



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

Citation: 2014 TMOB 158
Date of Decision: 2014-08-01

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Smart & Biggar against registration
No. TMA604,484 for the trade-mark PEACOCK &
DESIGN in the name of Terfloth Trade Marks Limited**

[1] At the request of Smart & Biggar (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 April 17, 2012 to Terfloth Trade Marks Limited (the Owner), the registered owner of registration No. TMA604,484 for the trade-mark PEACOCK & DESIGN (the Mark), shown below:



[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 April 17, 2009 and April 17, 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:

Canned Meat (luncheon meat, corned beef, Vienna sausages), Poultry; Frozen Meats; Meat Extracts Canned Fruits and Canned Vegetables (preserved, dried, cooked) Canned, Prepared, Frozen Fish (tuna, mackerel, sardines, herring, salmon) Canned Seafood (shrimp, oysters, crab, lobster) Corn Products (canned corn, whole kernel corn, corn on the cob) Soups (chicken noodle soup, canned soups, dried soups, soup mixes) Jams;

Jellies; Marmalades; Preserves, Dairy and Dairy Derived Products (processed cheese, butter) Milk Based Drinks (milk shakes, flavoured milk); Sour Cream, Whipping Cream; Yogurt, Milk Products (milk, frozen milk, ice milk, ice cream, condensed milk, canned/powdered milk), Peanut Butter; Coconut Milk; Coconut Cream, Edible Oils and Fats (olive oil, canola oil) Pastes (fruit pastes, vegetables pastes, meat pastes, tomato paste), Processed Grains and Pulses (lentils, peas, beans) Pickles: Hot Pepper Paste: Fruit Sauces, Rice; Tapioca; Sugar; Baking Powder; Salt, Flour & Preparations Made from Flour (bread, pastry) Cereals & Preparations Made From Cereals (breakfast cereals, processed/unprocessed cereals, cereal based snack foods) Bakery Goods (biscuits and cookies, bread), Ice Cream; Ice Milk; Frozen Yogurt, Snacks (crackers, popcorn, nachos, potato crisps/chips, nuts) Instant Oats; Oat Bran; Confectionery, Honey; Treacle; Maple Syrup Condiments (salsas, marinades, hot pepper paste, mustard, vinegars, jerk seasonings, liquid spice preparations, relish, hot pepper extracts, hot pepper flavourings, salad dressings) Sauces (ketchup, pasta sauces, fruit sauces, BBQ sauces, meat sauces, hot sauce, soya sauce, dessert sauce) Ready to Eat Meals (packaged foods) namely packaged meals consisting of primarily meat, fish, poultry or vegetables; Pasta; Cornmeal, Snacks (crackers, popcorn, potato chips/crisps, nachos, nuts), Unprocessed Grains and Pulses (peas, beans, lentils) Alcoholic Beverages (beers, wines); Mineral & Aerated Waters (carbonated soft drinks) Fruit Drinks (flavoured soft drinks); Fruit Juices (red cranberry juice, prune juice, orange, mango, passion fruit, cherry), Vegetable Juices (including carrot juice), Fruit Punches; Syrups; Cordials Concentrates/Powders for Making Soft Drinks, Coconut Drinks (coconut juices, coconut powder).

[4] The definitions of use with respect to wares are set out in sections 4(1) and 4(3) 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.

4(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

[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 statutory declaration of Mr. Boerries Terfloth, sworn on July 13, 2012. Only the Requesting Party filed written representations; an oral hearing was not held.

[7] Mr. Terfloth's declaration is very short and is reproduced below:

We, Terfloth Trade Marks Limited hereby declare that we have used and are using the PEACOCK trademark by purchasing canned vegetables in Canada for export. We intend to expand the use of our trademark for whatever products that we are registered for as we succeed in establishing the brand.

We are also using the PEACOCK brand by buying and selling it in other countries.

