

Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 222

Date of Decision: 2023-12-21

IN THE MATTER OF A SECTION 45 PROCEEDING

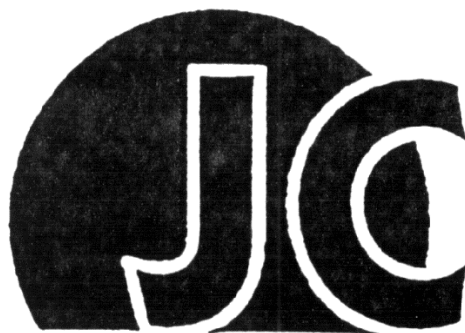
Requesting Party: Ridout & Maybee LLP

Registered Owner: Ocean Food Company Limited

Registration: TMA520,576 for the trademark JC & RISING SUN DESIGN

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. TMA520,576 for the trademark JC & RISING SUN DESIGN reproduced below (the Mark) owned by Ocean Food Company Limited (the Owner).



[2] For the reasons that follow, I conclude the registration ought to be amended to strike the Goods rice dinner products, namely, curry with rice, sukiyaki with rice, tonkatsu (pork) with rice, teriyaki with rice, fried rices, rice pilafs and frozen foods, namely, fried noodle dinners, but otherwise maintained.

THE PROCEEDING

[3] At the request of Ridout & Maybee LLP (the Requesting Party), the Registrar of Trademarks issued a notice to the Owner pursuant to section 45 of the Act on October 24, 2022.

[4] The notice required the Owner to show whether the Mark had been used 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 use since that date. In this case, the three-year period for showing use is October 24, 2019, to October 24, 2022 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the non-use is excused by special circumstances.

[5] The Mark is registered for use in association with the following goods (the Goods):

Food products, namely, salad dressings, dips, marinades and rice dinner products, namely, curry with rice, sukiyaki with rice, tonkatsu (pork) with rice, teriyaki with rice, fried rices, rice pilafs and frozen foods, namely, fried noodle dinners.

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

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] 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. It is not necessary for the evidence filed in a section 45 proceeding to be perfect. Rather the Owner need

only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. The burden of proof is light. While bare assertions of use will not suffice, all that is required is for evidence to supply facts from which a conclusion of use of the trademark in association with each of the goods may follow as a logical inference [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184; *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA) (*Plough*)]. Additionally, evidence must be considered as a whole, and it is therefore not appropriate to focus on individual pieces of evidence in isolation [*Kvas Miller Everitt v Compute (Bridgend) Ltd* (2005), 47 CPR (4th) 209 (TMOB); and *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)].

[8] In response to the Registrar's notice, the Owner submitted the affidavit of Mr. Daniel Leung, Director of Sales of the Owner, dated January 13, 2023.

[9] The Owner alone submitted written representations and no hearing was held.

SUMMARY OF EVIDENCE

[10] I have considered all evidence and conclude that the most relevant elements of Mr. Leung's evidence are:

- a statement as to the Owner's normal course of trade, which is to develop, produce and manufacture food products for subsequent sale to the general public, restaurants and wholesalers in Canada [para 7]
- photographs of two products Mr. Leung identifies as "salad dressings" labelled "Japanese Dressing Original" and "Japanese Dressing Soy Vinegar No Oil" [para 8 and Exhibit B]
- a photograph of a product Mr. Leung identifies as a "dip" labelled "Japanese Dressing Sesame" and brief description of the product's used as a dip [para 10 and Exhibit D]
- a redacted invoice from the Owner to a Scarborough, Ontario addressee, dated October 11, 2022, which shows "No Oil Japanese Vinaigrettes", "Original Japanese Vinaigrettes" and "Sesame Japanese Vinaigrette"

products and which Mr. Leung attests pertains to salad dressings and dips bearing the Mark and sold during the Relevant Period [paras 9 and 11 and Exhibit C and E]

