



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

Citation: 2015 TMOB 30
Date of Decision: 2015-02-20

**IN THE MATTER OF A SECTION 45
PROCEEDING requested by Goudreau
Gage Dubuc against registration
No. TMA671,829 for the trade-mark
PRESIDENT'S CHOICE Script Design
in the name of Loblaws Inc.**

[1] This decision pertains to a summary expungement proceeding with respect to registration No. TMA671,829 for the trade-mark PRESIDENT'S CHOICE Script Design, as shown below, owned by Loblaws Inc.

[2] The statement of goods of the registration is reproduced in Schedule "A" to this decision.

[3] For the reasons that follow, I conclude that the registration ought to be amended to delete the goods "*glass containers*", "*latte glass mugs*", "*steak knife sets*", "*coffee percolators*", and "*Dining stands*".

The Proceeding

[4] On October 12, 2012, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to Loblaws Inc. (the Registrant). The notice was sent at the request of Goudreau Gage Dubuc (the Requesting Party).

[5] The notice required the Registrant to furnish evidence showing that it had used the trade-mark PRESIDENT'S CHOICE Script Design (the Mark) in Canada, at any time between October 12, 2009 and October 12, 2012, in association with each of the goods specified in registration No. TMA671,829. If the Mark had not been so used, the Registrant was required to furnish evidence providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[6] In this case, the use of the Mark in association with the registered goods is governed by section 4(1) of the Act, which reads:

A trade-mark 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 clearing the register of "deadwood". Mere claims of use are insufficient to show the use of the trade-mark [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the criteria for establishing use are not very demanding and an overabundance of evidence is not necessary, sufficient facts must be presented to enable the Registrar to conclude that the trade-mark has been used in association with each good or service mentioned in the registration during the relevant period [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[8] In response to the Registrar's notice, the Registrant furnished an affidavit of Craig Hutchison, sworn on May 8, 2013, together with Exhibits "A" to "C".

[9] Only the Registrant filed written representations and was represented at the hearing.

[10] In the weeks before the hearing, which was held on October 28, 2014, the Registrant filed an application to amend registration No. TMA671,829 by deleting some of the goods from the statement of goods. The amendment was recorded on the Trade-marks Register on September 23, 2014. Accordingly, I have considered the Registrant's evidence and written

representations according to the statement of goods as amended on September 23, 2014, which is reproduced in Schedule “A” to this decision.

Preliminary Remark – Frivolous Proceeding

[11] The Registrant devoted a significant part of its written and oral representations to argue that this summary expungement proceeding is frivolous, without merit and has been brought forth in bad faith by Julia Wine Inc., the “true entity” the Registrant alleged is behind the request.

[12] I do not intend to detail or provide a lengthy discussion of the Registrant’s representations. Suffice it to note that I make mine the following comments of Hearing Officer Laine in *Technobev, SEC v Up John Beverages Inc.*, 2008 CanLII 88300 (TMOB) addressing an analogous argument:

[...] the Registrar does not have the discretion to initiate an inquiry into the requesting party’s intentions and whether these are in bad faith [see *Clark O’Neill Inc. v. PharmaCommunications Group Inc.* (2004), 30 C.P.R. (4th) 499], nor would this practice be compatible with the purpose of section 45, namely, to afford a simple, summary proceeding to clean up the “deadwood” from the register [see *Molson Companies Ltd. v. John Labatt Ltd. et al* (1984), 1 C.P.R. (3rd) (sic) 329 to 333].

Review of the Evidence

[13] Mr. Hutchison, who has been employed by Loblaw Companies Limited (Loblaw Companies) since 2008, is Senior Vice President, Marketing, Apparel Home and Entertainment for Loblaw Companies.

[14] According to Mr. Hutchison’s testimony, the Registrant is a subsidiary of Loblaw Companies; the matters to which he deposes are either based on his personal knowledge or knowledge obtained from documents and records maintained by Loblaw Companies to which he has access [para. 1 of the affidavit].

[15] Mr. Hutchison affirms that Loblaw Companies, “together with its affiliated companies and subsidiaries, is Canada’s largest food distributor and a leading provider of general

merchandise products, home décor, household products, drugstore and financial products and services” [para. 2 of the affidavit].

[16] Mr. Hutchison explains that Loblaw Companies operates supermarkets directly or indirectly, or via franchisees or through distributors, in Canada; he provides the names of these supermarkets [para. 4 of the affidavit]. Mr. Hutchison goes on to state that a very wide range of products bearing the Mark are and have been continuously sold to consumers through Loblaw Companies’ retail stores across Canada for over 25 years [para. 5 of the affidavit].

