



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

Citation: 2014 TMOB 273
Date of Decision: 2014-12-10

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Borden Ladner Gervais LLP against
registration No. TMA430,461 for the trade-mark RÉGAL
in the name of Elmira Pet Products Ltd.**

[1] At the request of Borden Ladner Gervais LLP, 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 23, 2013 to Elmira Pet Products Ltd. (the Owner), the registered owner of registration No. TMA430,461 for the trade-mark RÉGAL (the Mark).

[2] The Mark is registered for use in association with the wares “dog foods”.

[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 such use since that date. In this case, the relevant period for showing use is between January 23, 2010 and January 23, 2013.

[4] The relevant definition of “use” in association with 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 Owner filed the affidavit of Craig Sifton, the Owner’s Vice-President of Finance, sworn on April 19, 2013 in Kitchener, Ontario. Neither party filed written representations; an oral hearing was not held.

[7] In his affidavit, Mr. Sifton describes the Owner as a manufacturer and seller of pet foods, including dog food. In particular, he attests that, during the relevant period, \$98,736.18 total dollar value of dog food bearing the word “REGAL” was sold to pet food distributors in Canada. I note that Mr. Sifton’s statements and supporting exhibits all indicate use of the trade-mark REGAL (without the accent over the letter E), rather than the Mark as registered.

[8] In this respect, Mr. Sifton provides the following exhibits to his affidavit:

- Exhibit A consists of two photographs of the Owner’s dog food packaging. The trade-mark REGAL is displayed prominently on the packaging and Mr. Sifton confirms that the Owner’s dog food was sold in this packaging during the relevant period.
- Exhibit B consists of two photographs of the Owner’s brochure for pet foods that Mr. Sifton attests was distributed to customers in Canada during the relevant period. REGAL appears on both sides of the brochure.
- Exhibit C is a copy of an order form for the Owner’s pet foods, which Mr. Sifton states was distributed by one of the Owner’s distributors to customers in Canada during the relevant period. The trade-mark REGAL appears on the order form.
- Exhibit D consists of three invoices showing sales by the Owner of its REGAL dog food to different pet food distributors located in Canada during the relevant period.

Analysis

[9] Although the trade-mark shown in the evidence does not appear exactly as it is registered, in applying the principles set out by the Federal Court of Appeal [per *Canada (Registrar of Trade Marks) v Cie International pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA) and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)], I am satisfied that the dominant feature of the Mark, being the word REGAL, is retained in the trade-mark displayed and that the omission of the accent over the letter E is a minor deviation.

[10] Further, I accept Mr. Sifton's statement that the exhibited invoices are representative of sales of its REGAL dog food, as shown in Exhibit A, to pet food distributors in Canada during the relevant period.

[11] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with "dog foods" during the relevant period within the meaning of sections 4 and 45 of the Act.

Disposition

[12] Accordingly, 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