



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

**Citation: 2017 TMOB 153**

**Date of Decision: 2017-11-22**

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

**Smart & Biggar**

**Requesting Party**

**and**

**Canadian Tire Corporation, Limited**

**Registered Owner**

**TMA788,121 for EASY UP**

**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 28, 2015 to Canadian Tire Corporation, Limited (the Owner), the registered owner of registration No. TMA788,121 for the trade-mark EASY UP (the Mark).

[2] The Mark is registered for use in association with “Foldable tents, shelters, camping furniture and camp kitchens”.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of 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 it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is July 28, 2012 to July 28, 2015.

[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 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 Rainer Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of David Kelly, an Associate Vice President of the Owner, sworn on February 26, 2016 in Toronto. Both parties filed written representations and were represented at an oral hearing.

#### THE OWNER’S EVIDENCE

[7] In his affidavit, Mr. Kelly attests that the Owner is a retailer of a broad variety of goods and services, selling thousands of different products including a range of automotive, hardware, sporting goods, camping equipment and home goods. He explains that the Owner sells products to its Canadian Tire Associate Stores which, in turn, sell those products to the Canadian public. He states that there are 490 such Associate Stores throughout Canada, many of which sell products bearing the Mark. As such, he asserts that the Mark “has been used continuously by [the Owner] in association with outdoor and camping products during the Relevant Period.”

[8] Mr. Kelly estimates that sales of EASY UP goods amounted to approximately \$12 million from 2012 to 2015. At paragraph 9 of his affidavit, Mr. Kelly breaks down the

“estimated dollar retail value of national sales to Associate Stores” for seven such products during portions of the relevant period. He identifies these products as a “Screen House”, a “Gazebo” and five “Tents”.

[9] Attached as Exhibits A to G to his affidavit are spec images and photographs of the packaging of such EASY UP goods, together with printed summaries of sales from the Owner to Associate Stores during the relevant period. I note that on some of the depicted packaging, it is indicated that the product is “Imported by/Importé par **Trileaf Distribution Trifeuil**”. Although Mr. Kelly does not explain the Owner’s relationship to this entity in his affidavit, I also note that some of the spec images of packaging appear to display the Canadian Tire logo, such as in Exhibit A for the Broadstone “Easy Up™ 11x11 Screen House” and in Exhibit F for the Broadstone “Easy Up™ 5-Person Dome Tent”.

[10] Mr. Kelly also attaches, as Exhibits H to Q to his affidavit, copies of pages from newspaper inserts and flyers in which various EASY UP-branded goods are advertised. Mr. Kelly confirms that the advertised goods were sold by the Owner to Associate Stores and ultimately to the Canadian public during the relevant period. He identifies such goods as a “Gazebo/Screenhouse”, “Gazebo”, three types of “Dome Tent”, and five types of “Shelter”.

#### ANALYSIS

[11] First, I note that the evidence in this case appears to be limited to the registered goods “foldable tents” and “shelters”. Indeed, at the oral hearing, the Owner conceded that the evidence does not show use of the Mark in association with “camp kitchens”. The Owner did submit that the goods shown to be sold in association with the Mark could be considered “camping furniture”, but I disagree. None of the exhibits identify the goods as “furniture” and, in any event, having distinguished “camping furniture” from “foldable tents, shelters” in the statement of goods, the Owner was obliged to furnish evidence with respect to each of these goods accordingly [per *John Labatt, supra*]. However, the only evidence in this case is with respect to tents and different types of shelters.

[12] As such, I am not satisfied that the Owner has demonstrated use of the Mark in association with “camping furniture and camp kitchens” within the meaning of sections 4 and 45

of the Act. As there is no evidence of special circumstances excusing non-use of the Mark before me, the registration will be amended accordingly.

[13] With respect to “foldable tents” and “shelters”, the Requesting Party’s argument is that the evidence does not show that the Owner is the source of these products such that use of the Mark accrues to the benefit of the Owner.

