

SECTION 45 PROCEEDINGS
TRADE-MARK: WONDERFARM & DESIGN
REGISTRATION NO: TMA504,780

[1] On May 30, 2007, at the request of Borden Ladner Gervais LLP (the Requesting Party), the Registrar forwarded a notice under s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) to Wonderfarm Biscuits & Confectionery SDN BHD (the Registrant), the registered owner of the above-referenced trade-mark (the Mark).



[2] The Mark (shown above) is registered in association with the following wares:

Meat, fish, poultry and game; meat extracts; preserved, dried, cooked and stewed fruits; fruit salads, preserved, dried or cooked vegetables; canned mushrooms (preserved); jellies; jams; fruit sauces; eggs; milk; edible oils and fats; pickles; canned foodstuffs, namely, soups, anchovies, fish, shellfish, vegetables, gravies, coconut cream, coconut milk, coconut meat, coconut water, green grass jelly, grass jelly, fruit juice, non-alcoholic, non-carbonated beverages; coffee, artificial coffee, tea, cocoa, sugar, rice, tapioca, sago, flour and preparations made from cereals, namely, bread, pastry, biscuits, wafers, and cookies; and confectionery, namely, candy; ices, honey, treacle, yeast, baking powder, salt, mustard, vinegar, sauces (condiments), spices; ice, beers, mineral and aerated waters and other non-alcoholic drinks, namely, teas, coffees, non-carbonated fruit based beverages, and non-carbonated beverages made primarily of natural ingredients; fruit drinks, namely, non-alcoholic non-carbonated fruit based beverages; fruit extracts (non-alcoholic) syrups and other preparations for making beverages, namely, fruit based concentrates; nutmeg concentrate and lemon concentrate.

[3] Section 45 of the Act requires the registered owner to show whether the trade-mark has been used in Canada in association with each of the wares or 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 use since that date. In this case, the relevant period for showing use is any time between May 30, 2007 and May 30, 2004 (the Relevant Period).

[4] "Use" in association with wares is set out in s. 4(1) and 4(3) 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.

[...]

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

In this case, s. 4(1) applies.

[5] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing deadwood from the register and as such, the threshold test is quite low. As stated by Mr. Justice Russell in *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270:

68. [...] We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade mark owners business and merchandising practices.

[6] In response to the Registrar's notice, the Registrant furnished the affidavit of Mr. Pang Tee Chiang, a director of the Registrant, together with Exhibits A to E.

[7] Both parties filed written submissions. Only the Requesting Party was represented at an oral hearing.

[8] At the outset, the Registrant conceded in its written submissions that it has not furnished evidence of use of the Mark in respect of each and every ware listed in its registration. Accordingly, the Registrant has voluntarily amended its registration so as to delete from the statement of wares, the wares for which no evidence of use has been furnished, namely:

Meat, fish, poultry and game; meat extracts; fruit salads, preserved, dried or cooked vegetables; jellies; jams; fruit sauces; eggs; milk; edible oils and fats; pickles; canned foodstuffs, namely, soups, anchovies, fish, shellfish, vegetables, gravies, coconut meat; artificial coffee, tea, cocoa, sugar, rice, tapioca, sago, flour; and confectionery, namely, candy; ices, honey, treacle, yeast, baking powder, salt, mustard, vinegar, sauces (condiments), ice, beers; fruit extracts (non-alcoholic) syrups and other preparations for making beverages, namely, fruit based concentrates; nutmeg concentrate and lemon concentrate.

Consequently, these wares will be deleted from the registration.

[9] The amended statement of wares reads as follows:

Preserved, dried, cooked and stewed fruits; canned mushrooms (preserved); coconut cream, coconut milk, coconut water, green grass jelly, grass jelly, fruit juice, non-alcoholic, non-carbonated beverages; coffee, tea, preparations made from cereals, namely, bread, pastry, biscuits, wafers, and cookies; spices; mineral and aerated waters and other non-alcoholic drinks, namely, teas, coffees, non-carbonated fruit based beverages, and non-carbonated beverages made primarily of natural ingredients; fruit drinks, namely, non-alcoholic non-carbonated fruit based beverages.

