



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

Citation: 2017 TMOB 29
Date of Decision: 2017-03-10

IN THE MATTER OF A SECTION 45 PROCEEDING

Stikeman Elliott LLP

Requesting Party

and

Puratos NV

Registered Owner

TMA410,965 for RUSTIC

Registration

[1] At the request of Stikeman Elliott LLP (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 September 25, 2014 to Puratos NV (the Owner), the registered owner of registration No. TMA410,965 for the trade-mark RUSTIC (the Mark)

[2] The Mark is registered for use in association with the goods “Bread and rolls”.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods specified in the registration, at any time between September 25, 2011 and September 25, 2014. 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.

[4] The relevant definition of use with respect to 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 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 goods specified in the registration during the relevant period.

[6] In response to the Registrar's notice, the Owner furnished the affidavit of Roel Straetmans, Legal and Tax Director of the Owner, sworn on April 24, 2015 in Hoeilaart, Belgium. Both parties filed written representations; an oral hearing was not requested.

The Owner's Evidence

[7] In his affidavit, Mr. Straetmans asserts that, during the relevant period, the Owner sold breads and rolls in association with the Mark in Canada.

[8] In particular, Mr. Straetmans attests that the Owner "sold RUSTIC products in Canada through its licensee and wholly owned subsidiary Puratos Canada Inc." He explains that "Puratos, and Puratos Canada Inc., sells RUSTIC Products to Canadian customers by selling directly to bakeries, retailer and wholesalers. He attests that the Owner exercised control over the character and quality of the products sold by Puratos Canada and states that, at the time of sale, "the RUSTIC trade mark is marked on RUSTIC Products, indicating the source of the Trade Mark Products to be Puratos".

[9] In support, Mr. Straetmans attached to his affidavit the following exhibits:

- Exhibit A consists of two pages of "advertising and marketing materials" that Mr. Straetmans attests were distributed to the Owner's customers during the relevant period. The first page appears to relate to a "TEGRAL RUSTIC" product that is identified on the

exhibit in English as a “Complete Mix for Production of Rusitic [*sic*] Breads and Buns” and in French as “une Melange Complete pour la Production de Pains et Petits Pains Rustic”. Although Mr. Straetmans does not explain the significance of the document, the main text content appears to be two recipes, listing “Tegral Rustic”, “Yeast” and “Water” as ingredients. At the bottom of the page, Puratos Canada Inc. is identified as the manufacturer of the product and the weight of the product is given as “20kg”, suggesting that this page is also a label for the Tegral Rustic product.

The second page of Exhibit A appears to be a photocopy from a catalogue or other publication, showing an advertisement for PURATOS-branded products. In particular, the advertisement depicts six product bags or pouches, including one product prominently displaying “Rustic”. As the exhibit is of poor quality, I am only able to identify two of the other products as PURATOS “Friax Soft” and PURATOS “Friamatic”. The advertisement emphasizes that PURATOS products are “non-bromated”. I note that the depicted products do not appear to be “breads” or “rolls”.

- Exhibit B consists of three invoices that Mr. Staetmans attests is “a sampling of copies of invoices showing sales of Trade Mark Products by Puratos Canada Inc., a licensee of Puratos, in its normal course of trade.” The invoices are dated within the relevant period and show sales of various products from Puratos Canada to customers in Quebec and Ontario. Of the 27 invoiced items, three are for “RUSTIC” with identical product codes. Again, neither Mr. Straetmans nor the invoices themselves identify the products as either “breads” or “rolls”; the only description for each listing, under the heading “Unit”, is “BAG 25 KG”. I note that most of the other non-“RUSTIC” products are also identified as “BAG 25 KG”, with two listings identified as “BAG-IN-BOX 10 KG” and another identified as “BUCKET 14 KG”.
- Exhibit C consists of three pages of what Mr. Straetmans identifies as “copies of packaging showing how the trade mark is marked, branded and indicated on the trade marked products”. Each of the pages appears to be a photocopy of the same packaging for an empty bag of “Rustic Bread 450g”. In this respect, I note that the same “PACKED ON/BEST BEFORE” sticker appears at the bottom of each bag. I further note that the

images are of poor quality; as such, it is not clear if the Owner or its licensee is identified on the labels.

