



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

Citation: 2017 TMOB 35
Date of Decision: 2017-04-24

IN THE MATTER OF A SECTION 45 PROCEEDING

Marks & Clerk

Requesting Party

and

**Tritap Food Broker, a division of 676166
Ontario Limited**

Registered Owner

**TMA448,646 for KWIK WIPES &
DESIGN**

Registration

[1] At the request of Marks & Clerk (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 February 6, 2015, to Tritap Food Broker, a division of 676166 Ontario Limited (the Owner), the registered owner of registration No. TMA448,646 for the trade-mark KWIK WIPES & DESIGN (the Mark), shown below:



[2] The Mark is registered for use in association with the following goods: “Reusable all-purpose cloths.”

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark was used in Canada in association with the goods 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 the trade-mark was last used and the reason for the absence of such use since that

date. In this case, the relevant period for showing use is between February 6, 2012 and February 6, 2015.

[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 the purpose and scope of section 45 of the Act is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Joel Usher, sworn on August 6, 2015. Both parties filed written representations and were represented at a hearing held on February 7, 2017.

The Owner’s Evidence

[7] In his affidavit, Mr. Usher identifies himself as the Secretary-Treasurer of Tritap Food Brokers, a registered business name of the Owner. He also identifies himself as the General Manager of U-Buy Discount Foods Limited. He explains that these companies are related, and that the information set out in his affidavit is known by him personally or was obtained from the records of the Owner or of U-Buy.

[8] Mr. Usher attests that U-Buy carries on the business of grocery sales under the name Worldwide Food Dist., and that it sells products displaying the Owner’s trade-marks, including the Mark. He explains that U-Buy is a wholesaler of food and household products, which sells goods to Canadian retail stores and distributors, who in turn sell to consumers.

[9] He confirms that the registered goods, “reusable all-purpose clothes”, have been sold in

association with the Mark continuously in Canada since 1992. In particular, he attests that the Mark was used in association with the registered goods, in Canada and by the Owner, during the relevant period.

[10] In support, attached as Exhibit A to his affidavit is a photograph of the packaging for “All Purpose Reuseable Kwik Wipes”, bearing the Mark, which Mr. Usher attests is representative of the way the Mark appeared on packages of the registered goods sold in Canada during the relevant period.

[11] Mr. Usher confirms that U-Buy sold such packaged products to Canadian retailers during the relevant period. Attached as Exhibit B are three invoices from “Worldwide Distributors (Division of U-Buy Discount Food Ltd.)” to Dollarama and Dollar Joint stores, dated during the relevant period, showing sales of such Kwik-Wipe cloths.

Analysis

[12] At the hearing, the Requesting Party submitted that the evidence is insufficient to demonstrate the Owner’s use of the Mark in association with the registered goods. In particular, it submits that Mr. Usher does not sufficiently explain the relationship between the Owner and the entity that sells the goods, U-Buy. It argues that, taken at face value, the evidence suggests that the Mark was being used by U-Buy, and not the Owner.

[13] First, I note that evidence in a section 45 proceeding must be considered as a whole, and focusing on individual pieces of evidence in isolation is not the proper approach [see *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); and *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. Furthermore, reasonable inferences can be made from the evidence provided [see *Eclipse International Fashions Canada Inc v Shapiro Cohen* (2005), 48 CPR (4th) 223 (FCA)].

[14] Given a fair reading and considered in its totality, I find that the Usher affidavit sufficiently explains the relationship between the Owner and U-Buy. Here, it is clear that U-Buy is a distributor and wholesaler of the Owner’s goods, including the registered goods bearing the Mark.

[15] In this respect, it is well established that, with respect to the “normal course of trade”, section 4 of the Act contemplates a chain of transactions occurring between the manufacturer and the ultimate consumer, potentially involving various distributors, wholesalers and/or retailers. [see *Manhattan Industries Inc v Princeton Manufacturing Ltd* (1971), 4 CPR (2d) 6 (FCTD); *Lin Trading Co v CBM Kabushiki Kaisha* (1988), 21 CPR (3d) 417 (FCA)].

[16] Unfortunately, the Owner’s evidentiary focus on one such link in the distribution chain led the Requesting Party to allege “ambiguities” in the evidence, going so far as to suggest that it is not clear that the Owner is the *manufacturer* of the goods. Essentially, it submits that the Owner is not the source of the registered goods.

[17] However, the evidence in a section 45 proceeding need not be perfect; indeed, a registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at paragraph 2]. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant* at paragraph 9].

[18] While Mr. Usher is, arguably, not explicit regarding what entity is the actual manufacturer of the goods, I note that the Act does not require the owner of a trade-mark itself be the manufacturer. For example, it may outsource that function or have one or more manufacturer suppliers. In other words, contrary to the Requesting Party’s suggestion, a registered owner need not be the actual manufacturer of goods for it to be considered the source of such goods for purposes of the Act.

[19] Furthermore, as noted by the Federal Court of Appeal in *Ridout & Maybee LLP v Omega*, 2005 FCA 306, 43 CPR (4th) 18, the validity of a registration is not in dispute in section 45 proceedings. Any issues of ownership are more properly dealt with by way of application to the Federal Court pursuant to section 57 of the Act. As such, and given the nature and purpose of section 45 of the Act, it is proper to presume that a registered owner *is* the “source” of the goods in question, unless the evidence indicates otherwise, such as in the case of a licensee.

[20] In this case, such a presumption is consistent with Mr. Usher’s description of U-Buy’s activities and his statement that *the Owner* used the Mark during the relevant period. As noted

above, the reasonable conclusion is that U-Buy was the distributor and wholesaler of the Owner's goods bearing the Mark, which the evidence further shows were transferred and sold in the normal course of trade in Canada during the relevant period.

[21] As such, and in view of all of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

Disposition

[22] Accordingly, 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 maintained.

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: 2017-02-07

Appearances

Amalia Berg For the Registered Owner

Grant Lynds For the Requesting Party

Agents of Record

Goodmans LLP For the Registered Owner

Marks & Clerk For the Requesting Party