



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

**Citation: 2014 TMOB 159**  
**Date of Decision: 2014-07-11**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Diversified Marketing Solutions, LLC  
against registration No. TMA669,508 for the trade-mark  
REAL FOOD FOR REAL KIDS & Design in the name of  
Real Food for Real Kids Inc.**

[1] On June 15, 2012 at the request of Diversified Marketing Solutions, LLC (the Requesting Party) the Registrar forwarded a notice (the notice) under section 45 of the *Trade-marks Act*, RSC 1985, c T -13 (the Act) to Lulu Cohen-Farnell (the Registrant), concerning registration No. TMA669,508 for the trade-mark REAL FOOD FOR REAL KIDS & Design (the Mark) as shown below:



[2] Registration No. TMA669,508 covers: natural and organic raw materials, namely meat, grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks (the Wares); and provision and production of natural and organic food, namely lunches and snacks to daycares and schools; provision of educational seminars relating to nutrition and health for parents and caregivers at daycares and schools (the Services).

[3] Subsequent to the receipt of the notice the Registrant filed a confirmatory assignment in respect of registration No. TMA669,508 by which the Registrant confirms that on July 25, 2005 she transferred the Mark to Real Food for Real Kids Inc. (the Registered Owner).

[4] In response to the notice, the Registered Owner filed the affidavit of Ms. Lulu Cohen-Farnell, together with Exhibits 1 to 7. The parties filed written representations and no hearing was held.

[5] For the reasons that follow I conclude that the list of Wares and Services should be amended to delete ‘meat’. As such the list of wares will read:

Natural and organic raw materials, namely, grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks;

while the list of services will remain the same.

#### The law

[6] The notice requires the Registered Owner to show whether the Mark had been used in Canada in association with each of the Wares and Services 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. The relevant period in this case is any time from June 15, 2009 to June 15, 2012 (the Relevant Period).

[7] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such, the threshold test to establish use is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[8] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Wares and Services within the meaning of section 4 of the Act. There is no need for evidentiary overkill. However, any ambiguity in the evidence filed shall be interpreted against the owner of the Mark [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (4th) 62 (FCA)].

[9] I therefore must determine if I am satisfied that the evidence to be described afterward enables me to conclude that the Mark had been used by the Registered Owner in Canada in association with each of the Wares and Services during the Relevant Period.

The evidence relating to use

[10] Ms. Cohen-Farnell describes herself as the 'Founding Mom' and President of the 'Real Food for Real Kids business' based on the premise of providing childcare centres, elementary schools and camps with daily delivery of fully cooked lunches, prepared snacks and fresh fruits and vegetables. She explains that in July 2005 she and her husband decided to incorporate the Registered Owner and it continued to operate the Real Food for Real Kids business. As noted above, a copy of the Confirmatory Assignment of the Mark from the Registrant to the Registered Owner has been filed with the Registrar.

[11] Ms. Cohen-Farnell goes on to describe her functions and responsibilities with the Registered Owner. She then states that since the inception of the Real Food for Real Kids business, it has continuously offered 'child focused catering programs and proprietary food products in Canada and continues to do so.' She alleges that the Registered Owner 'currently caters to over 7,000 children everyday, providing healthy snacks and lunches, as well as educational programs to provide children, parents, educators and childcare staff with the knowledge they need to integrate an active, informative and sustainable nutrition program in their childcare program.'

[12] Ms. Cohen-Farnell asserts that the Mark is displayed on business and promotional materials, vehicles and on the Registered Owner's Internet web page, Facebook page and Twitter account. To support such allegation she filed as Exhibit 3 to her affidavit a vehicle design graphic from October 2009 on which appears the Mark. She states that the Registered Owner has applied the Mark since 2009 on 13 branded delivery vehicles that it uses in operating its business.

[13] Ms. Cohen-Farnell filed as Exhibit 4 to her affidavit an outline for one of the seminars the Registered Owner offers under its Body Detective Workshop Series. She filed as Exhibit 5 to her affidavit promotional brochures providing menus (April 2012); a price list (December 2011); and a pantry order form (summer 2012). She states that the materials in Exhibit 5 and similar promotional materials are, and have been used, by the Registrant and subsequently by the Registered Owner since the inception of the Real Food for Real Kids business in association with the sale of products and offering of services in the normal course of its business. She filed as

Exhibit 6 to her affidavit representative pages of the Registered Owner's website. She states that this website has been operated by the Registered Owner since 2008 and continues to do so. The Mark appears on the web pages filed. The content of those pages provides details on the catering service offered to childcare centres, elementary schools and camps by the Registered Owner and on its education programs which include workshops intended for teachers and caregivers at daycares and schools.

[14] Ms. Cohen-Farnell also filed representative invoices from the years 2010, 2011 and 2012 relating to the provision of lunches, snacks, natural and organic raw material and educational programs in the normal course of the Registered Owner's business.