[10] The Registrant did also enclose with its written submissions, photographs of packaging of some of its wares in addition to those attached as Exhibits A and E to the Pang affidavit. As objected to by the Requesting Party, these additional photographs

ought to be disregarded. They should have been filed at the evidentiary stage, as duly signed exhibits to a properly sworn affidavit.

[11] I will now turn to the evidence introduced by the Pang affidavit.

[12] Mr. Pang first goes over the history of the Registrant. The Registrant is a subsidiary of Trade Ocean Holdings Sdn. Bhd (Ocean Holdings), a Malaysian company. The Registrant became the manufacturing and research and development division of Ocean Holdings in the 1980s. The other subsidiary of Ocean Holdings is Trade Ocean Exporters Sdn. Bhd (Trade Ocean), which became the marketing arm for all exporting activities of the Registrant.

[13] In 1991, in line with Ocean Holdings' desire to seek new opportunities, another factory was built to meet its expansion needs. Ocean Holdings founded Interfood Processing Industry Ltd. (renamed in 2005 Interfood Shareholding Company) (Interfood), located in Vietnam. Over the years, Ocean Holdings moved its international marketing and manufacturing divisions into Vietnam. Mr. Pang states that Interfood quickly became the most modern manufacturer in Vietnam and one of today's most dominant and quality focused confectionery and beverages producers in Vietnam.

[14] Mr. Pang states in paragraph 7 of his affidavit that the Registrant "*continues to be the quality control and research and development division for our biscuits and confectionery while [Ocean Holdings] is responsible for canned drinks and foodstuff.*" He further states in paragraph 13 that "*[Interfood] is licensed by [the Registrant] to sell its products in Canada.*"

[15] Mr. Pang states in paragraph 14 of his affidavit that the Registrant currently export its products bearing the Mark to over 30 countries in five continents, with regions including North America, South America, Europe, Middle East, Australasia and across Asia. He further states in paragraph 15 that the Registrant "*sells its Wonderfarm Trade-mark branded products in Canada, and has sold continuously in Canada during the*

three-year period preceding May 30, 2007". He attaches in paragraph 16 as Exhibit A to his affidavit "*brochures displaying the following Wonderfarm Trade-mark branded products: (...)*", and he recites the statement of wares as it stood at the time of issuance of the s. 45 notice. Mr. Pang states that "[*t*]hese brochures are and have been distributed in Canada by [*t*he Registrant] continuously during the three-year period preceding May 30, 2007."

[16] Mr. Pang further attaches as Exhibits B to D to his affidavit, "*small sampling of invoices of Wonderfarm Trade-mark branded products sold in Canada*" for 2005, 2006 and 2007 respectively. The 2005 invoices have been issued by Interfood Processing Industry Ltd. and those for the years 2006 and 2007 by Interfood Shareholding Company. While these invoices do not bear the Mark, they serve to establish the occurrences of sales to Canadian addressees located in the provinces of Ontario and British Columbia during the Relevant Period.

[17] Mr. Pang also attaches as Exhibit E to his affidavit "*a sampling of actual labels from products that are sold in Canada bearing the WONDERFARM & Design trade-mark*".

[18] The Requesting Party submits that Mr. Pang's statements of use of all wares made in paragraphs 15 and 16 of his affidavit reproduced above amount to bald statements of use of the type found unacceptable in *Aerosol Fillers Inc. v. Plough (Canada) Ltd.* (1980), 53 C.P.R. (2d) 62 (F.C.A.) and ought not to be afforded any weight as the Registrant itself conceded in its written submissions that evidence of use of the Mark in respect of each of the wares listed in its registration had not been furnished. It is true that these general statements of use of Mr. Pang concerning all of the registered wares amount to bare assertions of use which by themselves do not meet the requirements of *Plough*. However, they must be read together with the evidence as a whole. This brings me to comment on the exhibits attached to Mr. Pang's affidavit.

