

OPIC



CIPO

LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2022 TMOB 094

Date of Decision: 2022-05-11

IN THE MATTER OF A SECTION 45 PROCEEDING

Fasken Martineau Dumoulin LLP

Requesting Party

and

Flink Holdings Inc.

Registered Owner

TMA904,344 for GATHER Design

Registrations

TMA904,350 for GATHER

INTRODUCTION

[1] This is a decision involving summary expungement proceedings under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA904,344 for the trademark GATHER Design (shown below) and with respect to registration No. TMA904,350 for the trademark GATHER (collectively, the Marks):



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

(1) Candied nuts; (2) Candied fruit; (3) Candies and pastries; (4) Canned fruit; (5) Dried fruits; (6) Fruit-based snack food; (7) Fruit jam; (8) Fruit jelly; (9) Fruit preserves;

(10) Fruit puree; (11) Fruit sauce; (12) Fruit spreads; (13) Fruit topping; (14) Frozen fruit; (15) Grains, namely cereal grains, spelt, amaranth, barley, kamut, rice, oats, soy; (16) Granola; (17) Muesli; (18) Nuts, both shelled and unshelled; (19) Rice and noodles; (20) Savoury jelly, namely savoury meat jelly, savoury vegetable jelly, savoury fruit jelly; (21) Edible seeds; (22) Spices; (23) Yogurt, plain and flavoured; (24) Promotional items namely t-shirts, sweatshirts, hats, caps, sport bags, carrying bags, tote bags, sweaters, jackets, towels, water bottles, watches, mouse pads, aprons, plush toys, golf balls.

(1) Advertising services, promotional services and marketing services for others, namely, retail store based advertising programs, retail store and special-event based product sampling programs, product sample distribution programs and coupon programs all related to the distribution and sale of food and food products; (2) Manufacture and distribution services related to the distribution and sale of food and food products and promotional items

[3] For the reasons that follow, I conclude that both registrations ought to be expunged.

THE PROCEEDINGS

[4] At the request of Fasken Martineau Dumoulin LLP (the Requesting Party), the Registrar of Trademarks issued notices under section 45 of the Act on October 18, 2019 to the registered owner of the Marks, Flink Holdings Inc. (the Owner).

[5] The notices required the Owner to show whether the Marks were used in Canada in association with each of the goods and services listed in the registrations at any time within the three-year period immediately preceding the date of the notices and, if not, the date when the Marks were 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 October 18, 2016 to October 18, 2019 (the Relevant Period).

[6] The relevant definitions of use are set out in section 4 of the Act:

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 trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[7] Bare statements that a mark 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)]. 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 Canada (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 Mark in association with each of the goods and services during the Relevant Period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[8] In the absence of use, pursuant to section 45(3) of the Act, the registrations are liable to be expunged, unless the absence of use is due to special circumstances.

[9] In response to the Registrar's notice, the Owner furnished in both proceedings the Affidavit of Erik Silden sworn on August 31, 2020, to which were attached Exhibits A and B.

[10] Both parties submitted written representations and both parties attend an oral hearing.

THE EVIDENCE

[11] Mr. Silden states that he is a shareholder and owner of the Owner.

[12] Mr. Silden asserts as follows:

3. Flink develops and sells, both directly and through authorized licensees and retailers, dry goods and pantry products like nuts, granola, and jellies in Canada since as early as April 2011 ("GATHER Goods") in association with the GATHER Marks.

4. Flink experienced production related challenges in late 2019 and into 2020. As with many industries, Flink was also affected by the global COVID-19 pandemic.

5. Flink has every intention of continuing to use the GATHER Marks and further developing GATHER Goods.

6. Flink has been selling GATHER Goods in association with the GATHER Marks for the last 3 years. An example of a purchase order for products sold in association with the GATHER Marks is attached to my affidavit as Exhibit A dated November 1, 2019.

7. A list of purchasers of GATHER Goods is attached at Exhibit B representing businesses to whom sales have been made of GATHER Goods associated with the GATHER Marks over the last 3 years and beyond.

[13] Exhibit A is a copy of a purchase order dated November 1, 2019 (after the Relevant Period) from Dovre Import & Export Ltd to a supplier identified as “Flink Inc. c/o Beez & Trees Specialty Foods” for the purchase of “BC Spicy Red Pepper Jelly”. In a box on the purchase order labelled “Description/Size/Brand”, there is a reference to “GATHER”.

[14] Exhibit B is entitled “Gather Foods Sales Analysis by Customer – Executive” for the period September 1, 2019 to August 31, 2020. The analysis does not identify what the customers bought or the specific date of any transaction, keeping in mind that the Relevant Period ended on October 18, 2019.

ANALYSIS AND REASONS FOR DECISION

[15] At the oral hearing, counsel for the Owner acknowledged that there was no evidence before me of use of the Marks, and no evidence of special circumstances to excuse non-use, in association with the following:

(24) Promotional items namely t-shirts, sweatshirts, hats, caps, sport bags, carrying bags, tote bags, sweaters, jackets, towels, water bottles, watches, mouse pads, aprons, plush toys, golf balls.

