



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

Citation: 2014 TMOB 60
Date of Decision: 2014-03-17

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Marche Lacroix (1986) Inc. against
registration No. TMA650,697 for the trade-mark
PIRATES BLEND in the name of Half Moon Bay
Trading Co.**

[1] At the request of Marche Lacroix (1986) 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 March 21, 2012 to Half Moon Bay Trading Co. (the Owner), the registered owner of registration No. TMA650,697 for the trade-mark PIRATES BLEND (the Mark).

[2] The Mark is registered in association with the following wares: “Pepper sauces; mustard and spice-based condiment sauce”.

[3] The section 45 notice required the Owner to furnish evidence showing that it had used the Mark in Canada in association with each of the wares specified in the registration within the time period between March 21, 2009 and March 21, 2012.

[4] The relevant definition of “use” 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 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.

Owner's "Affidavit of Continuous & Current Use"

[6] In response to the Registrar's notice, the Owner furnished the "Affidavit of Continuous & Current Use" of Thomas F. Nuijens, Vice President of the Owner. The affidavit appears to have been made in Florida, and the stamp and signature of a notary public of the State of Florida, Denise M. Arp, appears at the bottom of the page. Although 10 invoices are attached to the affidavit, none of them are stamped or initialed by the notary. I also note that the affidavit is very brief, consisting of only two paragraphs, and that there is no clear jurat as would typically appear in an affidavit sworn in Canada.

[7] Nonetheless, the Requesting Party filed no written representations, and raised no objections with respect to the form of the evidence furnished. The Act and the *Trade-marks Regulations* are silent as to the form of affidavits and statutory declarations to be filed in a section 45 proceeding before the Registrar. As the Registrar has noted before, while it may be desirable for evidence to conform to the *Federal Court Rules*, it is not an obligation [see *Tension 10 Inc v Tension Clothing Inc* (2004), 45 CPR (4th) 136 (TMOB)]. Furthermore, especially in the context of section 45 proceedings – which are intended to be summary and expeditious – the Registrar has frequently considered certain deficiencies in affidavits and statutory declarations to be mere technicalities [see, for example, *88766 Canada Inc v Tootsie Roll Industries Inc* (2006), 56 CPR (4th) 76 (TMOB)]. Furthermore, it is well-established that technical objections should be raised early [see, for example, *Maximilian Fur Co, Inc v Maximillian For Men's Apparel Ltd* (1983), 82 CPR (2d) 146 (TMOB); *Adams v Société des Produits Nestlé SA* (1986), 72 CPR (3d) 100 (TMOB)].

[8] In view of the foregoing, despite the possible deficiencies in the affidavit furnished by the Owner in this case, I will proceed on the assumption that it is a valid affidavit under the laws of Florida and admissible for purposes of this proceeding. In this respect, in the absence of objections from the Requesting Party, I accept that the Owner had no cause to make representations regarding the validity of the affidavit.

[9] However, as noted above, the affidavit is quite brief. The first sentence of the affidavit is essentially simply an assertion of use of the Mark by the Owner. The second sentence is as follows:

Attached invoices from sales covering a wide variety of dates to Canadian customers, both commercial distributors and direct retail consumers serviced by [the Owner] support this affidavit of continued use of ... [the Mark].

[10] The Owner furnishes no evidence of the Mark appearing on the wares, such as labels or photographs of its PIRATES BLEND sauces. As noted above, the only exhibits attached to the affidavit are 10 invoices, all issued from the Owner and billed to various Canadian customers. The invoices indicate sales of various products, including “Pirates Blend Caribbean Condiment” and other brand condiments such as “Iguana Red Pepper Sauce” and “Tamarindo Bay Steak Sauce”. I would note that of the 10 invoices, only four of the invoices are dated within the relevant period and have a “Ship To” address in Canada.

[11] I would further note that there is no indication that the invoices accompanied the wares when shipped. Indeed, some of the exhibited invoices include information suggesting that the invoices were generated internally after any shipment would have taken place. For example, the invoice dated 10/16/2007 includes a note in the product description field dated 9/1/2010 indicating that the invoice was “uncollectable”. Another invoice includes an undated note indicating that the customer did not receive certain items. All of the invoices, including the “uncollectable” invoice, include an electronic stamp indicating that the invoice had been “PAID” with a date after the relevant invoice and shipping dates.

[12] As such, in the absence of statements by Mr. Nuijens regarding the Owner’s normal course of trade, I am not prepared to infer that the exhibited invoices would have accompanied shipments of the Owner’s wares to Canada during the relevant period.

[13] Furthermore, I note one final deficiency in the evidence. As noted above, the only relevant reference in the invoices is to “Pirates Blend Caribbean Condiment”. However, Mr. Nuijen makes no clear statement in his affidavit as to whether this is in reference to the Owner’s registered wares “pepper sauces” or “mustard and spice-based condiment sauce”. Again, Mr. Nuijens makes no clear statement in his affidavit regarding the nature of the Owner’s wares and, in the absence of representations from the Owner, I am not prepared to make any inference as to whether the invoices represent sales in the normal course of trade of one or the other registered ware. This is a case where the ambiguity inherent in the evidence must be interpreted contrary to the interests of the Owner [see *Plough, supra*]. As such, I cannot conclude that the invoices constitute evidence of display of the Mark in association with any of the registered wares at the time of transfer.

[14] In view of all of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered wares within the meaning of sections 4 and 45 of the Act.

Disposition

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

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