



**LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS**

**Citation: 2013 TMOB 174
Date of Decision: 2013-10-11**

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Stikeman Elliott LLP against registration
No. UCA36133 for the trade-mark POM-POM in the
name of Orange Cove-Sanger Citrus Association**

[1] At the request of Stikeman Elliott LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on January 6, 2011 to Orange Cove-Sanger Citrus Association (the Registrant), the registered owner of registration No. UCA36133 for the trade-mark POM-POM (the Mark).

[2] The Mark is registered for use in association with the following wares: “fresh citrus fruits”.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares 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 relevant period for showing use is between January 6, 2008 and January 6, 2011.

[4] The relevant definition of “use” with respect to wares is set out in section 4(1) of the Act:

4(1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is

in any other manner so associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[5] 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 and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Registrant filed the affidavits of Lee C. Bailey, President of the Registrant, sworn on July 12, 2011 and of Richard Gregory French, Vice-President and Chief Financial Officer of Sunkist Growers Inc. (Sunkist), sworn on July 11, 2011. Only the Registrant filed written arguments; an oral hearing was not held.

Registrant’s Evidence

[7] In his affidavit, Mr. Bailey states that the Registrant’s business is that of growing and packing fresh citrus fruits, operating out of a packinghouse in Florida. He states that the Registrant is affiliated with Sunkist, an agricultural cooperative that assists the Registrant in receiving orders and invoicing purchasers of the Registrant’s fruit. Mr. Bailey explains that Sunkist forwards the orders to the Registrant which then packs the ordered fruit and ships them directly from its packinghouse to customers, including to customers in Canada. He attests that the Mark appears on Sunkist’s invoices sent to Canadian customers as well as on the cartons in which the fruit is shipped in. He further provides sales data since 2000, with a breakdown of the volume of sales to particular Canadian customers for each year of the relevant period. In particular, he attests that in 2010 alone, the Registrant had total sales of 52,779 40-pound cartons of POM-POM branded fruit to Canadian customers.

[8] In support, Mr. Bailey attaches, as Exhibit A to his affidavit, a photograph of the end of one of the standard cartons that the fruit is packaged in when shipped to Canadian customers. I note that the Mark is prominently displayed on the carton. He also attaches, as Exhibit B to his affidavit, five representative invoices from Sunkist to various Canadian customers which are dated within the relevant period and confirm shipment to various locations in Canada. I note that all of the invoices display item descriptions for navel oranges under the label “POM-POM”.

[9] In the second affidavit, Mr. French confirms that the Registrant is a member of Sunkist and provides further detail with respect to how Sunkist assists the Registrant in carrying out its business. In support of his statements, Mr. French attaches, as Exhibit A to his affidavit, the same representative invoices as above, showing sales and shipment of the Registrant's POM-POM branded fruit to Canadian customers during the relevant period.

[10] In view of the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark in association with "fresh citrus fruits" during the relevant period within the meaning of sections 4 and 45 of the Act.

Disposition

[11] 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.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office