Analysis

[10] In its written representations, the Requesting Party submits that the evidence in this case “is replete with ambiguous assertions of facts” and that, in any event, the furnished exhibits do not support the bald assertions of fact made by Mr. Straetmans.

[11] In particular, the Requesting Party submits that the evidence does not show use of the Mark with respect to the registered goods “breads” and “rolls”. It argues that, at best, the evidence shows use of the Mark in association with *mixes* for breads. In this respect, it first notes that the Owner has another registration for the trade-mark RUSTIC, namely TMA324,857 in association with “improver in powder form for bread”.

[12] More importantly, the Requesting Party notes that the first page of Exhibit A appears to be an advertisement for TEGRAL RUSTIC, a “Complete Mix For Production of Rusitc [*sic*] Breads and Buns”. It further submits that the Exhibit B invoices do not, in fact, show sales of “bread and rolls”, noting that such goods “are not usually sold, in the normal course of trade in 25 kg bags”. As such, it suggests that the exhibited invoices show sales of the aforementioned powdered mixes referenced in Exhibit A.

[13] Finally, with respect to Exhibit C, the Requesting Party questions the language used by Mr. Straetmans to describe it. In particular, the Requesting Party submits that there is no evidence that the packaging was used during the relevant period and further that Mr. Straetmans’ ambiguous language leaves it unclear as to whether the packaging was even that of the Owner or its licensee, Puratos Canada.

[14] For its part, the Owner submits that it is merely required to establish a *prima facie* case of use. In summarizing the evidence submitted, the Owner asserts that it has done so in this case, arguing that there is no ambiguity in Mr. Straetmans’ statements.

[15] In the context of a section 45 proceeding, the evidence as a whole must be considered and focusing on individual pieces of evidence is not the correct approach [*Kvas Miller Everitt v*

Compute (Bridgend) Limited (2005), 47 CPR (4th) 209 (TMOB)]. The evidence need not be perfect; indeed, as noted by the Owner, a registered owner need only establish a *prima facie* case of use within the meaning of section 4 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at paragraph 2]. This burden of proof is very light: evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant* at paragraph 9].

[16] However, while these principles normally favour the registered owner, in this case, they do not. Although Mr. Straetmans asserts that the Owner sold “bread and rolls” in association with the Mark, the attached exhibits and related statements simply do not support that assertion.

[17] Starting with Exhibits A and B, I agree with the Requesting Party that, on their face, the exhibits do not demonstrate use of the Mark in association with “bread and rolls”.

[18] In this respect, on the first page of Exhibit A, although “RUSTIC” appears below and in larger font than “TEGRAL” at the top of the page, the “Formula” on the page refers to “Tegral Rustic”, in the same font and size as “Yeast” and “Water”. As such, in applying the principles set out by the Federal Court of Appeal [per *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 am not satisfied that the dominant feature of the trade-mark as registered has been retained. Although RUSTIC appears on the page, it appears in combination with the coined word TEGRAL, with no trade-mark indicia and without otherwise being sufficiently set aside from the surrounding text. Accordingly, I am not satisfied that the first page in Exhibit A constitutes display of the Mark as registered.

[19] Second, I agree with the Requesting Party that these pages relate to *mixes* for breads and not the registered goods “bread and rolls” themselves. This is more apparent on the second page of Exhibit A, which shows several bags or pouches of such mixes. Although one of the bags displays “Rustic” under the “PURATOS” logo, the goods do not appear to be “bread or rolls”.

[20] With respect to Exhibit B, as noted above, none of the invoices indicate what the invoiced “RUSTIC” goods actually were, whether breads, rolls or mixes. Although the Owner

takes the position that there is no ambiguity in Mr. Straetmans' statements regarding Exhibit B, this is only possible if one accepts that the Owner's mixes equates with the goods "bread and rolls".

[21] However, if it is the position of the Owner that such mixes do, in fact, constitute the registered goods, this is not clear from Mr. Straetmans' affidavit or from the Owner's written representations. In any event, per section 30 of the Act, goods must be stated in ordinary commercial terms and whether a trade-mark has been used in association with the registered goods is to be determined on a case-by-case basis [see *Express File Inc v HRB Royalty Inc*, 2005 FC 542, 39 CPR (4th) 59]. As such, registered goods should be interpreted in accordance with common sense and given their ordinary meaning. Here, Exhibit A in particular would appear to be counter to the argument that the Owner's mixes constitute "bread and rolls".

