



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 202

Date of Decision: 2021-09-20

IN THE MATTER OF A SECTION 45 PROCEEDING

Aird & Berlis LLP

Requesting Party

and

CFS Brands, LLC

Registered Owner

TMA413,608 for SPECTRUM

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. TMA413,608 for the trademark SPECTRUM (“the Mark”), currently owned by CFS Brands, LLC (“the Owner”).

[2] All references are to the Act as amended June 17, 2019 (the Act), unless otherwise noted.

[3] The Mark is registered for use in association with the goods set forth in Schedule “A”.

[4] For the reasons that follow, I conclude that the registration ought to be maintained in part with respect to the following goods: housewares, namely brooms.

THE PROCEEDINGS

[5] At the request of Aird & Berlis LLP (“the Requesting Party”), the Registrar of Trademarks (“the Registrar”) issued a notice under section 45 of the Act on March 7, 2019, to Carlisle FoodService Products, Incorporated, the registrant as of that date.

[6] The notice required the owner to show whether the trademark 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 March 7, 2016 to March 7, 2019 (“the Relevant Period”).

[7] The relevant definition of use in the present case 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.

[8] 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. 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]. 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 para 9].

[9] In the absence of use as defined above, pursuant to section 45(3) of the Act, a trademark is liable to be expunged, unless the absence of use is due to special circumstances.

[10] In response to the Registrar’s notice, the Owner furnished an Affidavit of Martin Benning, sworn on October 4, 2019, to which were attached Exhibits 1 to 5 inclusive.

[11] On December 18, 2019, the following changes in title were recorded by the Registrar against the registration for the Mark:

- (a) The conversion of Carlisle FoodService Products, Incorporated into a limited liability company under the name Carlisle FoodService Products, LLC effective March 21, 2018; and,
- (b) The change of name from Carlisle FoodService Products, LLC to CFS Brands, LLC effective October 22, 2018.

[12] Both parties submitted written representations. No oral hearing was held.

THE EVIDENCE

[13] Mr. Benning describes himself as the Director of Research and Development of the Owner, which is based in Oklahoma City, Oklahoma. He states that he has full knowledge of the Owner's operations and has full access to the files and records kept by the Owner. He states that he has personal knowledge of the facts in his Affidavit.

[14] Mr. Benning states that, on March 21, 2018, Carlisle FoodService Products, Incorporated was converted to a limited liability company under the name Carlisle FoodService Products, LLC. and that, on October 22, 2018, Carlisle FoodService Products, LLC changed its name to CFS Brands, LLC. Exhibit 1 is said to evidence the conversion and Exhibit 2 the change of name.

[15] Mr. Benning goes on to explain that the Owner designs, manufactures and sources products, including brooms, for the commercial foodservice, janitorial and healthcare markets. He states that the Owner's goods bearing the Mark are sold in various countries around the world, including Canada and that, during the Relevant Period, goods bearing the Mark were sold by the Owner to Canadian based distributors who then resold the goods to Canada based retailers or end users.

[16] In support, Mr. Benning attached the following exhibits to his affidavit:

- (a) Exhibit 3: A photograph of typical packaging for brooms sold to Canadian based distributors displaying. The brooms sold to Canada based distributors are delivered in packaging as shown in Exhibit 3 or substantially similar packaging.
- (b) Exhibit 4: A printout from *www.carlislefsp.com*, a website operated by the Owner, showing brooms along with product number 4108204.
- (c) Exhibit 5: Invoices issued by “Carlisle FoodService Products” to a Canadian distributor, Rabco FoodService Ltd, during the Relevant Period. The invoices accompanied the brooms in packaging bearing the Mark when the brooms were delivered to the Canadian distributor.

[17] Based on this evidence, the Owner alleges that it has shown use of the Mark in Canada in the Relevant Period in association with “housewares, namely brooms”.

ANALYSIS AND REASONS FOR DECISION

[18] As the Owner did not provide any evidence of use of the Mark in Canada in the Relevant Period, or special circumstances to excuse non-use of the Mark in Canada, with respect to any of the goods listed in the registration other than “housewares, namely brooms”, the registration will be amended to delete all goods but for “housewares, namely brooms”.

[19] Accordingly, the following analysis and reasons for decision will be limited to “housewares, namely brooms”.

[20] The Requesting Party submits that:

- (a) The chain of title from Carlisle FoodService Products, Incorporated to CFS Brands, LLC was not properly established in the Benning Affidavit and that the change of title should have been recorded against the registration.
- (b) At best, the Benning Affidavit only provides evidence of use in association with “housewares, namely brooms”.

