



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

**Citation: 2017 TMOB 4**  
**Date of Decision: 2017-01-17**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Smart & Biggar**

**Requesting Party**

**and**

**CSM Bakery Products NA, Inc.**

**Registered Owner**

**TMA251,267 for THE LETTERS BB AND DESIGN**

**Registration**

[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 July 29, 2014 to CSM Bakery Products NA, Inc. (the Owner), the registered owner of registration No. TMA251,267 for the trade-mark THE LETTERS BB AND DESIGN, reproduced below (the Mark):



[2] The Mark is registered for use in association with the following goods: “Jams, jellies, shortening, syrups, honey glaze, icings, icing bases, bread mixes, bread bases, bun bases, donut mixes, donut bases, pie filling.”

[3] The notice required the registered owner to furnish evidence showing that the Mark was in use in Canada, in association with the goods specified in the registration, at any time between July 29, 2011 and July 29, 2014. If the Mark had not been so used, the registered 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.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods 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 section 45 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 goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Hannah Westbrooks, sworn February 27, 2015. Both parties filed written representations, but only the Requesting Party was represented at a hearing held on November 29, 2016.

#### The Owner’s Evidence

[7] In her affidavit, Ms. Westbrooks identifies herself as the Associate Organizational Communications Manager, North America, and Brand Activation Manager, North America, of the Owner. She states that the Owner was founded in 1928 and is based in Tucker, Georgia. Ms. Westbrooks explains that the Owner “manufactures bakery products and ingredients for in-

store and foodservice markets, as well as artisan and industrial bakeries.” She specifies that the products offered include ready-to-use icings, icing bases, ready-to-use fillings, donut icings, glazes, fruit and crème fillings, and bakery mixes, among others items.

[8] Ms. Westbrook attests that the Owner used the Mark in Canada during the relevant period in association with “bakery ingredients including pie fillings products”. She specifies that those pie fillings products are sold in boxes and pails and are “used by bakeries as fillings for pies, pastries and other desserts”. With respect to the Owner’s normal course of trade for those products, Ms. Westbrook explains that a customer will place orders with the Owner, who then ships the ordered product directly to the customer.

[9] Regarding display of the Mark, Ms. Westbrook attaches as Exhibit A to her affidavit a photograph of a box labelled “LEMON DANISH FILLING” and a photograph of a pail labelled “CHERRY PIE FILLING”. Both labels display the Mark set out below in the upper left corner. The Owner’s name and address are visible at the bottom of the lemon Danish filling label. Ms. Westbrook attests that these images are representative of the manner in which the Mark was displayed “in connection to the pie fillings products” that the Owner sold in Canada during the relevant period.



[10] The contents of the depicted box and pail are not visible in the exhibited photographs. However, each of the labels features a list of ingredients. In this respect, I note that the lemon Danish filling label indicates that that product is made with “lemon puree”.

[11] With respect to transfers of the registered goods, Ms. Westbrook attests that the Owner’s Canadian sales of “pie fillings” branded with the Mark exceeded \$71,000 in 2011, \$293,000 in 2012, \$298,000 in 2013 and \$217,000 in 2014. In addition, she attaches as Exhibit B to her affidavit a spreadsheet breaking down the sales of “pie fillings products” in Canada during the relevant period by year and by product. Ms. Westbrook attests that the information in the

spreadsheet was compiled from the Owner's records and represents sales of products in association with the Mark. By way of example, the spreadsheet shows that 720 lbs. of "Best Brands Strawberry Danish Filling 24# Box", 1,728 lbs. of "Best Brands Chunky Apple Turnover Filling 36# Pail", 7,680 lbs. of "Best Brands Cherry Pie Filling 40#Pail" and 10,080 lbs. of "Best Brands Bavarian Cream Filling 40# Pail" were sold in 2013. I note that the spreadsheet includes a column labelled "Product Category": this column identifies all of the products listed in the spreadsheet—including various Danish and turnover fillings and Bavarian cream filling—as falling within the product category "Pie Fillings".

### Analysis

[12] In its written representations, the Owner submits that the evidence shows use of the Mark in Canada during the relevant period in association with jams; jellies; icings; and pie filling.

[13] Accordingly, the Owner appears to concede that the Mark was not used in Canada during the relevant period in association with the remaining registered goods, being "... shortening, syrups, honey glaze, ... icing bases, bread mixes, bread bases, bun bases, donut mixes, donut bases." Indeed, there is neither any evidence of the Mark being displayed on or otherwise associated with such goods nor any evidence of such goods being sold or otherwise transferred in Canada during the relevant period. Since there is also no evidence before me of special circumstances excusing non-use of the Mark, these registered goods will be deleted from the registration.

#### *Pie filling*

[14] With respect to the registered good "pie filling", Ms. Westbrook makes a clear assertion of use, supported by photographs showing how the Mark is displayed on the product's packaging. Although the exhibited photographs are undated, Ms. Westbrook attests that they are representative of the manner in which the Mark was displayed during the relevant period.

[15] In its written representations, the Requesting Party describes the trade-mark shown in the exhibited photographs as "similar to the registered Mark", implying that the evidence may not in fact show use of the Mark as registered. However, in applying the principles set out by the

Federal Court of Appeal in *Canada (Registrar of Trade Marks) v Cie International 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 find that the dominant features of the Mark as registered—the circular background, the letters BB and those elements' relative positions—have all been maintained. I consider the variations to the Mark to be minor deviations that do not alter the Mark's identity; the registered Mark remains recognizable.

[16] With respect to transfers of the registered goods, Ms. Westbrooks attests to significant sales in Canada during the relevant period and provides a spreadsheet breaking down those sales by year and by specific type of “pie filling”.