[14] In this respect, as noted above, the packaging indicates that the subject products were imported by “Trileaf Distribution” and Mr. Kelly does not explain the Owner’s relationship to Trileaf in his affidavit. In its written representations, the Owner indicates that Trileaf is merely a trade name of the Owner. Had Mr. Kelly explicitly stated this in his affidavit, it is unlikely the Requesting Party would have raised the issue in their representations.

[15] Nevertheless, 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].

[16] While Mr. Kelly was 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, to the extent the question is even relevant in a section 45 proceeding – where a registered owner need only establish a *prima facie* case of use – contrary to the Requesting Party’s suggestion, a registered owner need not be established as the actual manufacturer of goods for it to be considered the source of such goods for purposes of the Act.

[17] Indeed, section 2 of the Act in part defines “trade-mark” as meaning “... a mark that is used by a person for the purpose of distinguishing or so as to distinguish goods or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others”. The definition is not limited to goods “manufactured” by a person and specifically includes goods “sold” by a person.

[18] 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 [see also *Marks & Clerk v Tritap Food Broker*, 2017 TMOB 35 and *Gowling Lafleur Henderson LLP v Henry Company, LLC*, 2017 TMOB 51].

[19] Such a presumption is consistent with Mr. Kelly’s assertion that *the Owner* used the Mark during the relevant period. First, I note that a registered owner is not required to provide evidence of use of the trade-mark along with its name [see, for example: *Novopharm Ltd v Monsanto Canada, Inc* (1997), 80 CPR (3d) 287 (TMOB); *Vogue Brassiere Inc v Sim & McBurney* (2000), 5 CPR (4th) 537 (FCTD); and *Gowling Lafleur Henderson LLP v Classical Remedia Ltd*, 2008 CarswellNat 4604 (TMOB)]. As such, the exact nature of the relationship between Trileaf and the Owner is ultimately irrelevant for purposes of this proceeding [for a similar finding, see *Koi Design LLC v 9155406 Canada Inc*, 2015 TMOB 165]. Nevertheless, the reasonable inference is that Trileaf was merely a supplier or distributor of the Owner. The appearance of the Canadian Tire logo on some of the exhibited spec images of packaging is also consistent with this inference. Second, the evidence clearly demonstrates that the Owner sold EASY UP foldable tents and shelters to Associate Stores who in turn sold them to the Canadian public during the relevant period.

[20] The Requesting Party argues that maintaining the registration on this evidence would result in an absurdity, suggesting that the same evidence could be used to maintain the registration for a third party mark that the Owner clearly does not own. In this respect, it gave the example of “FOLGERS” coffee products, which appear in some of the exhibited flyers as having been sold by the Owner through its Associate Stores.

[21] However, the Owner is not the registered owner of such third party marks. In cases where a registered owner/retailer is not the “legitimate” owner of a third party mark, the resolution of that issue does not lie in a section 45 proceeding. Ideally, the issue would be

resolved through an opposition proceeding before the trade-mark is even registered. Otherwise, as noted above, the proper recourse is to the Federal Court. In rare cases, the issue may indirectly be resolved through a section 45 proceeding from a failure to establish that any evidenced transfers of goods were in the normal course of trade. Again, though, the Owner's normal course of trade is clear in that it sells its EASY UP-branded products to Associate Stores that, in turn, sell such products to the Canadian public, and did so during the relevant period. This is sufficient in the context of a section 45 proceeding

[22] In view of all of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with "foldable tents, shelters" within the meaning of sections 4 and 45 of the Act.

#### DISPOSITION

[23] 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 amended to delete "camping furniture and camp kitchens" from the registration.

[24] The amended statement of goods will be as follows: "Foldable tents, shelters."

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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**

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**HEARING DATE** 2017-11-02

**APPEARANCES**

Alison Hayman For the Registered Owner

Andrea Kroetch For the Requesting Party

**AGENTS OF RECORD**

Cassels Brock & Blackwell LLP For the Registered Owner

Smart & Biggar For the Requesting Party