



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 68

Date of Decision: 2021-04-12

IN THE MATTER OF A SECTION 45 PROCEEDING

Richard Tétreault

Requesting Party

and

Hormel Foods Corporation

Registered Owner

TMA513,156 for THICK & EASY

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA513,156 for THICK & EASY (sometimes referred to herein as the Mark).

[2] The Mark is registered for use in association with the following goods:

(1) Thickening agents for use in food preparation.

[3] For the reasons that follow, I conclude that the registration ought to be maintained.

THE PROCEEDING

[4] At the request of Richard Tétreault (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act to Hormel Foods Corporation (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the Mark was used in Canada in association with the registered goods 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. As the notice was sent on June 7, 2018, the relevant period for showing use is between June 7, 2015 and June 7, 2018.

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

4(1) A trademark 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.

[7] In the absence of use, pursuant to section 45(3) of the Act, a trademark is liable to be expunged, unless the absence of use is excused by special circumstances.

[8] In response to the Registrar’s notice, the Owner submitted the affidavit of Yvette C. Szeleczky, sworn on January 3, 2019.

[9] Both the Requesting Party and the Owner filed written representations. No hearing was held.

SUMMARY OF THE OWNER'S EVIDENCE

[10] In her affidavit, Ms. Szeleczky identifies herself as a Registered Dietitian Nutritionist and Business Development Manager for Hormel Health Labs, LLC (“Hormel Health”), a subsidiary of the Owner.

[11] Ms. Szeleczky explains that “THICK & EASY is a food and beverage thickener that is sold in powder form to be added to foods and beverages for consumption by swallowing-impaired patients.” In her affidavit, Ms. Szeleczky defines the Owner’s powdered thickener as “THICK & EASY products”. She also states that “THICK & EASY products” have been continuously advertised and sold in Canada since 1998.

[12] With respect to distribution, Ms. Szeleczky explains that from 1998 until February 2018 Campbell’s Foodservice Healthcare and Hospitality, a division of Campbell Company of Canada, acted as the exclusive distributor of the Owner’s powdered thickeners in Canada. After February 2018, the Owner’s powdered thickeners were sold in Canada through Dot Foods Canada, Inc., located in Vancouver, British Columbia. Ms. Szeleczky also explains that these goods were manufactured and packaged by the Owner, and sold and shipped to its Canadian distributors who then sold the goods to customers in Canada.

[13] In support, she provides examples of product packaging, promotional materials, representative invoices and aggregated sales figures in Canada from November 2014 to February 2018.

[14] Although the evidence will be discussed in greater detail below, the following is an overview of what I consider to be the core evidence in this case:

- Image of a container and packaging labelled “Instant Food & Beverage Thickener” bearing the Mark [Exhibit A]. Ms. Szeleczky states that this exhibit “is a sample of images of containers in which the THICK & EASY powdered product is currently sold in Canada”.

- Image of a sample label for “Instant Food & Beverage Thickener” bearing the Mark [Exhibit D]. Ms. Szelezky states that this label has been employed in Canada since November 2017.
- Redacted invoices dated within the relevant period and issued by “Hormel Foods Corporation & Subsidiaries” to Campbell Company of Canada [Exhibits G and H] and Dot Foods Canada Inc. [Exhibit I]. Ms. Szelezky attests that the goods sold were received in Brampton, Ontario and in Vancouver, British Columbia.

PRELIMINARY ISSUES ON THE ADMISSIBILITY OF EVIDENCE

[15] As a preliminary matter, I will first address the Requesting Party’s submission that the Szelezky affidavit is inadmissible. In particular, the Requesting Party argues that Ms. Szelezky is employed by a “third party”, namely Hormel Health, and that such a third party is not in a position to attest to the Owner’s sales in Canada.

