



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 108

Date of Decision: 2023-06-23

IN THE MATTER OF SECTION 45 PROCEEDINGS

Requesting Party: 88766 Canada Inc.

Registered Owner: Bute Island Foods Ltd

Registrations: TMA777,707 for SHEESE 100% DAIRYFREE, and
TMA796,215 for SHEESE 100% DAIRYFREE & Design

INTRODUCTION

[1] This decision involves a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration Nos. TMA777,707 and TMA796,215 for the trademarks SHEESE 100% DAIRYFREE (the Word Mark) and SHEESE 100% DAIRYFREE & DESIGN shown below (the Design Mark; collectively, the Marks).

Sheese
100% DAIRY FREE

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

(1) Non-Dairy Cheese Substitute.

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

PROCEEDING

[4] At the request of 88766 Canada Inc (the Requesting Party), the Registrar of Trademarks issued notices under section 45 of the Act on March 25, 2022, to Bute Island Foods Ltd (the Owner), the registered owner of the Marks.

[5] The notices required the Owner to show whether the Marks were used in Canada in association with the goods specified in the registrations at any time within the three-year period immediately preceding the date of the notices and, if not, the date when they 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 March 25, 2019 to March 25, 2022.

[6] The relevant definition of “use” in the present case is 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.

[7] Where the owner has not shown “use”, a registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[8] In response to the Registrar’s notices, the Owner furnished solemn declaration of Guy Crichton, sworn June 13, 2022, to which were attached Exhibits 1 to 4.

[9] Only the Owner submitted written representations and no oral hearing was held.

EVIDENCE AND ANALYSIS

[10] In his solemn declaration, Mr. Crichton states that he has been the Owner's Managing Director since May 2021 and that he previously held the positions of Director and Company Secretary. He also states that the Owner manufactures its goods in the United Kingdom and sells them to distributors and resellers who then resell to retailers for further sales to end-consumers in Canada [paras 1, 4 and 6].

[11] Mr. Crichton states that during the relevant period, the Owner sold in its normal course of trade goods bearing the Marks across Canada. In this respect, he states that the Owner's distributors and resellers sold the goods to Canadian groceries during such period [paras 2, 6 and 10].

[12] As Exhibit 1, Mr. Crichton attaches three in-store photographs of goods and nine images of front-top views of packaging. The photographs and images show different flavors of "dairy-free soya alternative to cream cheese" products, which all display the Marks. Mr. Crichton asserts that the photographed goods are those sold in Canada during the relevant period [para 5]. To illustrate such sales, as Exhibit 2, he attaches five invoices dated during the relevant period and issued by one of the Owner's distributors to a grocery located in Canada. The invoice lists goods, which are all identified with the abbreviation of the Word Mark "SHEESE".

[13] 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 38] and "evidentiary overkill" is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3].

[14] In the present case, the photographs and images demonstrate how the Marks were displayed in association with the registered goods during the relevant period and the invoices demonstrate its sales in Canada during same period. Given that Mr. Crichton attests that the goods shown in the photographs and images are those sold, I am satisfied that the Owner has demonstrated transfers of such goods in its

normal course of trade in Canada during that period. In this respect, it is well established that 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].

[15] Therefore, I am satisfied that the Owner has demonstrated use of the Marks in association with the registered goods within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[16] In view of all the above, 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 maintained.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: ROBIC

For the Registered Owner: Simon Lemay