[17] Furthermore, Mr. Hutchison affirms that:

- the Registrant is the owner of registration No. TMA671,829 for the Mark as applied to the goods listed in the registration [para. 6 of the affidavit];
- for at least the three-year period preceding the date of the section 45 notice, the Mark “has been continuously applied to the packaging of a wide range of housewares products, including the [goods] listed” in the registration [para. 7 of the affidavit];
- the Mark is, and has been, on the packaging “of the aforesaid goods” at the time of their sale or transfer of possession in Canada [para. 8 of the affidavit];
- over the last three years, sales of “housewares products covered under” the registration and bearing the Mark have been in excess of \$145 million [para. 9 of the affidavit]; and
- flyers advertising products bearing the Mark are and have been circulated for many years within retail stores and as a supplement in daily and weekly newspapers [para. 12 of the affidavit].

[18] Finally, Mr. Hutchison files the following documentary evidence as Exhibits “A” to “C” to his affidavit:

- Exhibit “A”: “representative samples” showing how the Mark appears on alcohol and wine related goods, including but not limited to wine glasses, martini glasses, beer glasses, wine decanter, champagne glasses and shot glasses, at the time of

sale in Canada in the normal course of business, including in the three-year period prior to the date of the section 45 notice [para. 10 of the affidavit]. I note that one of the samples is an actual packaging for shot glasses; the remaining samples are images of packaging or images of mock-ups of packaging, as opposed to actual product packaging, for the other alcohol and wine related goods specifically referenced by Mr. Hutchison;

- Exhibit “B”: “representative samples” showing how the Mark appears on “products covered under” registration No. TMA671,829 at the time of sale in Canada in the normal course of business [para. 11 of the affidavit]. I note that these samples consist of images of mock-ups of packaging and labels for different products, as opposed to actual product packaging and labels; and
- Exhibit “C”: “flyers” made available in numerous stores operated by Loblaw Companies and its franchisees and distributed through numerous newspapers [para. 12 of the affidavit]. I note that four of the five flyers show dates falling within the relevant period; the flyer not showing a date is obviously for the holiday season. Also included in the exhibit is an article on different housewares for the patio, including PRESIDENT’S CHOICE products, published in the June 4, 2011 issue of the *Toronto Star*.

Analysis of the Evidence and Reasons for Decision

[19] For the reason that follow, and absent representations from the Requesting Party, I am satisfied that the Registrant has furnished sufficient evidence to enable me to conclude that the Mark has been used in Canada, during the relevant period, in association with goods within the meaning of the Act.

[20] Firstly, Mr. Hutchison clearly attests that the Mark has been continuously applied to the packaging of a wide range of housewares products, including the goods listed in the registration for the Mark, for at least the three years preceding the date of the section 45 notice.

[21] Secondly, Mr. Hutchison provides the value of sales of houseware products covered by the registration for the Mark for three years prior to the date of his affidavit, sworn on

May 8, 2013. This corroborates Mr. Hutchison's statement concerning the sale of products bearing the Mark in Loblaw Companies' retail stores across Canada during the relevant period.

[22] Thirdly, based on a fair reading of Mr. Hutchison's statements, I can reasonably conclude that Exhibits "A" and "B" show housewares products sold during the relevant period in packaging bearing the Mark. I note in passing that the samples do not refer to any other entity than the Registrant. In any event, there is nothing in the evidence to suggest that the Mark would have been used by Loblaw Companies rather than by the Registrant.

[23] Lastly, given Mr. Hutchison's sworn statement that the Mark has been continuously applied to the packaging of the housewares products listed in the registration, I infer that the PRESIDENT'S CHOICE products shown in the flyers have been sold in Canada during the relevant period in packaging bearing the Mark. The same goes for the PRESIDENT'S CHOICE products shown in the *Toronto Star* excerpt.

[24] Accordingly, the issue becomes whether the evidence enables me to conclude to the use of the Mark in association with each of the registered goods.

[25] For the reasons that follow, I decide this issue in favour of the Registrant, except for the registered goods "*glass containers*", "*latte glass mugs*", "*steak knife sets*", "*coffee percolators*", and "*Dining stands*". I shall discuss in turn the registered goods that I find ought to be maintained and those that I find ought to be deleted.

Goods maintained in the registration

[26] I will discuss in three parts my findings regarding the goods maintained in the registration.