[19] As rightly pointed out by the Requesting Party, the specimen of marketing brochure attached as Exhibit A to Mr. Pang's affidavit is not by itself sufficient to establish use of the Mark on the alleged wares within the meaning of s. 4 of the Act [see *Burroughs Wellcom Inc. v. Kirby, Shapiro, Eades & Cohen* (1983), 73 C.P.R. (2d) 13]. While Mr. Pang states that this brochure is and has been distributed in Canada by the Registrant continuously during the three-year period preceding May 30, 2007, no information is provided as to whom the brochure has been distributed to, nor as to the number of brochures so distributed and their manner of distribution. However, this marketing brochure does show how the Mark is affixed on the wares themselves or on their packages. It is also useful in understanding the nature of the affiant's business and of the wares in association with which the Mark is used.

[20] More particularly, Exhibit A is in the name of Interfood Shareholding Company. It comprises a two-pager presentation of Interfood, which abundantly describes itself as "*We at Wonderfarm*", and a series of loose one-pager product presentation sheets displaying the WONDERFARM trade-mark branded products. In its presentation, Interfood provides a brief history of "*our structure and history*" wherein reference to the Registrant is made. I will revert to this point later on in my decision.

[21] The mark appearing on the cover page of the brochure as well as on the one-pager product presentation sheets and photographs of packaging of the wares reproduced therein slightly differs from the Mark as registered in that the three Chinese characters appearing to the left of the dominant portion of the mark (an oval design containing a depiction of conifer trees, a farm house, a large windmill with the words WONDERFARM on the bottom portion of the oval, with ears of wheat inside the balance of the oval) have been deleted. The transliteration of the Chinese characters as provided in the registration is DA NONG ZHUANG, translated into English as BIG FARM VILLAGE. The Registrant advises that this is the closest translation to the word WONDERFARM, which is fanciful.

[22] The Registrant submits that the deletion of the Chinese characters from the Mark as registered does not materially affect the distinctive character of the Mark from the point of view of the average bilingual Canadian consumer. I agree. Such deviation from the Mark as registered may be qualified as inconsequential; the dominant features are preserved such that the WONDERFARM & Design Mark as used maintain its identity and remain recognizable as the registered Mark *per se* [see *Registrar of Trade-marks v. Compagnie Internationale pour l'Informatique CII Honeywell Bull* (1985), 4 C.P.R. (3d) 523 (F.C.A.) and *Promafil Canada Ltee v. Munsingwear Inc.* (1992), 44 C.P.R. (3d) 59 (F.C.A.)]. I will thus refer to the mark as depicted in the brochure and product presentation sheets as the Mark.

[23] The one-pager product presentation sheets cover a variety of products including photographs of packaging displaying the Mark. Cross-referencing the wares displayed in these one-pager product presentation sheets with the invoices attached as Exhibits B, C, and D and the specimens of labels attached as Exhibit E, and comparing the results of this exercise with the amended statement of wares, I come to the following conclusions:

i) With respect to the wares described as “*preserved, dried, cooked and stewed fruits*”:

[24] The Mark is clearly shown on the front package of the unsweetened desiccated coconut featured in the “Coconut Products” one-pager presentation sheet and these goods are cross-referenced in a few invoices provided for the Relevant Period.

[25] The Registrant submits that use of the Mark on unsweetened desiccated coconut supports use of the Mark in association with the whole category of wares described as “preserved, dried, cooked and stewed fruits”. I disagree. The evidence as a whole does not enable me to infer that use of the Mark in association with such broad category of wares has been made by the Registrant. To the contrary, the Registrant’s use of the Mark with respect to such category of wares appears to be restricted to “desiccated coconut” only, which falls under the “sub-category” of “dried fruits”.

[26] Accordingly, I am prepared to conclude that use of the Mark has been shown in association with “*dried fruits*” only.

ii) With respect to the wares listed as “*canned mushrooms (preserved)*”:

[27] The marketing brochure includes on the cover page under the prominent display of the Mark and on the back of the cover page under the product range entitled “Canned Food”, a photograph of a tin of straw mushrooms. While the Registrant submits in its written submissions that the Mark appears on the side of the tin of the straw mushrooms sold in Canada as per the additional photograph attached to its written submission, which ought to be disregarded as discussed above, the photographs included in the marketing brochure only show the front of the tin.