(1) Advertising services, promotional services and marketing services for others, namely, retail store based advertising programs, retail store and special-event based product sampling programs, product sample distribution programs and coupon programs all related to the distribution and sale of food and food products.

[16] Accordingly, the goods (24) and the services (1) will be deleted from both registrations.

[17] As for the remaining goods and services, the Requesting Party submits that the evidence consists of nothing more than bald assertions of use and is insufficient to prove that there was any use of the Marks in Canada during the Relevant Period.

[18] The Owner submits that the evidentiary burden for establishing use in a section 45 proceeding is low and that a *prima facie* case of use has been made out through the Silden Affidavit given that Mr. Silden has personal and first hand knowledge of the availability of the goods and services in Canada

Goods

[19] With respect to the goods, there are three issues which I will address in turn.

[20] First, Mr. Silden states that the Owner sells “dry goods and pantry products like nuts, granola and jellies” but he makes no attempt to correlate those goods to the goods in the registration.

[21] The Owner submits that “dry goods and pantry products like nuts, granola and jellies” overlap with the goods (1) to (23) and that those goods should not be struck from the registrations.

[22] Alternatively, the Owner submits that “dry goods and pantry products like nuts, granola and jellies” encompass goods (1), (7), (8), (9), (16), (18) and (20) and that those goods should not be struck from the registrations.

[23] While there is no need for evidentiary overkill in a section 45 proceeding, an owner is nevertheless obligated to provide evidence to enable the Registrar to form an opinion on “use” for each of the registered goods within the meaning of the Act [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448]. Such evidence is not before me in these proceedings. In particular, there is no evidence as to what specific goods listed in the registrations fall within “dry goods and pantry products” as referenced by Mr. Silden.

[24] Accordingly, I am limited in my consideration to nuts, granola and jellies but I am prepared to accept that such goods correspond to the goods marked (1), (7), (8), (9), (16), (18) and (20) as submitted by the Owner.

[25] This brings me to the second issue, namely that, apart from the assertions in the Silden Affidavit, I have no evidence before me, such as labels, invoices or catalogues, to show how either of the Marks was associated with any of the goods at the time of transfer of property in or possession of the goods.

[26] Accordingly, I conclude that the Owner has not shown that there existed a notice of association between either of the Marks and any of the goods at the time of transfer of property in or possession of the goods.

[27] The third issue is that there is no a evidence of transfer in the normal course of trade.

[28] Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr (1988), 21 CPR (3d) 483 (FCTD)], some evidence of transfer in the normal course of trade in Canada is necessary [John Labatt Ltd v Rainier Brewing Co (1984), 80 CPR (2d) 228 (FCA)]. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements regarding volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, 1471706 Ontario Inc v Momo Design srl, 2014 TMOB 79]. Such evidence is lacking in this case.

[29] All that I have before me, apart from the assertions in the Silden Affidavit, is a purchase order from Dovre Import & Export Ltd dated outside the Relevant Period (Exhibit A) and a sales analysis by customer for the period September 1, 2019 to August 21, 2020, without any indication of what was purchased or when (Exhibit B). As noted in *Grapha-Holding AG v. Illinois Tool Works Inc*, 2008 FC 959 at para 22, reference to dates that fall both within and outside the Relevant Period does not provide clear evidence because it cannot be determined if any use occurred specifically within the Relevant Period.

[30] Given the lack of evidence to show how the Marks were associated with any of the goods and the lack of evidence to show a transfer of any of the goods in the normal course of trade in Canada during the Relevant Period, I conclude that the Owner has not shown use of either of the Marks in association with any goods within the meaning of sections 4(1) of the Act.

[31] Given that the Owner acknowledged during the oral hearing that there was no evidence before me of special circumstances to excuse non-use of the Marks in association with any of the goods listed in the registration, all of the goods will be deleted from both registrations.

Services

[32] With respect to the services “manufacture and distribution services related to the distribution and sale of food and food products and promotional items”, the only evidence from Mr. Silden is that the Owner “develops and sells ... dry goods and pantry products like nuts, granola and jellies”. Based on the plain meaning of the words, I would not conclude that “develops and sells” is the same as “manufacture and distribute” but, even if I accept that they mean the same thing, there is nothing in the evidence, apart from the assertions in the Silden Affidavit, to show how either of the Marks was used in the performance or advertising of the services in Canada during the Relevant Period.

[33] Accordingly, I conclude that the Owner has not shown use of either of the Marks in association with any of the services within the meaning of section 4(2) of the Act.

[34] Given that the Owner acknowledged during the oral hearing that there was no evidence before me of special circumstances to excuse non-use of the Mark in association with any of the services listed in the registration, all of the services will be deleted from both registrations.

DISPOSITION

[35] 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 registrations will be expunged.

Robert MacDonald
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2022-April-26

APPEARANCES

Elizabeth Dipchand
Zack Nickels

For the Registered Owner

Simon Hitchens
Nathan Haldane

For the Requesting Party

AGENTS OF RECORD

Dipchand LLP

For the Registered Owner

Fasken Martineau Dumoulin LLP

For the Requesting Party