



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

Citation: 2014 TMOB 247
Date of Decision: 2014-11-14

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Universal Food Public Company Limited
against registration No. TMA468,727 for the trade-mark
UFC in the name of Nutri-Asia Inc.**

[1] At the request of Universal Food Public Company Limited (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 June 20, 2012 to Nutri-Asia Inc. (the Owner), the registered owner of registration No. TMA468,727 for the trade-mark UFC (the Mark).

[2] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the wares specified in the registration, at any time between June 20, 2009 and June 20, 2012. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[3] The Mark is registered for use in association with the following wares: Food products, namely, ketchup, vinegar; sauces namely, soya sauce, hot sauce, fish sauce, chili sauce, roasting sauces, banana sauces and gravy mixes; noodles, canned fruits and vegetables, spices, dried, fresh and frozen fish and vegetables, spices, tea, rice.

[4] The relevant definition of use with respect to wares is set out in section 4(1) of the Act as follows:

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 Registrar's notice, the Owner furnished the affidavit of Genaro D. Reyes, Treasurer of the Owner, sworn on January 21, 2013. Both parties filed written representations; an oral hearing was not held.

The Owner's Evidence

[7] In his affidavit, Mr. Reyes attests that the Owner sells its products to food distributors and Canadian retailers, who then sell the products to consumers. Mr. Reyes explains that between 2009 and 2011, the Owner did business as UFC Philippines and attaches, as Exhibits A and B, articles and plans of merger which show mergers between the Owner and other companies. These mergers are not at issue, and I am satisfied that any use of the Mark, as discussed below, was by the Owner.

[8] At paragraph 9 of his affidavit, Mr. Reyes makes a general assertion of use of the Mark with respect to all of the registered wares. However, in summarizing the evidence later in his affidavit, Mr. Reyes refers only to the following wares: "ketchup, vinegar, soy sauce, hot sauce, chili sauce, roasting sauces, banana sauces, gravy mixes, noodles, and canned fruits and vegetables".

[9] With respect to how the Mark was displayed during the relevant period, Mr. Reyes attaches, as Exhibit C to his affidavit, 25 printouts of labels that he states are representative of the labels affixed to the Owner's products during the relevant period. The labels, all of which display the Mark prominently, are for the following products: banana sauce; vinegar; soy sauce; banana chili sauce; sweet chili sauce; rice noodles; sweet mixed fruits & beans; purple yam spread; sweet macapuno strings; sauce for roasts; and Chinese vermicelli noodles. Of the wares specified in Mr. Reyes' summary, I note that there are no labels for "ketchup" or "gravy mix".

[10] Further, as noted by the Requesting Party, the labels corresponding to the wares "canned fruits and vegetables" – *i.e.*, sweet mixed fruits & beans, purple yam spread, and sweet macapuno strings – appear to be labels for jars rather than cans.

[11] With respect to evidence of sales and shipment during the relevant period, Mr. Reyes attaches, as Exhibit D to his affidavit, copies of several "representative" invoices and packing slips. The invoices show sales of the same UFC food products for which labels were provided at Exhibit C. In addition, although not listed in the registration, I note that "UFC spaghetti sauce" and "UFC tomato sauce" appear on the invoices. Again, the wares "ketchup" and "gravy mix" do not appear on the invoices.

[12] Further, neither the Exhibit C labels nor the Exhibit D invoices make reference to any of the following registered wares: tea; rice; fish sauce; spices; dried, fresh, and frozen fish and vegetables.

Analysis

[13] First, I note that the Requesting Party does not take issue with a number of the wares for which the Owner provides clear evidence, namely: vinegar, soya sauce, hot sauce, chili sauce, roasting sauces, banana sauces, and noodles. Indeed, I am satisfied that the combination of labels and invoices attached to Mr. Reyes' affidavit demonstrate use of the Mark in association with these wares within the meaning of sections 4 and 45 of the Act.

[14] With respect to tea, rice, fish sauce, spices, and dried, fresh, and frozen fish and vegetables, the Requesting Party submits that these wares should be deleted from the

registration, as no evidence was furnished to demonstrate use of the Mark in association with such wares. In its written representations, the Owner submits that direct or documentary evidence may not be necessary as long as it can be determined from the evidence that the trademark was in use with each item and that the examples of use provided are representative only [per *Saks & Co v Canada (Registrar of Trade Marks)* (1989), 24 CPR (3d) 49 (FCTD)]. On the other hand, the Requesting Party notes that there is a relatively short list of wares and therefore the burden of providing evidence for each ware is quite low.

