



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

**Citation: 2011 TMOB 199**  
**Date of Decision: 2011-10-25**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by BBY Solutions, Inc. against registration  
No. TMA595,783 for the trade-mark YOUR BEST BUY  
IS AT THE BRICK in the name of The Brick Warehouse  
LP.**

[1] At the request of BBY Solutions, Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on November 23, 2009 to The Brick Warehouse LP (the Registrant), the registered owner of registration No. TMA595,783 for the trade-mark YOUR BEST BUY IS AT THE BRICK (the Mark).

[2] The Mark is registered for use in association with the following services:

Operation of a retail store selling home furnishings, furniture, mattresses and box springs, appliances, televisions, radios, audio and video equipment, consumer electronics, and computers; retail services associated with selling home furnishings, furniture, mattresses and box springs, appliances, televisions, radios, audio and video equipment, consumer electronics, and computers through retail stores, by telephone, by catalogue and over the internet (the Services).

[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 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 such use since that date. In this case, the relevant period for showing use is between November 23, 2006 and November 23, 2009 (the Relevant Period).

[4] The relevant definition of “use” is set out in s. 4(2) of the Act:

4. (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of a s. 45 proceeding [*Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1979), 45 C.P.R. (2d) 194, aff’d (1980), 53 C.P.R. (2d) 63 (F.C.A.)]. Although the threshold for establishing use in these proceedings is quite low [*Lang, Michener, Lawrence & Shaw v. Woods Canada Ltd.* (1996), 71 C.P.R. (3d) 477 (F.C.T.D.)], and evidentiary overkill is not required [*Union Electric Supply Co. v. Canada (Registrar of Trade Marks)* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)], 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 or services specified in the registration during the relevant period.

[6] In response to the Registrar’s notice, the Registrant filed the affidavit of Mr. Robert Gloweski, the Vice President of Advertising with the Registrant. Both parties filed written arguments; an oral hearing was not requested.

[7] In his affidavit, Mr. Gloweski states that the Registrant and its franchisees operate retail stores in various locations across Canada and that these stores sell or have sold home furnishings, furniture, mattresses and box springs, appliances, televisions, radios, audio and video equipment, consumer electronics, and computers under the house brand THE BRICK.

[8] The affiant also provides that the Registrant operates over two million square feet of distribution space with six distribution centres across Canada. In this regard the Registrant and its franchisees operate a fleet of trucks to deliver wares to customers in Canada who purchase these wares from the Registrant’s retail stores and via internet orders. Mr. Gloweski states that since 2001 and during the Relevant Period, the Mark has been on the delivery trucks to advertise and promote the goods sold by the Registrant; he states that the fleet of trucks delivers to customers in Canada only. As evidence of how the Mark appears on the trucks, Mr. Gloweski has provided photographs of both sides of a delivery truck used by the Registrant (Exhibits A and B). He states that the photographs were taken during the Relevant Period.

[9] I note that each Exhibit shows a large advertisement, covering the whole of the side of a large delivery truck; the Mark is displayed clearly in the ad on both sides of the truck underneath the house brand, THE BRICK. The Registrant's website address is also provided. The ad on each side of the truck displays appliances of a specific brand, thus clearly indicating that these brands are available from the Registrant's store or online.

[10] I am satisfied on a fair reading of the affidavit as a whole that the advertisements on the fleet of delivery trucks fulfill the requirement of use under s. 4(2) of the Act. Such advertising has taken place since 2001; the photographs were taken in the Relevant Period and are examples of such use. I am willing to infer, based on the square footage of its distribution space, that the Registrant does substantial retail business and that therefore its delivery trucks would have been seen across Canada in the areas of its distribution centres. Accordingly, contrary to the Requesting Party's submissions, I find that the display on the trucks functions the same way that billboard advertising would, and therefore can be considered advertising of the Registrant's services within the meaning of s.4(2) of the Act. Whether or not the fleet of trucks is owned by the Registrant or its franchisees is irrelevant.

[11] In view of the above, I am satisfied that the evidence demonstrates use of the Mark by the Registrant in association with the Services within the meaning of s. 4(2) and s. 45 of the Act.

[12] Accordingly, pursuant to the authority delegated to me under s. 63(3) of the Act and in compliance with the provisions of s.45 of the Act, the registration will be maintained.

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P. Heidi Sprung  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office