- photographs of products Mr. Leung identifies as various marinades, labelled “Japanese Dressing Ginger”, “Japanese Dressing Miso” and “Stir Fry Sesame Sauce” and an explanation of how the products are used as marinades [para 12 and Exhibit F]
- a redacted invoice, from the Owner to a Scarborough, Ontario addressee dated October 5, 2021, which shows “Ginger Japanese Vinaigrette”, “Miso Japanese Vinaigrette” and “Sesame Sauce” which Mr. Leung attests pertains to marinades bearing the Mark and sold during the Relevant Period [para 13 and Exhibit G]

ANALYSIS AND REASONS FOR DECISION

[11] I note that, aside from a recitation of the statement of goods, Mr. Leung’s evidence is silent with respect to rice dinner products, namely curry with rice, sukiyaki with rice, tonkatsu (pork) with rice, teriyaki with rice, fried rices, rice pilafs and frozen foods, namely, fried noodle dinners. I am therefore not satisfied that the Owner has shown use of the Mark within the meaning of sections 4 and 45 of the Act in association with these registered goods. There is likewise no evidence as to the existence of special circumstances that might excuse non-use. The registration will therefore be amended to delete these Goods.

[12] This leaves the remaining Goods, comprising food products namely salad dressings, dips and marinades, which I will discuss below.

Salad Dressing

[13] Mr. Leung attests to use of the Mark in association with salad dressing and provides example of products identified as “Japanese dressing” bearing the Mark. In support of this claim he evidences associated invoices dated within the Relevant Period. In view of Mr. Leung’s sworn statement of use and the associated documentary support he has provided, I find that the Owner has established use of the Mark within the

meaning of sections 4 and 45 of the Act, in association with “food products, namely salad dressings”. As such, the Registration will be maintained in respect of these goods.

Dips

[14] In respect of the Goods designated as food products, namely dips, Mr. Leung deposes that these too have been sold in association with the Mark. He identifies the Owner’s Japanese Dressing Sesame as a dip and provides a depiction of this product, bearing the Mark. He has also supplied an invoice, dated during the Relevant Period, indicating sales of these products to a Canadian purchaser.

[15] It is well established law that I need not be astutely meticulous when contemplating a specification of goods contained in a registration [*Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654 at para 17]. Additionally, while there might be imperfections, it is important to consider the evidence as a whole [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 2005 CanLII 78281 (CA COMC), 47 CPR (4th) 209 (TMOB)]. Therefore, although the products are not labelled as dips, I accept Mr. Leung’s statement that the Japanese Dressing Sesame product is a dip for vegetables and other foods and, in the absence of arguments to the contrary, I find that the Owner has established a *prima facie* case of use of the Mark in association with food products namely dips within the meaning of sections 4(1) and 45 of the Act.

Marinades

[16] Mr. Leung identifies the Owner’s Japanese Dressing Miso and its Japanese Dressing Ginger as marinades. He also identifies the Owner’s Stir Fry Sesame Sauce as a marinade. I note the Mark appears on each of these products. The invoice filed in support of Mr. Leung’s claim to use of the Mark in association with marinades shows sales of the miso, ginger and sesame sauce products. Considering the evidence as a whole including Mr. Leung’s description of how these products are used as marinades, along with the jurisprudential guidance noted in the paragraph above, I am satisfied that the Owner has established use of the Mark, within the meaning of sections 4(1) and 45 of the Act, in association with food products, namely marinades.

DISPOSITION

[17] 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 by deleting:

and rice dinner products, namely, curry with rice, sukiyaki with rice, tonkatsu (pork) with rice, teriyaki with rice, fried rices, rice pilafs and frozen foods, namely, fried noodle dinners

[18] The registration will be maintained for:

Food products, namely, salad dressings, dips, marinades

Coleen Morrison
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: Ridout & Maybee LLP

For the Registered Owner: Riches, McKenzie & Herbert LLP