[17] Indeed, at the hearing, the Requesting Party conceded that the evidence shows use of the Mark in Canada during the relevant period in association with “pie filling”.

[18] Accordingly, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered good “pie filling” within the meaning of sections 4(1) and 45 of the Act.

#### *Jams, jellies and icings*

[19] In its written representations, the Owner submits that it has also demonstrated use of the Mark in association with “jams”, “jellies” and “icings”. With respect to “jams” and “jellies”, the Owner notes the various Danish and turnover fillings listed in the exhibited spreadsheet and also the exhibited photograph of a box of lemon Danish filling; the Owner submits that it is common knowledge that Danish and turnover fillings “are jams and jellies”. With respect to “icings”, the Owner submits that the Bavarian cream filling referenced in the spreadsheet is “in the nature of an icing which can be used either as a filling in pies, pastries ... and other desserts, or as icing or frosting on pies, pastries and other desserts.”

[20] In her affidavit, Ms. Westbrooks attests to sales of “pie fillings” and “pie fillings products” only. However, in its written representations, the Owner submits that the term “pie fillings” in this context denotes a broad product category encompassing more than just pie fillings *per se*. In this respect, the Owner observes that the “Pie Fillings” product category in the

exhibited spreadsheet includes, not only products described as “pie filling”, but also products described as “Danish filling” and “turnover filling”, for example.

[21] However, even if I were to accept that Danish filling and turnover filling are distinct from pie filling *per se*, Ms. Westbrook does not identify the Danish and turnover fillings sold by the Owner as “jams” or “jellies”. Nor are “jams” or “jellies” referenced in the exhibits to her affidavit. Indeed, the list of ingredients on the depicted lemon Danish filling label refers to “lemon puree” rather than lemon “jam” or lemon “jelly”. Likewise, Ms. Westbrook does not equate Bavarian cream filling with “icing” in her affidavit. On the contrary, she attests that the “pie fillings products” sold under the Mark are “used by bakeries *as fillings* for pies, pastries and other desserts” (emphasis added). In any event, the fact that a consumer might use a filling product in place of icing is insufficient to characterize the filling product as constituting the registered good “icings”. I also note that there is no mention of “icing” or the like in the exhibits.

[22] In the absence of particulars from Ms. Westbrook, I agree with the Requesting Party that the Owner’s proposed characterization of the Danish and turnover fillings and Bavarian cream filling is speculative.

[23] The Owner additionally submits that, where the goods in a registration have been logically and properly characterized, there is no requirement to furnish either direct evidence or documentary proof regarding every item in each category [per *Saks & Co v Canada (Registrar of Trade Marks)* (1989), 24 CPR (3d) 49 (FCTD)]. In this respect, the Owner also refers to the Federal Court’s decision in *Westinghouse Air Brake Co v Moffat & Co*, 2001 FCT 1061, 14 CPR (4th) 257, where the Court found that evidence of use of a trade-mark in association with some of the goods listed in the registration was sufficient to maintain the registration in its entirety, since the goods fell into “one broad category” and some of those goods were “constituent parts” of the devices contained in the category.

[24] However, in the present case, there is no evidence that jams, jellies, icings and pie fillings constitute a general category of goods in the Owner’s trade. Furthermore, when Ms. Westbrook’s affidavit is considered in its entirety, there is no indication that her evidence with respect to pie fillings products is intended to represent a broader category of registered goods sold in Canada. Although Ms. Westbrook asserts that the Owner used the Mark in Canada during the relevant

period in association with “bakery ingredients *including* pie fillings products” (emphasis added), she gives no indication that those “bakery ingredients” included among them any of the remaining registered goods.

[25] The Owner cites two additional cases in support of its position on this issue: *MacKenzie Gervais v Paschal-Werk G Maier GmbH & Co* (1990), 30 CPR (3d) 532 (TMOB) and *Sterling & Affiliates v Zeneca Corp* (1996), 72 CPR (3d) 560 (TMOB). However, the present proceeding is distinguishable from those cases. In *MacKenzie Gervais*, there was a clear assertion of use in association with all of the registered goods and substantial evidence of use with numerous goods. Here, Ms. Westbrook does not clearly assert use of the Mark with any registered goods other than “pie filling”. In *Sterling*, use in association with the broadly defined registered good “insecticides” was established by showing use in association with a specific type of insecticide. Here, the evidence does not establish that any of the Owner’s pie fillings products can be considered a specific type of jam, jelly or icing. Rather, it appears the Owner is seeking to rely on use of the Mark with pie fillings products to maintain the registration for *related* goods. However, having distinguished particular goods in the registration, the Owner must provide some evidence of use with respect to each of the listed goods [see *John Labatt Ltd v Rainier Brewing Co, supra*; and *Sharp Kabushiki Kaisha v. 88766 Canada Inc.* (1997), 72 CPR (3d) 195 (FCTD)].

[26] Accordingly, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods “jams”, “jellies” or “icings” within the meaning of sections 4(1) and 45 of the Act.

[27] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark in association with those goods, they will be deleted from the registration.

### Disposition

[28] In view of all of the foregoing, 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, the registration will be amended to delete all of the registered goods except for “pie fillings”.

[29] The amended statement of goods will read as follows: “Pie fillings.”

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Natalie de Paulsen  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office



**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** 2016-11-29

**APPEARANCES**

No one appearing

For the Registered Owner

Mark Evans

For the Requesting Party

**AGENTS OF RECORD**

McMillan LLP

For the Registered Owner

Smart & Biggar

For the Requesting Party