

SECTION 45 PROCEEDINGS  
TRADE-MARK: CAFITA  
REGISTRATION NO. TMA436,374

On January 27, 2006, at the request of Ogilvy Renault LLP, the Registrar issued the notice prescribed by s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”) to Jana Beverages Ltd., the registered owner of registration No. TMA436,374 for the trade-mark CAFITA (the “Mark”). The Mark is registered in association with “coffee based carbonated soft drinks.”

Section 45 requires the registered owner of a trade-mark to indicate whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years preceding the date of the notice, in this case between January 27, 2003 and January 27, 2006. If the mark has not been used during that time period then the registered owner is required to indicate the date on which it was last used and the reason why it has not been used since that date.

In response to the s. 45 notice, the registered owner filed the affidavits of Keith Jackson and Rene Schoepflin. It is noted that each of the affidavits appears to contain a typographical error in one instance, namely where they refer to the affiant making the affidavit on June 12, 2007. It would appear that the correct year is 2006 since the affidavits were filed on June 13, 2006 and the Commissioner in each case indicated that they were sworn on June 12, 2006.

Only the requesting party filed a written argument. I have disregarded those portions wherein the requesting party refers to information that is not of record in these proceedings.

An oral hearing was not requested.

Mr. Jackson identifies himself as a director and beneficial owner of Jana Beverages Ltd. He attests that the registrant manufactured and sold a beverage as CAFITA from 1993 up until 2001 in Canada.

However, he states that in 2000, the registrant “temporarily pulled the CAFITA product from the marketplace to reformulate the product with a view to improving the product sold under the CAFITA name and making it organic.” To that end, he attests that the registrant hired a chemist to assist in reformulation and testing, which is ongoing, and a graphic artist and designer to work on an improved logo for the CAFITA mark. Mr. Jackson advises that the registrant at no time intended or wished to abandon or surrender the CAFITA name. He also states that the registrant intends to relaunch its CAFITA product throughout Canada in Spring, 2007.

Mr. Schoepflin is the graphic artist referred to in Mr. Jackson’s affidavit. He provides copies of invoices dated 2004 concerning work that he did on behalf of the registrant towards redesigning labels and the like in respect of the reformulation of the CAFITA product. One invoice, dated 25-Aug-04, reads, “RE: Printing Cafita Labels with neckbands 2 flavors”. As pointed out by the requesting party, in view of Mr. Jackson’s statement that the intent is to relaunch CAFITA throughout Canada, the United States and Europe, we do not know if the labels referred to in the invoice were intended for the Canadian market.

The registrant has not claimed to have used the Mark in Canada during the relevant three-year period. Therefore I must assess whether the reasons given for the lack of use justify the absence of use. My conclusion is that they do not, for the following reasons.

When assessing whether or not there are circumstances that would excuse non-use, three factors must be considered:

1. the length of time during which the trade-mark has not been used;
2. whether the registered owner’s reasons for not using its trade-mark were due to circumstances beyond its control; and
3. whether there exists a serious intention to shortly resume use.

[*Registrar of Trade-marks v. Harris Knitting Mills Ltd.*, 4 C.P.R. (3d) 488 (F.C.A.)]

In the present case, we are dealing with a period of non-use of approximately 6 years. It may be

possible to justify an absence of use for such a length of time, but not in the present case since the reason for lack of use appears to have been totally voluntary. An absence of use can only be excused where there are circumstances that prevented the use which were beyond the owner's control, *i.e.* circumstances which are "special" in the sense of being peculiar or abnormal and which are experienced by persons engaged in a particular trade as the result of the working of some external forces as distinct from the voluntary acts of any individual trader. [*John Labatt Ltd. v. The Cotton Club Bottling Co.*, 25 C.P.R. (2d) 115 at 125]

In addition, the registrant's evidence falls short of adequately supporting its claim that use will be resumed in the near future.

As the registrant has not satisfied the burden on it, Registration TMA436,374 will be expunged, in accordance with the provisions of s. 45(5) of the Act.

DATED AT TORONTO, ONTARIO THIS 20<sup>th</sup> DAY OF DECEMBER 2007.

Jill W. Bradbury  
Member  
Trade-marks Opposition Board