[15] Although I agree with the Requesting Party that these wares should be deleted from the registration, I do not consider that the application of *Saks* necessarily depends simply on the number of wares in question. Rather, what is determinative is the degree of detail that a registered owner provides and the clarity with which it explains the representative evidence.

[16] In this case, at best Mr. Reyes merely asserts use with respect to all of the registered wares. Apart from the exhibited invoices and packing slips – which feature only some of the registered wares – he does not otherwise attest to transfers of the wares during the relevant period. He provides no statements with respect to volume or dollar value of sales for each ware or, for that matter, each category of wares. Equally important, he makes no statement from which it can be concluded that wares not depicted in the Exhibit C labels similarly displayed the Mark during the relevant period. It is not clear, for example, how the Mark would have been displayed on “fresh fish” or how such wares were sold, based on the evidence furnished and the normal course of trade attested to by Mr. Reyes.

[17] As such, I do not accept the exhibited labels and invoices as representative with respect to the wares tea, rice, fish sauce, spices, and dried, fresh, and frozen fish and vegetables.

[18] With respect to the remaining three registered wares, namely “gravy mix”, “ketchup”, and “canned fruits and vegetables”, the Requesting Party submits that there is insufficient evidence of use despite Mr. Reyes’ statements.

[19] With respect to “gravy mix”, the Owner appears to rely on the invoices for “sauce for roasts” and the corresponding label to show use. However, the Owner registered the Mark in association with both “gravy mix” and “roasting sauces”. Given that the Owner itself made a

distinction between the two in its statement of wares, the Owner is required to provide evidence of use of the Mark for each of the wares [see *Sharp Kabushiki Kaisha v 88766 Canada Inc* (1997), 72 CPR (3d) 195 (FCTD)]. In other words, while the Owner furnished invoices and labels that clearly show use of the Mark with respect to “roasting sauces”, those invoices and labels cannot also be used to show use with respect to “gravy mix” in this case.

[20] With respect to ketchup, the Owner submits in its written representations that ketchup is also known as “banana sauce” and points to labels for banana sauce and invoices showing “UFC banana sauce” as evidence of use with respect to “ketchup”.

[21] While some of these invoices also show sales of “UFC tomato sauce”, the Requesting Party submits that “tomato sauce” is not “ketchup”. Furthermore, the Owner has not furnished any evidence of labels for “tomato sauce”. In any event, Mr. Reyes does not make any statements or provide any evidence that tomato sauce should be considered as corresponding with the registered ware “ketchup”, nor does the Owner appear to make that argument in its representations. As such, it appears that the Owner is relying on the sale of “banana sauce” as evidence of use with respect to “ketchup”. However, as with “gravy mix”, per *Sharp, supra*, the Owner should have submitted evidence with respect to ketchup separately from its evidence of use with respect to banana sauce in order to maintain the registration for both food products.

[22] With respect to canned fruits and vegetables, the Requesting Party argues that labels for jars containing fruits and vegetables cannot be considered evidence for “canned fruits and vegetables” as jars are not the same as cans. In response, in its written representations the Owner provides a definition of “canning” from the *Canadian Oxford Dictionary (2nd ed)* as follows: “the process of preserving food in cans or hermetically sealed glass jars”.

[23] In the context of these particular wares, I agree with the Owner that “canned” does not necessarily refer to a particular container, but can be interpreted broadly to refer to the process of preserving the food. Therefore, in view of the evidence as a whole in this case, I accept that the exhibited invoices and labels are sufficient to show use of the Mark in association with “canned fruits and vegetables” within the meaning of sections 4 and 45 of the Act.

[24] In view of all of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act with respect to the following registered wares: gravy mixes, ketchup, fish sauce, spices, tea, rice, and dried, fresh and frozen fish and vegetables. Furthermore, there is no evidence of special circumstances excusing such non-use of the Mark before me.

Disposition

[25] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete the following wares: "... ketchup, ... fish sauce, ... gravy mixes; ... dried, fresh and frozen fish and vegetables, spices, tea, rice".

[26] The amended statement of wares will read as follows:

Food products, namely, vinegar; sauces namely, soya sauce, hot sauce, chili sauce, roasting sauces, banana sauces; noodles, canned fruits and vegetables.

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