[21] Accordingly, the Respondent submits that, if the evidence of use in the Benning Affidavit accrues to the Owner, then the registration should be limited to “housewares, namely brooms”.

Chain of Title

[22] The Requesting Party takes issue with the evidence relating to the chain of title.

[23] The Benning Affidavit states in paragraph 3:

“For several years prior to March 18, 2018, the Owner’s name was “Carlisle FoodService Products, Incorporated”. Effective March 21, 2018, the Owner converted to a limited liability company named “Carlisle FoodService Products, LLC”, as confirmed by the government-issued document attached to my affidavit as Exhibit 1. Effective October 22, 2018, the Owner changed its name to “CFS Brands, LLC”, as confirmed by the government-issued document attached to my affidavit as Exhibit 2. On October 3, 2019, the Owner’s agent requested that the Canadian Trademarks Office record this conversion and name change against the Registration, among other registrations.”

[24] The Requesting Party is correct that Exhibit 1 does not confirm the conversion of Carlisle FoodService Products, Incorporated into Carlisle FoodService Products, LLC. Instead, Exhibit 1 is a Certificate of Formation of Carlisle FoodService Products, LLC.

[25] In response to the submissions from the Requesting Party, the Owner has attempted to submit new evidence in its written submissions in the form of Appendix A and Appendix B, which will be ignored. The proper course would have been for the Owner to seek leave to file an additional affidavit with those documents attached as exhibits. However, the Owner is correct to point out that the Registrar has a discretion to review the state of the register [*True Software Scandinavia AB v Ontech Technologies Inc.*, 2018 TMOB 40 at para 23]. Further, as noted in *True Software*, once a change of title has been recorded by the Registrar, “it must be accepted *prima facie*”.

[26] Accordingly, based on the assertions in paragraph 3 of the Benning Affidavit, coupled with the Registrar’s subsequent recordal of the conversion and change of name, which I have confirmed, I accept that CFS Brands, LLC is the owner of the Mark and the successor in title to the registrant at the time these proceedings were commenced, namely Carlisle FoodService

Products, Incorporated. Consequently, any use of the Mark by Carlisle FoodService Products, Incorporated accrues to the benefit of CFS Brands, LLC.

Statement of Goods

[27] 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)].

[28] The evidence consists of a photograph of packaging for angle brooms showing the Mark (Product No. 4108204), a screen shot from the Owner's website showing angle brooms in association with the Mark (Product No. 4108204) and, four invoices issued during the Relevant Period to a Canadian customer for "Angle Broom" (Product No. 4108204).

[29] The Requesting Party appears to acknowledge that the evidence described above shows use of the Mark in Canada during the Relevant Period in association with brooms.

[30] Based on the totality of the evidence, I am satisfied that the Owner has demonstrated use of the Mark in Canada in the normal course of trade during the Relevant Period in association with "housewares, namely brooms" within the meaning of section 4(1) of the Act.

DISPOSITION

[31] Accordingly, 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 listed in Schedule “A” but for “housewares, namely brooms” in compliance with the provisions of section 45 of the Act.

[32] The amended statement of goods will read as follows:

“housewares, namely brooms”.

Jean Carrière
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

SCHEDULE "A"

