2013 TMOB 44
Date of Decision: 2013-03-14

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Lafco Enterprises Inc. against registration
No. TMA651,148 for the trade-mark HOUSE & HOME
STYLE FOR LIVING in the name of Canadian Home
Publishers**

[1] At the request of Lafco Enterprises Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on August 17, 2010 to Canadian Home Publishers (the Registrant), the registered owner of registration No. TMA651,148 for the trade-mark HOUSE & HOME STYLE FOR LIVING (the Mark).

[2] The Mark is registered for use in association with the following wares (the Wares):

(1) Bedding, namely, complete bedding sets; bedding, namely, sheets in stand alone colours; bath accessories, namely, towels, shower curtains, bath mats; bath accessories, namely, soap dispensers, toothbrush holders, soap dishes.

(2) Tabletop dinner plates, cups, saucers, mugs, drinking glasses, stemware, teapots, creamers, serving platters, bowls, flatware, placemats, napkins; laundry baskets, canvas bins, metal storage bins; storage baskets, bins; outdoor furniture & accessories, namely, tables, chairs, umbrellas, footstools, loungers, pillows, chair pads, lanterns, serving trays, pitchers, drinkware, dinner plates; decorative accents, namely, candle holders, vases, frames, bowls.

(3) Laundry, namely, ironing board, iron, step ladder, ironing chair, hampers, wash bag sets, step stool, drying rack; storage, namely, shelving units, small cabinets, hanging wall cabinet, magazine holders, bottle holders/wine cube, cork board, bulletin board; candles;

bathroom hardware, namely, towel bars, toilet paper holders, cup holders, hooks; drapery; decorative pillows; furniture, namely, beds, sofas, dining tables.

[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 services specified in 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 such use since that date. In this case, the relevant period for showing use is between August 17, 2007 and August 17, 2010 (the Relevant Period).

[4] The relevant definition of “use” in association with wares 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 the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Registrant furnished the affidavit of Ryan Sargent, sworn on March 16, 2011. Both parties filed written representations, however only the Registrant was represented at an oral hearing.

[7] In his affidavit, Mr. Sargent identifies himself as the Executive Assistant to the President of the Registrant, a position he has held since May 2004. He explains that the Registrant is the publisher of two design and decorating magazines, *Canadian House & Home* and *Maison et Demeure*, and the producer of the television program *House & Home*. He states that tens of thousands of Canadian subscribers have subscribed to the magazines, and millions of Canadian viewers have viewed the Registrant’s television program.

[8] Mr. Sargent attests that in August 2000, the Registrant introduced a line of household products under the HOUSE & HOME and HOUSE & HOME STYLE FOR LIVING brands. He states that the HOUSE & HOME STYLE FOR LIVING line of products corresponds to the Wares, and that they were available for purchase in Canada during the Relevant Period in the Hudson's Bay Company (HBC) family of retail stores.

Use of the Mark under License

[9] Mr. Sargent explains that the Registrant licensed HBC to use the Mark on the Wares that HBC manufactures and sells to its retail customers in Canada. Pursuant to this licensing arrangement, Mr. Sargent confirms that the Registrant continuously exercises control over the character and quality of the Wares, as well as all related packaging, promotional materials, and advertising, and the appearance and placement of the Mark within such packaging, promotional materials, and advertising.

[10] On this issue, the Requesting Party submits that since the Registrant failed to produce a copy of the license agreement for confidentiality reasons, there is insufficient evidence to establish quality control and use of the Mark under license pursuant to section 50 of the Act.

[11] However, it is well established that filing a copy of a license agreement is not mandatory in a section 45 proceeding provided that the evidence establishes that the registered owner has control over the character and quality of the wares bearing the trade-mark [*Gowling, Strathy & Henderson v Samsonite Corp* (1996), 66 CPR (3d) 560 (TMOB); *Central Transport, Inc v Mantha & Associates* (1995), 64 CPR (3d) 354 (FCA)]; a sworn statement to that effect is sufficient [*Federated Department Stores, Inc v John Forsyth Co* (2000), 10 CPR (4th) 571 (TMOB)].

[12] In this case, Mr. Sargent provides a clear explanation of the licensing relationship between the Registrant and HBC and includes a sworn statement to the fact that the Registrant controls the character and quality of the Wares in association with which the Mark has been used as well as of the use of the Mark itself.

