O P I C C I P O

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 251

Date of Decision: 2021-11-23

IN THE MATTER OF A SECTION 45 PROCEEDING

Marks & Clerk	**Requesting Party**
and	
Dan Cornea c.o.b as Crispy Pop	**Registered Owner**
TMA921,595 for GARAVOGUE	**Registration**

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding with respect to registration No. TMA921,595 for the trademark GARAVOGUE (the Mark).

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

GOODS

(1) Bakery goods namely rice cakes, grain cakes, wheat cakes

(2) Machines for baking rice cakes and rice crackers, wheat cakes and wheat crackers, grain cakes and grain crackers

SERVICES

(1) Repair of machines for baking rice cakes and rice crackers, wheat cakes and wheat crackers, grain cakes and grain crackers

[3] For the reasons that follow, I conclude that the registration ought to be maintained only in association with "Bakery goods namely grain cakes, wheat cakes".

THE PROCEEDING

[4] On January 16, 2019, at the request of Marks & Clerk (the Requesting Party), the Registrar of Trademarks issued a notice pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) to Dan Cornea c.o.b as Crispy Pop (the Owner). The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods and services 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 Mark 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 between January 16, 2016 and January 16, 2019.

[5] In response to the Registrar's notice, the Owner submitted the statutory declaration of the Owner in his own name, solemnly declared on April 12, 2019 in Toronto, Ontario.

[6] No written representations were filed. Both parties attended an oral hearing.

SUMMARY OF THE OWNER'S EVIDENCE

[7] In his relatively brief declaration, Mr. Cornea attests that he "used [the Mark] in Canada during the three year period preceding the date of the Section 45 Notice, with respect to each of the goods specified in the registration".

[8] Mr. Cornea specifically attests that the Owner has sold "goods under the trademark to various businesses in Ontario" and, in support, he provides as Exhibit 1 to his declaration four "packing slips to 3rd party points of sales". I note the following items listed in slips dated within

the relevant period: “Wheat Snacks – Garavogue – Small Size”, “Wheat Snacks – Garavogue – Big Size” and “Corn Snacks – Garavogue – Small size”.

[9] Mr. Cornea states that he “designed appropriate packaging, labels that include the Garavogue trademark and commercialized the products under this name”. As Exhibit 2 to his declaration, Mr. Cornea provides “pictures of labels, packaging”, including the following:

- Images of labels displaying nutritional information and ingredients for a first product made with wheat and a second product made with corn flour;
- Photographs depicting two bags of unidentified baked goods, each bag bearing a label displaying a stylized version of the Mark. Although the labels do not identify the specific type of baked goods, these appear to be crispy flat cakes or crackers.

[10] I note that Exhibit 2 also contains what appears to be promotional materials for bakery goods and a specification sheet for a “dual hole rice pop machine”.

[11] Mr. Cornea states that he plans to sell “popper machines” to distributors by the third quarter of 2019 and explains that an “after sale program” for those machines will “include [a] one year free of charge warranty and training of personnel that will operate the machines”.

[12] Finally, Mr. Cornea states that the Owner’s marketing efforts included “sample offerings at different points of sales” as well as the creation of a website located at *www.garavogue.com*. According to Mr. Cornea, the “2019 Business Plan” includes expanding its online presence by launching “the option to purchase the product via shopping cart (on-line)”.

ANALYSIS AND REASONS FOR DECISION

[13] As a preliminary matter, the Requesting Party argued that the statutory declaration was deficient because the exhibits attached thereto are not notarized. However, having regard to the purpose and intent of section 45, it is well established technical deficiencies should not stop a party from successfully responding to a section 45 notice where there is sufficient evidence to

conclude the trademark was in use [*Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FC)]. Having regard to those principles as well as the fact that Mr. Cornea referenced the exhibits in his statutory declaration, I am prepared to accept the exhibits as part of the evidence.

[14] I will now turn to the Owner's evidence and whether it demonstrates use of the Mark in association with the registered goods and services. The relevant definitions of "use" in this case are set out in section 4 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.
>
> 4(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.

[15] It is well established that bare statements that a trademark is in 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)] and that although the evidentiary threshold is low, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with *each* of the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[16] First, with respect to display of the Mark on the goods, the Owner has provided photographs of packaged products and labels. In this regard, the Requesting Party briefly argued at the hearing that the trademark displayed on the goods themselves is not the Mark as registered because the term "GARA" is displayed above, and therefore separated from, the term "VOGUE".