[16] In her affidavit, Ms. Szelezky explains that Hormel Health is a subsidiary of the Owner and that, as a result of her position at Hormel Health since 2005, she has knowledge of the sales of the Owner’s thickener products in Canada and of the matters on which she deposes. Taking into account the corporate relationship between the Owner and Hormel Health and the nature of Ms. Szelezky’s position, I accept Ms. Szelezky’s sworn statement that she has the required knowledge. As such, I see no reason to question the reliability of the information set out in Ms. Szelezky’s affidavit regarding the use of the Mark by the Owner during the relevant period [see *Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79 at para 25 for the well-established principle that an affiant’s statements are to be accepted at face value and must be accorded substantial credibility in a section 45 proceeding].

[17] The Requesting Party also submits that the invoice dated March 4, 2016 in Exhibit G is inadmissible because it was not issued by the owner of the Mark at that time (the Mark having been assigned to the Owner on March 29, 2016). As there are multiple invoices issued by the

Owner, dated after the assignment and within the relevant period, there is no need to address this particular objection.

[18] It is also worth noting that the Requesting Party has identified a number of purported deficiencies in the evidence by meticulously and individually examining Ms. Szelezcky's statements and the exhibits attached to her affidavit. In this regard, the Owner summarizes its representations by stating that "the Requesting Party's complaints amount to nothing more than highly selective nitpicking".

[19] In the context of section 45 proceedings, it is important to consider the evidence 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)]. In this case, I find that the Requesting Party has taken the incorrect approach of isolating certain pieces of evidence; an approach that can lead to incorrect conclusions as it does not consider other relevant or related evidence.

[20] Having said that, I will now turn to the question of whether the Owner's evidence, when viewed as a whole, shows use of the Mark within the meaning of sections 4 and 45 of the Act.

ANALYSIS AND REASONS FOR DECISION

[21] 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 at para 68] and "evidentiary overkill" is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with the registered goods [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[22] As noted in the evidence overview above, the Owner provided images of a container and packaging in Exhibit A as well as a sample label in Exhibit D. The container, packaging and label prominently display the Mark and identify the product as “Instant Food & Beverage Thickener”.

[23] In view of Ms. Szeleczky’s explanations regarding the nature and purpose of the “THICK & EASY product”, namely that it is a “food and beverage thickener” sold in “powdered form” to be added to foods and beverages, I accept that the exhibited container, packaging and label display the Mark in association with the registered goods.

[24] With respect to the relevant period, given Ms. Szeleczky’s statement that the Exhibit A containers show how the powdered thickener products are “currently sold in Canada”, it is unclear whether the containers are representative of those sold during the relevant period. However, at a minimum, Ms. Szeleczky confirms that the label shown in Exhibit D was used on thickeners as of November 2017, which is well within the relevant period.

[25] With respect to transfers of the registered goods, as noted above, the Owner has provided invoices dated during the relevant period, including invoices from after November 2017, when the Mark would have been displayed on the goods as shown in Exhibit D.

[26] In particular, the invoices at Exhibits G, H and I identify goods sold by the Owner with the following product descriptions: “THKNR-100/6.5 GR INST FD T&E”, “THKNR-2KG CANADA T&E” and “THKNR-2/2.5 CANADA T&E”.

[27] As noted by the Requesting Party, the invoices make no mention of “thickening agents for use in food preparation” and do not display the Mark. However, Ms. Szeleczky states that the invoices evidence sales of powdered thickeners by the Owner and that the occurrences of the term “T & E” in the product descriptions is a reference to the Mark, which was displayed on the container of “all the products that were shipped”.

[28] Lastly, while the Exhibit G and H invoices show the purchaser of the goods as “Campbell Company of Canada” with an address in Canton, Massachusetts, I note that, as indicated in the

invoices themselves, Ms. Szelezky confirms that such goods were shipped to Brampton, Ontario. Likewise, I accept that the Exhibit I invoices, in conjunction with Ms. Szelezky's statements, demonstrate transfers of the registered goods bearing the Mark to a Vancouver-based customer during the relevant period.

[29] In view 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

[30] 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.

Eve Heafey
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE No hearing held

AGENTS OF RECORD

Smart & Biggar LLP

For the Registered Owner

Richard Tétreault

For the Requesting Party