[13] Accordingly, I am satisfied that any use of the Mark shown by HBC enures to the benefit of the Registrant in accordance with section 50 of the Act.

Display of the Mark

[14] In his affidavit, Mr. Sargent explains that the Mark appears prominently on all labels that are affixed to the Wares and/or on the packaging containing the Wares. Examples of such are provided at Exhibit B to his affidavit, which includes packaging and labels for a serving platter, bedding, hangers, and drinking glasses/stemware, as well as a hang tag that Mr. Sargent attests would have been affixed to some of the Wares. I note that the Mark is clearly displayed on all the exhibited sample packaging.

[15] The Requesting Party submitted that certain items included at Exhibit B also display the trade-mark H&H, and that consumers would therefore perceive use of the trade-mark H&H rather than that of the Mark itself.

[16] It is well established, however, that there is nothing to prevent the display of two or more trade-marks at the same time. In my view, consumers would perceive use of the Mark as well as use of other marks owned by the Registrant [see, for example, *AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD); *Blaney, McMurty, Stapells, Friedman v Spectra Computer Services Ltd* (2000), 5 CPR (4th) 106 (TMOB); *Cie Générale des Établissements Michelin – Michelin & Cie v Continental General Time Canada Inc* (2000), 8 CPR (4th) 417 (FCTD)].

[17] The Requesting Party also submitted that there is a lack of evidence of use of the Mark in association with “candles” specifically.

[18] In this respect, I would first note that Mr. Sargent clearly attests that the Mark was used in association with all of the Wares as registered, and that while the exhibited samples are not meant to be an exhaustive collection of all the packaging and labels used during the Relevant Period, they are representative of the manner in which the Mark appeared on such labels or packaging during the Relevant Period. In my view, such representative evidence, supported by

Mr. Sargent's sworn statements, is sufficient in this case [see *Saks & Co v Canada (Registrar of Trade Marks)* (1989), 24 CPR (3d) 49 (FCTD)].

[19] In any event, Mr. Sargent also provides, at Exhibit E of his affidavit, photographs of representative in-store and point of sale advertising, which show various signs, consumer information cards, and in-store banners displaying the Mark. These photographs show that, during the Relevant Period, HBC created "display rooms" showcasing the Registrant's Mark and associated line of products. These display rooms feature shelves and tables lined with the Wares all in close proximity to large point of sale display signs as well as smaller shelf cards all bearing the Mark. Candles are clearly seen displayed in such a manner on pages 2 and 6 of Exhibit E.

[20] In my view, such display of the Mark on in-store displays would bring the Mark to the attention of consumers at the time of transfer of the Wares and, as such, would satisfy the requisite notice of association within the meaning of section 4(1) of the Act [see *Loblaws Ltd v Richmond Breweries Ltd* (1982), 73 CPR (2d) 258 (TMOB); *Riches McKenzie & Herbert LLP v Parissa Laboratories Inc* (2006), 59 CPR (4th) 219 (TMOB)].

Evidence of Sales

[21] With respect to evidence of sales during the Relevant Period, Mr. Sargent estimates the value of sales for the Registrant's branded Wares to have ranged from \$10,600,000 to \$16,900,000 between 2007 and 2010. Consistent with this, Mr. Sargent furnishes at Exhibit C of his affidavit a large volume of detailed sales reports by HBC. Mr. Sargent attests that these reports are not produced as evidence of use of the Mark but rather as evidence of sales of each of the Wares in association with the Mark in Canada during the Relevant Period.

[22] Each sales report shows line items identifying the particular HBC retail establishment followed by a product description, the original retail price, and the number of units sold. As an example -- and in response to the Requesting Party's submissions concerning the alleged lack of evidence specifically with respect to "candles" -- at the oral hearing, the Registrant directed the Registrar's attention to sales of candles bearing the Mark set out in the "The Bay" report for "Week 52, 2007 (February 1st, 2007 – January 31st, 2008)" under the item "filled glass boxed candles".

[23] As such, and in view of all of the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark in association with all of the Wares as registered within the meaning of sections 45 and 4(1) of the Act.

Disposition

[24] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

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