



LE REGISTRAIRE DES MARQUES DE COMMERCE  
THE REGISTRAR OF TRADEMARKS

**Citation: 2022 TMOB 121**

**Date of Decision: 2022-06-20**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Lidl Stiftung & Co. KG**

**Requesting Party**

**and**

**Anderson Watts Ltd.**

**Registered Owner**

**TMA457,579 for FRESHANA**

**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. TMA457,579 for the trademark FRESHANA (the Mark).

[2] The Mark is registered for use in association with the following goods: soups, seasoning mixes and powdered fruit drink mix.

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

THE PROCEEDING

[4] At the request of Lidl Stiftung & Co. KG (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on July 30, 2020 to the registered owner of the Mark, Anderson Watts Ltd. (the Owner).

[5] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods listed 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 July 30, 2017 to July 30, 2020 (the Relevant Period).

[6] The relevant definition of use in the present case is set out in section 4(1) of the Act as follows:

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] 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. This burden of proof is light; evidence must only supply facts from which a conclusion of use may follow as a logical inference [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[8] In response to the Registrar’s notice, the Owner furnished the Affidavit of Robert Johnston, affirmed on October 26, 2020, to which were attached Exhibits A to D.

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

## THE EVIDENCE

[10] Mr. Johnston is the Marketing Manager of the Owner. He states that the Owner is a wholesale foods and drinks company, based in British Columbia, which sources and sells products to retailers for sale to the public.

[11] Mr. Johnston states that, in the ordinary course of business, the Owner fulfills purchase orders received from grocery retailers or wholesalers and then ships products to the buyer. A bill of lading and an invoice accompany the shipments at the time of delivery.

[12] Mr. Johnston states that the Mark was used during the Relevant Period in association with soups, seasoning mixes and powdered fruit drink mix. In support, he provides the following exhibits:

- (a) Exhibit B consists of packaging which Mr. Johnston states is representative of how the Mark appeared on the goods sold by the Owner during the Relevant Period. The packaging shown in Exhibit B is for the following items, all of which display the Mark: Soupa Brocoli soup mix, El Grande Guacamole dip mix, Hollandaise sauce mix, and Strawberry Storm drink mix.
- (b) Exhibit C consists of purchase orders received by the Owner and the corresponding invoices issued by the Owner during the Relevant Period for goods shipped to Canadian customers. In each case, the Mark is referenced in the product descriptor used in the invoice. The details of the invoices are as follows:
  - i. Invoice dated December 12, 2019 for the sale of the following FRESHANA products: Banana Storm drink mix, Chocolate Banana Storm drink mix, Soupa Brocoli soup mix, cheese sauce mix, Hollandaise sauce mix and El Grande Guacamole dip mix;
  - ii. Invoice dated December 17, 2019 for sale of the following FRESHANA products: El Grande Guacamole dip mix, Orange Storm drink and Strawberry Storm drink mix;

iii. Invoice dated July 24, 2019 for the sale of the following FRESHANA products:  
Soupa Brocoli soup mix, El Grande Guacamole dip mix and Strawberry Storm  
drink mix.

(c) Exhibit D consists of the corresponding bills of lading for the shipments referenced in Exhibit C. In each case, the Mark is referenced in the product descriptor used in the bill of lading.

#### ANALYSIS AND REASONS FOR DECISION

[13] The Requesting Party submits that the registration should be expunged on the basis that the goods identified in the evidence, namely soup mix, dip mix, sauce mix, and drink mix, do not correspond to the goods in the registration, namely soups, seasoning mixes and powdered fruit drink mix. In particular, the Requesting party submits that:

- (a) A soup mix is not a soup;
- (b) A dip mix is not a seasoning mix;
- (c) Sauce mixes are not covered by the registration; and
- (d) There is no evidence that the drink mix is in powdered form or that it contains fruit or is fruit flavoured.

[14] It is a well-established principle that, when interpreting a statement of goods in a section 45 proceeding, one is not to be “astutely meticulous when dealing with [the] language used” [see *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17].

[15] In my view, a reasonable interpretation of the word “soup” would include the various forms in which soup could be sold, such as packaged soup mixes. Such an approach is consistent with the overall purpose of section 45 [see *Conagra Foods Inc. v Fetherstonhaugh & Co.*, 2002 FCT 1257 at para 23].

[16] Similarly, a reasonable interpretation of “seasoning mixes” would include a mix that adds seasoning to other ingredients to make a dish, whether it be a dip or a sauce. For example, the El

Grande Guacamole dip mix is added to avocado to make guacamole and contains various seasonings as listed on the packaging: dehydrated onion and garlic, salt, dehydrated red pepper and spices.

[17] Finally, with respect to drink mixes, the Requesting Party states that there is no evidence that they are in powdered form. However, Mr. Johnston states that the Mark is used on powdered drink mix and the packaging in Exhibit B is provided to show how the Mark is used on such goods. Absent evidence to the contrary, an affiant's statements are to be accepted at face value and must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79 at para 25]. There is nothing to suggest that the drink mix is not in powdered form.

[18] As for the submission of the Requesting Party that there is nothing in the evidence to show that the drink mix contains fruit or is fruit flavoured, the very names of the drink mixes (Strawberry Storm, Orange Storm, Chocolate Banana Storm) suggests that they are fruit flavoured.

[19] Accordingly, a fair reading of the evidence as a whole is that the drink mix shown in Exhibit B and referenced in the invoices in Exhibit C and the bills of lading in Exhibit D is a powdered fruit drink mix.

[20] Having concluded that the goods identified in the evidence correlate to the registered goods, the evidence described above clearly shows that the Mark was in used in Canada, by displaying it on the packaging for the goods and referencing it in the invoices and bills of lading which accompanied the goods, during the Relevant Period within the meaning of sections 4(1) and 45 of the Act.

#### DISPOSITION

[21] 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.

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Robert A. MacDonald  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office

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

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**HEARING DATE** No Hearing Held

**AGENTS OF RECORD**

Ridout & Maybee LLP

For the Registered Owner

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For the Requesting Party