



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

Citation: 2012 TMOB 24
Date of Decision: 2012-01-31

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Piassetzki & Nenniger LLP against
registration No. TMA597,977 for the trade-mark COLA
CADDY in the name of UNIQUE PROD-X LTD.**

[1] At the request of Piassetzki & Nenniger LLP (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on December 14, 2009, to UNIQUE PROD-X LTD., the registered owner (the Registrant) of registration No. TMA597,977 for the trade-mark COLA CADDY (the Mark).

[2] The Mark is registered in association with “detachable handle for beverage bottles” (the Wares).

[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/or services listed on 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 December 14, 2006 and December 14, 2009 (the Relevant Period).

[4] The relevant definition of “use” in the present case is set out in s. 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 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. Assertions of use as a matter of law are insufficient to demonstrate use [see *Aerosol Fillers Inc. v. Plough (Canada) Ltd.* (1979), 45 C.P.R. (2d) 194 (F.C.T.D.)]. A recipient of a s. 45 notice must put forward evidence showing how it has used the trade-mark in order that the Registrar may assess if the facts qualify as use of the trade-mark pursuant to s. 4 of the Act. However, it has also been held that evidentiary overkill is not required when use can be shown in a simple, straightforward fashion [see *Union Electric Supply Co. v. Registrar of Trade Marks* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)].

[6] In response to the Registrar's notice, the Registrant furnished the affidavit of Keith Barrington, an Officer of the Registrant, sworn March 9, 2010, together with Exhibits A through D. Neither party filed written submissions. An oral hearing was not held.

[7] In his affidavit Mr. Barrington states that the Registrant's accounting records indicate that the Mark has been in use with respect to the Wares. In support of this statement Mr. Barrington provides three sample invoices dated April 1, 2007, August 4, 2008 and September 22, 2009, respectively, all relating to "sales for the COLA CADDY detachable handles" (Exhibits A – C). Each of the invoices is dated in the Relevant Period and each evidences sales to Canadian purchasers.

[8] Mr. Barrington also states that "[e]ach detachable handle is molded with the name 'COLA CADDY' on the top ring of each handle". Mr. Barrington attaches to his affidavit what he states is "a photograph of the mark on the 'COLA CADDY'" (Exhibit D). I note that the quality of the photocopy of the photograph is poor; however, I am able to make out the Mark on the product in the photograph. Based on a review of the affidavit as a whole, I am willing to infer that this has been a continuing practice such that the Wares would have been marked with the

Mark during the Relevant Period in the manner described by Mr. Barrington in his affidavit and displayed in the photograph at Exhibit D.

[9] Based on the foregoing, I am satisfied that the Registrant has evidenced use of the Mark in the Relevant Period in compliance with s. 4(1) of the Act.

Disposition

[10] Having regard to the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be maintained in compliance with the provisions of s. 45 of the Act.

Andrea Flewelling
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office