[22] Exhibit C, on the other hand – while not showing bread *per se* – does depict what appears to be a bread bag and, in fact, displays "Rustic Bread 450g".

[23] However, I do not accept that this packaging satisfies the Owner's burden to establish a *prima facie* case of use of the Mark within the meaning of sections 4 and 45 of the Act. Even when considered as a whole, it is not clear how this exhibit fits with the rest of the furnished evidence.

[24] First, as noted above, Mr. Straetmans simply states that Exhibit C is "packaging showing how the trade mark is marked, branded and indicated on the trade marked products". However, in contrast to Exhibit A, Mr. Straetmans does not identify the packaging as being from the relevant period and, in contrast to Exhibit B, the exhibit itself sheds no light on whether it relates to the relevant period. As such, I agree with the Requesting Party that the affidavit fails to establish that the exhibit is representative of packaging from the relevant period.

[25] Furthermore, it is not clear that any use of the Mark based on its display on this packaging of "RUSTIC bread" enures to the benefit of the Owner. On its face, it is not clear that this packaging was used by the Owner or its licensee as, curiously, Mr. Straetmans uses the passive voice in referring to the exhibit. As well, I am unable to identify any reference to the Owner or its licensee on the exhibited packaging.

[26] It is also telling that Mr. Straetmans does not attempt to connect the Exhibit C packaging to the invoiced goods at Exhibit B. Indeed, there appears to be an inconsistency between the unit sizes indicated on the invoices (bags of 25kg) and that on the Exhibit C packaging (450g).

[27] In this respect, the reasonable inference would be that the exhibits refer to different products. In reviewing the evidence as a whole, at best, it would appear that the Owner's licensee, Puratos Canada, sells bread mixes to bakeries and other customers. Exhibit A depicts these mixes and Exhibit B shows sales of such mixes. Exhibit C, meanwhile, depicts packaging for a finished product, being "RUSTIC" bread – such bread *perhaps* having been produced and sold by one of the Owner's customers that purchased and used its bread mix.

[28] Based on the evidence before me, the Owner's licensee does not appear to sell the finished products – as set out in the registration – "bread and rolls". Although Mr. Straetmans identifies Puratos Canada as the Owner's licensee (and thus with respect to RUSTIC bread *mixes*), he does not identify customers who purchased such mixes as the Owner's licensees.

[29] If the Owner's position is that sales of RUSTIC-branded bread by bakeries – where such bread was made using the Owner's "Tegral Rustic" bread mix – somehow satisfies the licensing and control requirements of section 50 of the Act, than this is not clear from the evidence or from the Owner's representations.

[30] In any event, I am not prepared to infer that a license existed between the Owner and customers, such as bakeries, who purchased its bread mixes. I am also not prepared to accept that the Owner somehow exercised direct or indirect control over the quality or character of such bakeries' bread, simply because the bakeries used, as one of the ingredients, the Owner's "Tegral Rustic" mix.

[31] In view of all of the foregoing, I am not satisfied that the Owner has satisfied its *prima facie* burden to demonstrate use of the Mark in association with the registered goods "bread and rolls" within the meaning of sections 4 and 45 of the Act.

[32] I would also note that, even if I were to accept that Exhibits B or C show use of the Mark in association with "bread", I am not prepared to accept it as representative evidence with respect to the registered good "rolls". Having distinguished particular goods in the registration, the

Owner must provide some evidence with respect to each of the listed goods accordingly [per *John Labatt, supra*]. Here, the Exhibit C packaging identifies the product as “bread”. If the packaging was also used for rolls, I do not consider it would have been an undue hardship on the Owner to furnish a photograph depicting such accordingly.

Disposition

[33] As there is no evidence of special circumstances excusing non-use of the Mark before me, 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 expunged.

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

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

Hearing Date: No Hearing Held

Agents of Record

Riches, McKenzie & Herbert LLP

For the Registered Owner

Stikeman Elliott LLP

For the Requesting Party