Analysis of the evidence concerning use of the Mark in association with the Wares

[15] The Requesting Party argues that:

- i) There is no evidence that the Mark appeared on the Wares themselves or their packaging or otherwise comes to the attention of purchasers of the Wares at the time of their transfer;
- ii) There is no evidence that the Registered Owner ever sold meat, grains, fruits or vegetables used to create healthy, prepared lunches and snacks.

[16] There is no evidence showing the Mark on any of the Wares or their packaging. The question remains: was a notice of the association of the Mark to the Wares given to the purchasers of the Wares in some other manner?

[17] Nevertheless, I agree with the Registered Owner that notice of association, as described in section 4(1) of the Act, was given to its customers that purchased the wares described in the invoices. The Mark appears on the delivery trucks, on the menus, on the price list and on the invoices. Given the nature of the Wares, this is sufficient to create the notice specified in section 4(1) of the Act. As such the Registered Owner has established use of the Mark in association with: natural and organic raw materials, namely grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks.

[18] With respect to ‘meat’, however, I agree with the Requesting Party that there is no evidence in the record that the Registered Owner ever sold meat used to create healthy, prepared lunches and snacks.

[19] The Registered Owner refers to the content of the invoices filed as Exhibit 7 to Ms. Cohen-Farnell’s affidavit. In those invoices, references are made to small lunch, small snack, mixed fruit, fresh fruit, organic whole grain cereal, organic crackers, tomato salsa and frozen vegetarian proteins. They are part of lunches or snacks sold by the Registered Owner to daycares and schools. Still, I do not have any evidence of the sale of ‘meat to create prepared lunches and snacks’.

[20] I note that there is no evidence of special circumstances within the meaning of section 45(3) of the Act that would justify the non-use of the Mark during the Relevant Period in association with ‘meat’.

[21] Consequently, with respect to the Wares, the registration will be amended to read:

natural and organic raw materials, namely grains, fruits, and vegetables for use to create healthy, prepared lunches and snacks.

#### Analysis of the evidence concerning use of the Mark in association with the Services

[22] In its written representations the Requesting Party appears to concede that the evidence described earlier establishes use of the Mark in association with the provision of natural and organic food, namely lunches and snacks to daycares and schools.

[23] As stated earlier, the Mark appears on the delivery trucks used by the Registered Owner to deliver lunches and snacks to daycares and schools. The Mark also appears on the price list and the menus filed in the record. Therefore the Registered Owner has established use of the Mark in Canada during the Relevant Period, within the meaning of section 4(2) of the Act, in association with the provision of natural and organic food, namely lunches and snacks to daycares and schools. However, I still have to decide if there has been use of the Mark in association with the production of natural and organic food, namely lunches and snacks to daycares and schools.

[24] The evidence shows that the Registered Owner offered and provided in association with the Mark, during the Relevant Period, catering services in the form ‘fully cooked lunches’ and ‘prepared snacks’. In the Spring Menu, part of Exhibit 5 to Ms. Cohen-Farnell’s affidavit, we can read the following quote: ‘All natural menu, made fresh from scratch’. Also the web pages filed make reference to the catering services offered by the Registered Owner.

[25] I consider catering of “fully cooked lunches” and “prepared snacks” to be both producing and providing lunches and snacks.

[26] I am fully aware that the web pages filed were printed outside the Relevant Period (August 8, 2012), but Ms. Cohen-Farnell does state that they ‘are printouts of representative pages from the [Registered Owner] website which has, since at least 2008, and continues to be, operated in the normal course of [its] business.’

[27] Consequently, I conclude that the registered Owner was producing ‘natural and organic food, namely lunches and snacks to daycares and schools’ during the Relevant Period in association with the Mark.

[28] The last issue to be resolved is whether there is evidence of use of the Mark in Canada during the Relevant Period in association with ‘provision of educational seminars relating to nutrition and health for parents and caregivers at daycares and schools’. The Requesting Party argues that:

- i) Paragraph 5 of the Cohen-Farnell affidavit uses the words ‘[The Registered Owner] currently...[provides]...as well as educational programs to provide children, parents, educators and childcare staff with the knowledge they need to integrate an active ...’ (my underline);
- ii) Exhibit 4 to Cohen-Farnell’s affidavit appears to relate to educational programs provided to children which service does not form part of the Services, which are intended ‘for parents and caregivers’.

[29] Exhibit 4 to Cohen-Farnell’s affidavit is the outline of a workshop to be used by teachers and caregivers at schools and daycares as a guided tool to teach their students about

healthy food and snacks. On one invoice, dated July 15, 2011, there is an item identified as ‘staff training lunch’. Also, Ms. Cohen-Farnell does mention that the invoices filed are exemplary invoices for the years 2010, 2011 and 2012. They relate to the provision of ‘...educational programs in the normal and ordinary course of the business of [the Registered Owner].’

[30] Consequently, I conclude that the Registered Owner has shown evidence of use of the Mark in association with those services.

#### Disposition

[31] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, registration No TMA669,508 will be amended to delete ‘meat’ from the Wares. The Services will remain the same.

---

Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office