[27] Firstly, further to my thorough review of the product packaging filed as Exhibit "A" and the product packaging/labels filed as Exhibit "B", I conclude that the evidence establishes the use of the Mark in association with the following registered goods:

- (1) Cutlery; vases; [...] decanters, [...] chinaware [...] wine glasses, martini glasses, beer glasses, [...] knife sets, [...] pots and pans, [...] can openers, juicers, small appliances, namely toasters, blenders, coffee makers, [...] coffee grinders, kettles, [...] toaster ovens, [...] rice cookers, grills, electric slow cookers, deep fryers; chopping boards.
- (2) [...] oven mits.
- (3) Paper towel holders, [...] candle holders, rugs.
- (4) Bed and bath products namely sheets, [...] pillows, [...] towels, shower curtains, bath mats.
- (5) [...], chairs, [...].
- (6) Hammocks, [...] flower pot holders, [...].
- (7) Laundry bags, [...].

[28] Absent representations from the Requesting Party, suffice it to say that the goods “*decanters*”, “*wine glasses*”, “*martini glasses*”, and “*beer glasses*” are readily observable in Exhibit “A” whereas the other registered goods are readily observable in Exhibit “B”.

[29] Secondly, given the sworn statements of Mr. Hutchison and my thorough review of the products packaging included in Exhibit “B”, I conclude that the evidence establishes use of the Mark in association with the following registered goods:

- (1) [...] coffee pots, [...] salad bowls, kitchen utensils, [...] food choppers, [...] sandwich makers, [...].
- (3) [...] incense, incense burners, [...].
- (4) [...] polar fleece blankets, [...].
- (5) [...] tables.
- (6) [...] lawn chairs, [...].
- (7) [...] door mats, umbrellas.

[30] My findings are based on a common sense understanding and fair reading of the statement of goods found in the registration in relation to products shown in Exhibit “B”. More particularly, for the purposes of section 45 of the Act and absent representations from the Requesting Party to convince me otherwise, I accept that:

- the good “*coffee pots*” encompasses the exhibited “glass replacement carafe” product for coffee makers;
- the exhibited “mixing bowls” product encompasses the good “*salad bowls*”;

- the good “*kitchen utensils*” encompasses the exhibited “utility knife” product;
- the good “*food choppers*” encompasses the exhibited “multi-use blade grinder” product;
- the good “*sandwich makers*” encompasses the exhibited “duo panini grill” product;
- the goods “*incense*” and “*incense burners*” are encompassed by the exhibited “scented reed diffuser” product, which includes both the scented reed and the diffuser;
- the good “*polar fleece blankets*” encompasses the exhibited “carved coral fleece throw” product;
- the good “*tables*” encompasses the exhibited “cabana side table” product;
- the exhibited “cabana lounge” product, which is clearly a chair that is meant for outdoor use, corresponds to “*lawn chairs*”. In my view, nowadays a common sense understanding of the term “lawn chair” is not necessarily restricted to the old metal folding chairs of the past;
- the exhibited “printed coir mat” product corresponds to the good “*door mats*”; and
- the good “*umbrellas*” encompass the exhibited patio “tilt umbrella” product.

[31] Lastly, given Mr. Hutchison’s sworn statement that the Mark has been continuously applied to the packaging of the housewares products listed in the registration, my review of Exhibit “C” leads me to conclude that the evidence establishes use of the Mark in association with the following registered goods:

- (1) [...] ceramic serveware, [...] tumblers, [...].
- (2) Napkins, [...].
- (4) [...] duvets, [...].
- (5) [...] cushions, [...].
- (6) [...] garden tools, flower pots, [...] hampers.

[32] Absent representations from the Requesting Party, suffice it to say that PRESIDENT'S CHOICE products corresponding to "*ceramic serveware*", "*napkins*", "*duvets*", "*cushions*", and "*flower pots*" are readily observable in Exhibit "C".

[33] Also, I understand that the term "*tumblers*" refers to drinking glasses "with no handle or foot, formerly with a rounded bottom so as not to stand upright, now with a thick heavy base" [see the definition of "tumbler" in the online version of the *Canadian Oxford Dictionary* (2 ed.)]. I note that a PRESIDENT'S CHOICE product corresponding to "*tumblers*" is readily observable in the holiday season flyer.

[34] In addition, based on a common sense understanding and fair reading of the statement of goods, I accept that:

- the good "*garden tools*" encompasses the "soil scoop" product shown in the PRESIDENT'S CHOICE flyer for May 14 to June 11, 2010; and
- the "willow basket" product shown in the PRESIDENT'S CHOICE flyer for May 11 to June 8, 2012 corresponds to the good "*hampers*".