(1) Bar and buffet serving accessories, namely, soda spoons, cocktail fork sets, ice tongs, corkscrews, party spoons, party strainers, party jiggers, bar forks, ice buckets, ice cube crushers, ice cube trays, ice picks, wine racks, bottle/can openers, long drink spoon, long drink fork, pitchers, aluminum tumblers, citrus peeler, bottle stoppers, liquor pourer, toothpicks in barrel, party picks, coasters, trivets; barbecue tools, namely; tongs, turners, forks, brushes, shish kabob sets, skewers, plastic tableware, hamburger press, food guards, table clamps, napkin holder, hibachis and grills, outdoor cookers; bathroom accessories; namely, nail brushes, shower caddy, shower cap, soap dish; canning products, namely jar wrenches, jar openers, canning funnel; chinese cookware accesories, namely, wok pans and sets, wok tools, namely turner, skimmer and laddle, chopsticks, bamboo skewers, wok scrubber, chopper/cleaver; closet accessories, namely, hangers, slack racks, cookware, namely, pots, pans, skillets, microwave cookware, chicken fryer, omelet pan, dutch ovens, slow cookers, copper wares; namely mixing bowls, whipping bowls, salad and dessert moulds; stoneware and porcelain dinnerware, namely, plates, mugs, bowls, fruit nappies, cups, saucers, casseroles, onion soup bowls, soup tureens, sugar pot, creamer, salt shaker, pepper shaker, egg cups, butter dish, sauce boat, serving plates, pitchers, platters, teapots, coffee pots; fireplaces and fireplace accessories; namely, fire screens, fire starters, log roller, log basket, log holder, coal scuttle, grates, bellows, grills, log tongs, dampers, fireplace tools, namely, poker, brush, shovel, and irons, fireplace kettle, brass rails, fireplace broom; fondue accessories, namely fondue sets, fondue lazy susan, fondue forks, fondue plates, fondue fork holders, garden accessories; namely, loungers, folding stools, table and benches, terrace shell, camping tables and covers, garden umbrella, hammocks, garden tools, namely shovel, spade, rake, trowel, fork, digger, cultivator, transplanter, pruner, weeder, grass shears; household hardware; namely, wrenches, telephone lock, crimping tool, combination lock, level, tape, screwdrivers, tubing cutter, pliers, snap button tool kit, eyelet plier, hole saw, padlocks, hooks and holders, clamps, racks, magnets, drill sets, spring clips, hammer, rubber mallet, measuring tape, nails, sandpaper, wire, saws, bike lock, sink and drain cleaner, putty knife, trunk lid holder, iron cord holder, work gloves; housewares, namely, flower pots, vases, planters, scissors, scales, wall plates, clocks, watches, mats, dusters, baskets, mirrors, kitchen linens, thermometers, barometers, bottle and can openers, ashtrays, brooms, trays; bakeware, namely, cake pans, cookie sheets, muffin tins, pizza trays, pie plates, loaf pans, jelly roll pans, patty tins, open bakers; kitchenwares; kitchen utensils namely, turner, ladle, slotted spoon, basting spoon, fork, potato masher, long spatula, long slotted spatula, tool rack; strainer, pizza cutter, measuring cups, measuring spoons, ice cream scoops, plain scoops, utility scoops, scissor scoops, broiler pans, apple slicers, pastry cutters, corn holder sets, towel holders, poultry lacers, cookie cutters, egg rings, knife sharpener, nut crackers, vegetable and fruit peelers, spoon rests, pie server, fruit juicer, spatulas, paper towel holder, bacon press, spaghetti forks, garlic and onion press, vegetable slicer, egg boiler stand, cake decorator, egg slicers and separators, lemon press, grapefruit spoons, fruit and potato presses, spice graters, carving sets, frankfurter grills, corers and papers, meatball presses, melon scoops and potato ballers, spaghetti serving tongs, all-purpose tongs, safety tongs, four-in-one can openers, ballers and curlers, peelers and curlers, potato bakers, pastry brushes, salad scissors, cutlery, flatware, serving trays, platters, potato ricer, sifters, graters, cheese slicer, measuring scoop, french-style spoons and forks, coffee makers, kettles; laundry accessories, namely, clothespins, laundry hooks, clothesline, clothespin bag, clothes dryers, pantry ware, namely, extender rack, plate rack, cup rack, canister sets; sporting

goods, namely, track suits, pistols, rifles; stainless steel holloware, namely, bowls, wire goods, namely beaters, whippers, dough blenders, whisk beater, egg beater, racks, splatter screens, roast and turkey lifter, sifters, slicers, woodenwares, namely, trays, lazy susan tray, tiki spoon and fork, wine racks, nut cracker bowl, carving boards, cutting boards, steak boards, cheese boards, salad bowls, salad forks and spoons, salt and pepper shakers, rolling pins, meat tenderizers, spice racks, flatware chests, wooden mixing spoons, bamboo forks, notions, namely, kerosene lamps, ironing boards, candles, memo magnets, magic calculator, window wiper, mug racks, stationery, namely thumb tacks, paper clips, scissors, hand truck and dolly, axes, ladders and step stools, fans, luggage, trolley, flash lights, stuffed toys, mechanical toys, telephone accessories namely; jacks, extension cord, modular cord coupler, modular dual jack extension adaptors, baby stroller and baby walker, coin sorters, coin banks, sock mates, bread boxes, condiment sets, oil and vinegar sets, onion keepers, recipe boxes, telephone index, sponges, drinking straws, poachers, griddles, photo frames.

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

Ridout & Maybee LLP

For the Registered Owner

Aird & Berlis LLP

For the Requesting Party