[8] The stamp and signature of a notary public from "St. John's, Antigua, W.I." appears below the declaration. Although not referenced in Mr. Terfloth's declaration, there were five additional pages provided when the Owner furnished the declaration. The first two pages are simply a reproduction of the wares listed in the registration. The third page appears to be a reproduction of three canning labels for sliced beets, whole kernel corn, and mixed vegetables. The labels show a variation of the Mark and identify Alamac Trading Co. Inc. as the distributor of the products. The final two pages appear to be an invoice. The invoice appears to document the exportation of canned vegetable products corresponding to the products shown on the labels. The goods appear to be sold from one Canadian entity to another with the goods being shipped to Barbados. As discussed below, the labels do not show the Owner's name and it is not self-apparent that the Owner was involved in the transaction shown on the invoice.

Analysis

[9] In its written representations, the Requesting Party noted several problems with the evidence, submitting that, at best, Mr. Terfloth's declaration amounts to a bald assertion that is insufficient to show use of the Mark. It points out that the "purchasing" of wares is not a form of use contemplated in section 4 of the Act and Mr. Terfloth gives no further explanation in his declaration regarding the exportation of its wares.

[10] Fundamentally, I note that while the declaration appears to be notarized, there is not a proper *jurat* as would normally be present in a declaration from Canada, indicating that the statements were affirmed before the notary public. This is not necessarily fatal as the Registrar may admit a declaration so long as it complies with the requirements of the country in which it was executed [see *Dubuc v Montana* (1991), 38 CPR (3d) 88 (TMOB)].

[11] However, the Requesting Party's main submission is that the five additional pages attached to the declaration are inadmissible. The Requesting Party notes in its written representations that the additional pages are not notarized. It has been established that technical deficiencies in evidence should not stop a party from successfully responding to a section 45 notice where the evidence provided could be sufficient to show use [see *Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)]. On occasion, the Registrar has accepted evidence that is not properly notarized if it is properly identified and explained in the declaration [see *Borden & Elliot v Raphaël Inc* (2001), 16 CPR (4th) 96 (TMOB)]. However, in this case the documents are not notarized, nor does the declaration explain or even identify the additional documents, making this more than a mere technical deficiency. Accordingly, I agree with the Requesting Party that the additional pages are inadmissible in this case.

[12] As such, I further agree with the Requesting Party that the declaration does little to explain the Owner's use of the Mark during the relevant period or otherwise. Given that there is only a bald assertion of use and no admissible evidence demonstrating use of the Mark, I am not satisfied that Owner has demonstrated use of the Mark as set out in sections 4 and 45 of the Act.

[13] In any event, even if I were to consider the additional pages of evidence as forming part of Mr. Terfloth's declaration, I would still not be satisfied that the Owner has demonstrated use of the Mark because the evidence would still contain significant deficiencies. I will now briefly discuss those deficiencies.

[14] I would first note that, at best, the additional pages address only two of the wares in the registration, namely "canned vegetables" and "whole kernel corn".

[15] While the Requesting Party further submits that the trade-mark that appears on the labels is substantially different from the Mark as registered, I would respectfully disagree on this point.

In applying the principles as set out in *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull, SA* (1985), 4 CPR (3d) 523 (FCA) and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA), I accept that the dominant features of the Mark are the word “Peacock” and the feather-like design, both of which are present on the labels.

[16] The more significant issue for the Owner in this case is with respect to the invoice. As noted above, the Owner is not identified on the invoice. The invoice identifies the seller as Bonduelle Canada Inc. and the buyer as B. Terfloth-CIE Canada Inc; it also indicates that the goods were shipped to Alamac Trading Co. Ltd., located in Barbados. Mr. Terfloth does not explain or reference the invoice in his declaration. When examining the invoice, it is not clear what role the Owner played in the transaction, and thus the invoice does not help demonstrate use of the Mark by the Owner. As Mr. Terfloth does not even make reference to this transaction in his declaration, I am not prepared to make any inferences regarding the relationship between the entities referenced on the invoice and the Owner.

[17] As such, in my view, the additional pages that were attached to Mr. Terfloth’s affidavit, even if admissible, would not have been sufficient to demonstrate use of the Mark during the relevant period as required by sections 4 and 45 of the Act. Finally, the Owner has not demonstrated special circumstances excusing non-use of the Mark.

Disposition

[18] In view of all of the foregoing, 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