[28] On a fair reading of the affidavit as a whole, including the fact that straw mushrooms are cross-referenced in a few invoices provided for the Relevant Period, I am prepared to infer that the Mark appears on the side of the tin as it does for the cans of coconut milk and coconut water discussed below and to conclude that use of the Mark has been shown in association with these wares.

iii) With respect to the wares described as “*coconut cream, coconut milk, coconut water, green grass jelly, grass jelly, fruit juice, non-alcoholic, non-carbonated beverages*”:

[29] These wares were formerly included in the broad category of wares described by the Registrant as “canned foodstuff”. The Mark is clearly shown in the photographs of the coconut cream cans featured in the “Coconut Products” one-pager presentation sheet and the specimens of labels attached as Exhibit E. These goods are also cross-referenced in several invoices provided for the Relevant Period.

[30] The Mark is partially shown on the left hand side of the can of coconut milk featured in the “Coconut Products” one-pager presentation sheet and these goods are cross-referenced in a few invoices provided for the Relevant Period.

[31] The Mark is clearly shown in the specimen of label attached as Exhibit E pertaining to a can of coconut water. A photograph of a can of coconut water is also featured in the “Coconut Products” one-pager presentation sheet. While this photograph only shows the front of the can, the specimen of label clearly shows the Mark appearing on the side of the can. These goods are also cross-referenced in several invoices provided for the Relevant Period. The specimen of label includes the following mention: *“Manufactured by Interfood Shareholding Company Under License, Process Technology Supervision and Quality Control of Trade Ocean Holdings BHD”*. I will revert to this point later on in my decision.

[32] The photographs included in the one-pager presentation sheets pertaining to a wide selection of “Canned Juice Drinks” and “Soda Drinks” show the front of the cans with a very partial view of the left hand side of the cans which seem to display the Mark. As for the “straw mushrooms” discussed above, the Registrant has attached to its written submissions an additional photograph clearly showing the Mark applied to the left hand side of a can of water melon tea, which ought to be disregarded, as discussed above. On a fair reading of the affidavit as a whole, including the fact that these goods are cross-referenced in several invoices provided for the Relevant Period, I am prepared to accept that the Mark does fully appear on the side of the cans as it does for the other cans of beverages featured in the “Energy Drinks” and “PET Bottle Drinks” one-pager presentation sheets and to conclude that use of the Mark has been shown in association with *“fruit juice, non-alcoholic, non-carbonated beverages”*.

[33] However, the evidence as a whole does not enable me to infer that use of the Mark in association with *“green grass jelly, grass jelly”* has been shown by the Registrant. While the Registrant submits that a few invoices support use of the Mark in association with “canned grass jelly”, the marketing brochure purporting to describe the

Registrant's product offering under the Mark and sample of labels attached to Mr. Pang's affidavit do not enable me to infer that use of the Mark in association with any such jellies has been made by the Registrant. To the contrary, the Registrant itself indicated in its written submissions that Mr. Pang's affidavit "*failed to clearly establish that the Registrant has used its trade-mark in Canada in association with the goods described as: (...) jellies; jams; (...)*"

[34] Accordingly, I am prepared to conclude that use of the Mark has been shown in association with "*coconut cream, coconut milk, coconut water, fruit juice, non-alcoholic, non-carbonated beverages*" only.

iv) With respect to the wares described as "*coffee, tea, preparations made from cereals, namely, bread, pastry, biscuits, wafers, and cookies*":

[35] The Mark is clearly shown in the photographs of the mocha ice coffee can and cappuccino ice coffee can featured in the "Coffee Drinks" one-pager presentation sheet. The Mark is also partially shown on the right hand side of the can of coffee featured in the one-pager presentation sheet entitled "Ground coffee" and these goods are cross-referenced in a few invoices provided for the Relevant Period. As per my comments above, I am prepared to infer that the Mark appears on the side of the can of water melon tea featured in the "Canned Juice Drinks" one-pager presentation sheets.

[36] The Mark is clearly shown in the photographs featured in the various "Wafer Sticks", "Cream Wafers" and "Assorted Biscuits and Cookies" one-pager presentation sheets and in some of the specimens of labels attached as Exhibit E and these goods are cross-referenced in several invoices provided for the Relevant Period.

[37] However, the evidence as a whole does not enable me to infer that use of the Mark in association with "bread" and "pastry" has been shown by the Registrant. Except for Mr. Pang's general statement of use of the Mark, the evidence is totally silent as to these varieties of wares, which cannot be assimilated to "biscuits, wafers, and cookies".