[17] In my view, the separation of the first portion of the Mark from the second portion does not cause the Mark to lose its identity. I find that the Mark remains recognizable despite this separation such that the display of the Mark as shown on the exhibited product packaging constitutes display of the Mark as registered [see *Promafil Canada Ltée v Munsingwear Inc*

(1992), 44 CPR (3d) 59 (FCA); *Registrar of Trade-marks v Cie international pour l'informatique CII Honeywell Bull* (1985), 4 CPR (3d) 523 (FCA); and *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB), for a thorough discussion of the general principles that govern the test for deviation].

[18] Second, with respect to evidence of transfers, the Owner has provided copies of packing slips showing products shipped to third-party points of sales. In this regard, the Requesting Party argued that, in the absence of additional evidence such as sales figures, packing slips are insufficient to establish that products listed therein were sold and further argued that there is no evidence that the listed products were transferred in the Owner's normal course of trade.

[19] In this case, although Mr. Cornea does not provide explicit statements regarding the Owner's normal course of trade, he provides the exhibited slips – which he specifically describes as "packing slips to 3rd party points of sales" – together with the statement that the Owner "sold goods under the trademark to various businesses in Ontario". As such, I find it reasonable to infer that the Owner's normal course of trade was to sell its products to third-party vendors, which in turn resold those products to end consumers.

[20] In coming to that conclusion, I am mindful that evidence in a section 45 proceeding must be considered as a whole and that reasonable inferences can be made from the evidence provided [see *Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB); and *Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

[21] As a result, in view of the above, I find that the exhibited packing slips evidence sales of "Corn Snacks" and "Wheat Snacks" in the Owner's normal course of trade. Given that corn is a common grain, and having regard to the Mark displayed on product packaging and in the body of the packing slips, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods "grain cakes, wheat cakes" within the meaning of sections 4(1) and 45 of the Act.

[22] That being said, the registered goods "rice cakes" are nowhere referenced in Mr. Cornea's declaration or the exhibited materials. As there is no evidence of special circumstances before me which could excuse non-use of the Mark, the goods "rice cakes" will be deleted.

[23] With respect to goods (2), there is no evidence that the Owner used the Mark in association with "Machines for baking rice cakes and rice crackers, wheat cakes and wheat crackers, grain cakes and grain crackers". In particular, the Owner has provided no statement or supporting evidence regarding the sale or transfer of any machines during the relevant period. In fact, to the extent that "pop machines" or "popper machines" relate to goods (2), the evidence is clear that the Owner plans to sell such machines "by the third quarter of 2019", that is to say, after the relevant period. As there is no evidence of special circumstances before me which could excuse non-use of the Mark, goods (2) will be deleted.

[24] Lastly, with respect to the registered services, there is no evidence that the Owner ever performed the services "Repair of machines for baking rice cakes and rice crackers, wheat cakes and wheat crackers, grain cakes and grain crackers". Again, to the extent that the popper machine warranty referenced in Mr. Cornea's declaration relates to the registered services, the evidence is clear that popper machines were not yet sold by the Owner and, consequently, that the Owner would not have been able to perform repair services on such machines during the relevant period [*per Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB), where the Registrar determined that, in the absence of actual performance of the services, a trademark owner can demonstrate use of a trademark in association with services where the services were advertised and the owner was willing and able to perform the services in Canada during the relevant period].

[25] As there is no evidence of special circumstances before me which could excuse non-use of the Mark, the registered services will be deleted.

DISPOSITION

[26] 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: (i) the entirety of the services, and (ii) the following goods:

> (1) … rice cakes…
> (2) Machines for baking rice cakes and rice crackers, wheat cakes and wheat crackers, grain cakes and grain crackers

[27] The Mark will now be registered only in association with the following goods:

> (1) Bakery goods namely grain cakes, wheat cakes.

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: November 8, 2021

APPEARANCES

Dan Cornea	For the Registered Owner
Kenneth McKay	For the Requesting Party

AGENTS OF RECORD

No agent appointed	For the Registered Owner
Marks & Clerk	For the Requesting Party