



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

Citation: 2019 TMOB 13

Date of Decision: 2019-02-14

IN THE MATTER OF A SECTION 45 PROCEEDING

BCF S.E.N.C.R.L./BCF LLP

Requesting Party

and

London Drugs Limited

Registered Owner

**TMA550,968 for CREATIVE
KITCHENS & Design**

Registration

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA550,968 for the trade-mark CREATIVE KITCHENS & Design, shown below (the Mark), owned by London Drugs Limited.



[2] The Mark is currently registered in association with the following goods and services:

Goods:

Kitchen appliances, namely coffee makers, jug kettles, food steamers, hand mixers, mini choppers, popcorn makers, toasters, blenders, electric food blenders, food processors, electric food processors, electric coffee grinders, electric can openers, electric knives; dinnerware, namely plates, bowls, cups, saucers, salad plates, serving plates and serving bowls; cookware, namely pots, pans, frying pans, roasting pans; kitchen accessories, namely strainers, measuring cups, cutting boards, pot holders, oven mitts, placemats, dish cloths, tea towels, aprons, ironing board covers; kitchen gadgets, namely graters, tongs, peelers, slicers, corers; glassware, namely mugs, teapots, glasses, salad sets; tableware, namely stainless steel cutlery, pitchers, plates, cream and sugar sets, salt and pepper sets; bakeware, namely casserole dishes, cookie sheets, loaf pans, muffin tins, pie plates.

Services:

The operation of a retail kitchenware and kitchen appliance store.

[3] For the reasons that follow, I conclude that the registration ought to be maintained with respect to the services, but amended to delete all of the goods.

THE PROCEEDING

[4] On July 17, 2017, the Registrar of Trade-marks (the Registrar) sent a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to London Drugs Limited (the Owner). The notice was sent at the request of BCF S.E.N.C.R.L./BCF LLP (the Requesting Party).

[5] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between July 17, 2014, and July 17, 2017, in association with each of the registered goods and services. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[6] The relevant definitions of use in the present case are set out in sections 4(1) and 4(2) 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.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[7] 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. The threshold for establishing use in the context of section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)]. While mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding (*Plough (Canada) Ltd v Aerosol Fillers Inc* (1979), 45 CPR (2d) 194, aff'd (1980), 53 CPR (2d) 62 (FCA)), evidentiary overkill is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)]. However, 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 registered goods and services during the relevant period [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270].

[8] In response to the Registrar's notice, the Owner furnished the affidavit of Clint Mahlman, the Executive Vice President and Chief Operating Officer of the Owner, sworn February 16, 2018, together with Exhibits A and B.

[9] Only the Requesting Party filed a written argument. Neither party requested an oral hearing in the matter.

THE EVIDENCE

[10] Mr. Mahlman explains that the Owner is a leading Canadian drugstore and retailer of general merchandise, including kitchenware and kitchen appliances, with 80 retail locations in western Canada. He attests that each week, on average, approximately three-quarters of a million customer transactions take place at the Owner's retail locations.

[11] Mr. Mahlman attests that the Owner has used the Mark in Canada in association with "[t]he operation of a retail kitchenware and kitchen appliance store" during the relevant period by having the Mark displayed at some retail locations to mark its kitchenware and kitchen appliance departments. In support, he provides as Exhibit B to his affidavit, photographs of

signage bearing the Mark above the retail kitchenware and kitchen appliance departments of the Owner's stores in Victoria (Tillicum Centre) and Vancouver (41st & Victoria).

ANALYSIS AND REASONS FOR DECISION

[12] The Requesting Party's written representations are limited to a brief submission with respect to the registered goods only. After reviewing the evidence with regards to the registered goods, I agree with the Requesting Party that the Owner has not filed any evidence of use of the Mark in association with the registered goods. Indeed, Mr. Mahlman's affidavit is silent with respect to use of the Mark in association with the registered goods, only referring to the general category of "kitchenware and kitchen appliances" as an example of the types of products available at the Owner's retail locations. Furthermore, it is noteworthy that Mr. Mahlman only asserts use of the Mark in association with the registered services.

[13] As the Owner has not brought forth any special circumstances which would excuse the absence of use of the Mark in association with the goods during the relevant period, all of the goods will be deleted from the registration.

[14] With respect to the registered services, however, I am satisfied that the evidence clearly demonstrates that the Owner used the Mark in association with the registered services during the relevant period. In this regard, it is evident from the photographs in Exhibit B that the Mark is displayed above the retail kitchenware and kitchen appliance departments in two of the Owner's retail locations. Furthermore, Mr. Mahlman clearly attests that these photographs are demonstrative of use of the Mark in association with the registered services during the relevant period.

[15] Consequently, I am satisfied that the Owner has established use of the Mark in association with "[t]he operation of a retail kitchenware and kitchen appliance store" in the manner required by sections 4(2) and 45 of the Act.

DISPOSITION

[16] Having regard to the aforementioned, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete all of the goods from the

registration, but maintained with respect to the services in compliance with the provisions of section 45 of the Act.

Kathryn Barnett
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

Norton Rose Fulbright Canada LLP/S.E.N.C.R.L., S.R.L. FOR THE REGISTERED OWNER

BCF S.E.N.C.R.L./BCF LLP FOR THE REQUESTING PARTY