[38] Accordingly, I am prepared to conclude that use of the Mark has been shown in association with “*coffee, tea, preparations made from cereals, namely, biscuits, wafers, and cookies*” only.

v) With respect to the wares described as “*spices*”:

[39] The Registrant submits that the Mark is used in Canada association with curry powder. The photographs included in the one-pager presentation sheet entitled “Curry Powder” only show the front of two cans of curry powder. As for the “straw mushrooms” discussed above, the Registrant has attached to its written submissions an additional photograph clearly showing the Mark applied to the left hand side of a can of curry powder, which ought to be disregarded, as discussed above.

[40] In view of the above, and as none of the invoices attached as Exhibits B to D pertain to spices or curry powder, I am not prepared to infer that use of the Mark in association with “spices” has been shown by the Registrant.

vi) With respect to the wares described as “*mineral and aerated waters and other non-alcoholic drinks, namely, teas, coffees, non-carbonated fruit based beverages, and non-carbonated beverages made primarily of natural ingredients*”:

[41] My comments above pertaining to the Registrant’s wide selection of “Canned Juice Drinks” and “Soda Drinks” apply. Accordingly, I am prepared to conclude that use of the Mark has been shown in association with these wares.

vii) With respect to the wares described as “*fruit drinks, namely, non-alcoholic non-carbonated fruit based beverages*”:

[42] My comments above pertaining to the Registrant's wide selection of "Canned Juice Drinks" and "Soda Drinks" apply. Accordingly, I am prepared to conclude that use of the Mark has been shown in association with these wares.

[43] I must now determine whether the use of the Mark discussed above enures to the benefit of the Registrant.

[44] The specimens of brochure, labels and invoices attached as Exhibits A to E to Mr. Pang's affidavit are all in the name of Interfood, which has been identified by Mr. Pang as a licensee of the Registrant.

[45] The only way that third party use of a trade-mark is deemed to be that of the registered trade-mark owner is when s. 50 of the Act is satisfied. Subsections 50(1) and (2) read as follows:

50(1) For the purposes of this Act, if an entity is licensed by or with the authority of the owner of a trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

(2) For the purposes of this Act, to the extent that public notice is given of the fact that the use of a trade-mark is a licensed use and of the identity of the owner, it shall be presumed, unless the contrary is proven, that the use is licensed by the owner of the trade-mark and the character or quality of the wares or services is under the control of the owner.

[46] The evidence does not reveal that public notice was given of the fact that the Mark was used under licence and of the identity of the Registrant. The only reference to the Registrant that can be found in the materials discussed above is the one appearing in Interfood's two-pager presentation, which reads as follows (typos and the like reproduced):

Trade Ocean Holdings, in 1982, the corporate holdings company and founded two subsidiaries – Trade Ocean Exporters Sdn. Bhd which became the marketing arm for all exporting activities, and Wonderfarm Biscuits & Confectionary Sdn. Bhd., Which became the manufacturing, research and development division. In 1991, Vietnam opened its doors to foreign investment [...] our holdings established Interfood Processing Industry Lt. in late 1991, moving our international marketing and manufacturing into Vietnam.

[47] Such reference does not reveal the existence of a license of the Mark by the Registrant in favour of Interfood. The mention appearing on the can of coconut water pertaining to the use of the Mark under license of “Trade Ocean Holdings BHD” reproduced earlier in my decision, also does not assist the Registrar.

[48] Thus, the Registrant cannot claim the benefit of s. 50(2) of the Act.

[49] The question therefore becomes whether the Registrant can claim the benefit of s. 50(1) of the Act. As set out by Hearing Officer Fung in *Selena Altro Paperman v. Aliments Da Vinci Ltée/DaVinciFoo*, 2009 CarswellNat 5068:

11. [...] In order to satisfy the requirements of subsection 50(1) of the Act, the registrant or the licensee needs to clearly state in the affidavit or statutory declaration that the control required by s. 50 exists [see *Gowling, Strathy & Henderson v. Samsonite Corp.* (1996), 66 C.P.R. (3d) 560 (T.M.O.B.) and *Mantha & Associates v. Central Transport Inc.* (1995), 64 C.P.R. (3d) 354 (F.C.A.)]. Alternatively, a description of the control or a copy of the license agreement containing provisions pertaining to control would also suffice. Furthermore, the jurisprudence is clear that if the president or the director of a corporate owner is also the president or the director of the user of the trademark, the requirements of section 50 may be satisfied [see *Petro-Canada v. 2946661 Canada Inc.* (1998), 83 C.P.R. (3d) 129 and *Automobility Distribution Inc. v. Jiangsu Electronics Industries Ltd.* (2005), 43 C.P.R. (4th) 157].

[50] In the present case, except for the wares described in the statement of wares as “*preparations made from cereals, namely biscuits, wafers and cookies*”, I am not satisfied that such control between the Registrant and Interfood has been shown during the Relevant Period for the following reasons.

[51] Mr. Pang's statement in paragraph 7 of his affidavit that the Registrant "*continues to be the quality control and research and development division for our biscuits and confectionery while Trade Ocean Holdings Sdn. Bhd. is responsible for canned drinks and foodstuff*" does not amount to a clear statement of direct or indirect control by the Registrant of the character or quality of the wares described as "*canned drinks and foodstuff*" associated with the Mark.

[52] There is no mention of any license agreement in respect of the use of the Mark, be it oral or written, between the Registrant and Ocean Holdings. The "two-headed" type of control described by Mr. Pang in respect of the licensed use of the Mark by Interfood is much too vague to enable me to infer that the Registrant exercises appropriate control over the quality or character of the "*canned drinks and foodstuff*" that are manufactured and sold by Interfood under the supervision of Ocean Holdings.

[53] It is well established that corporate structure alone is insufficient to establish the existence of a license agreement and does not permit the inference that a registrant has control over the character or quality of the wares and services used in association with a licensed mark [see *Automobility Distribution Inc. v. Jiangsu Electronics Industries* (2005), 43 C.P.R. (4th) 157 (T.M.O.B.); *MCI Communications Corp. v. MCI Multinet Communications Inc.* (1995), 61 C.P.R. (3d) 245 (T.M.O.B.); *Dynatech Automation Systems Inc. v. Dynatech Corp.* (1995), 64 C.P.R. (3d) 101 (T.M.O.B.)]. As stated in *3082833 Nova Scotia Co. v. Lang Michener LLP* 2009 FC 928 at para 32:

32. A licensing agreement may be inferred from the facts. A licensing agreement need not be in writing [...]. However, the mere fact that there is some common control between the applicant's companies is not sufficient to establish that the use of the trade-mark was controlled and therefore infer a licensing agreement [...]. Evidence of control has to be adduced.

[54] While it is true that evidentiary overkill is not required in s. 45 proceedings, and the Registrar does not require much information to reach a conclusion that s. 45 evidence complies with s. 50 of the Act, there must still be sufficient facts from which a conclusion of controlled use can be made. An affidavit must also be considered from the

point of view of what it does not say. As stated in *Aerosol Fillers Inc. v. Plough (Canada) Ltd.* (1980), 45 C.P.R. (2d) 194 (F.C.T.D.) at 198:

The allegations in an affidavit should be precise and more particularly so with respect to an affidavit under s. 44(2) [now 45(2)] because that is the only affidavit to be received. It should not be susceptible to more than one interpretation and if it is then the interpretation adverse to the interest of the party in whose favour the document was made should be adopted.

[55] As the Registrant has not provided any evidence that it either directly or indirectly controls the quality or character of the wares described as “*canned drinks and foodstuff*”, I must therefore conclude that use of the Mark by Interfood in respect of the wares falling into these broad categories of wares in the statement of wares does not accrue to the Registrant.

[56] In view of all the foregoing, and as this is not a case where special circumstances excusing the absence of use of the Mark apply, the registration will be amended to delete the wares for which insufficient evidence of use has been shown. Pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will thus be maintained in respect of the following wares only, in compliance with the provisions of s. 45 of the Act: “*Preparations made from cereals, namely biscuits, wafers and cookies.*”

DATED AT Montréal, Québec, THIS 29TH DAY OF March 2010.

Annie Robitaille
Member
Trade-marks Opposition Board