[35] To be clear, I do not accept the display of the Mark on the cover pages of the two PRESIDENT'S CHOICE flyers as establishing use of the Mark in association with goods. Indeed, it is trite law that the use of a trade-mark in advertising is not in itself sufficient to constitute use in association with wares [*BMW Canada Inc v Nissan Canada Inc* (2007), 60 CPR (4th) 181 (FCA)]. I accept these flyers as relevant evidence in the context of Mr. Hutchison's statement that the housewares listed in the registration have been sold in packaging bearing the Mark.

[36] I wish to add that I have focussed my review of Exhibit "C" to the registered goods for which I considered that there were no corresponding products shown by Exhibits "A" and "B". However, it is of note that PRESIDENT'S CHOICE products shown by Exhibit "C" correspond to some of the registered goods for which I have found in favour of the Registrant based on Exhibits "A" and "B".

[37] In summary, in view of the above, I conclude that the evidence shows use of the Mark during the relevant period in Canada, within the meaning of sections 4(1) and 45 of the Act, in association with the following registered goods:

- (1) Cutlery, vases; [...] decanters, coffee pots, chinaware, ceramic serveware, wine glasses, martini glasses, beer glasses, tumblers, knife sets, [...] pots and pans, salad bowls, kitchen utensils, can openers, juicers, small appliances, namely toasters, blenders, coffee makers, [...], coffee grinders, kettles, food choppers, toaster ovens, sandwich makers, rice cookers, grills, electric slow cookers, deep fryers; chopping boards.
- (2) Napkins, oven mits.
- (3) Paper towel holders, incense, incense burners, candle holders, rugs.
- (4) Bed and bath products namely sheets, duvets, pillows, polar fleece blankets, towels, shower curtains, bath mats.
- (5) [...] chairs, cushions, tables.
- (6) Hammocks, lawn chairs, garden tools, flower pots, flower pot holders, hampers.
- (7) Laundry bags, door mats, umbrellas.

[38] Accordingly, these goods will be maintained in the registration.

Registered goods to be deleted from the registration

[39] Despite its representations, the Registrant did not convince me that it has established use of the Mark in association with the registered goods “*glass containers*”, “*latte glass mugs*”, “*steak knife sets*”, “*coffee percolators*”, and “*Dining stands*” for the reasons that follow.

[40] I am mindful that in certain circumstances, due to the summary nature of section 45 proceedings and consequent concerns over evidentiary overkill, it is not always necessary to show use for every registered goods to prevent removal from the register [*Saks & Co Canada (Register of Trade Marks)* (1989), 24 CPR (3d) 49 (FCTD); *Ridout & Maybee LLP v Omega SA*, (2005), 39 CPR (4th) 261 (FC); and *Gowling Lafleur Henderson LLP v Neutrogena Corporation* (2009), 74 CPR (4th) 153 (TMOB)]. This concept is appropriately applied to cases where there is a long list of goods and where the statement of goods is organized such that demonstration of use for a number of goods within a category can be sufficient to show use for the entire category. However, in such circumstances, an affidavit must contain a clear statement of use within the relevant period in association with *each* of the goods and must provide sufficient facts to permit the Registrar to conclude that the trade-mark is in use in association with each good.

[41] In the present case, although Mr. Hutchison affirms that the Mark has been used by being applied to the packaging of a wide range of housewares products, including the goods listed in the registration, it remains that he does not affirm that this has been the case for a wide range of housewares products, including *each* of the goods listed in the registration.

[42] Furthermore, even though Mr. Hutchison uses the term “housewares” to describe the goods listed in the registration, I cannot accept that all the registered goods correspond to “housewares”, nor for that matter can I accept that they all fall in the same category of goods. In other words, I do not consider this to be a case where the goods are logically and properly categorized as per *Saks & Co., supra*, as they contain several unrelated products. For example, based on a common sense understanding of the statement of goods, I cannot accept that there is a clear relationship, or for that matter any relationship, between the goods listed at (1) and those listed at (7) in the registration. I would add that the Registrant itself, at paragraph 10 of its written representations, references different categories of goods when discussing the exhibits to the Hutchison affidavit in relation to the goods listed in the registration.

[43] With regard to the exhibits to the Hutchison affidavit, it is clear that Exhibit “A” is provided to show how the Mark appears on alcohol and wine related goods.

[44] As regards Exhibit “B”, I stress that Mr. Hutchison introduces the samples by a broad reference to “products”. The same may be said for Exhibit “C”, which Mr. Hutchison introduces as flyers “advertising products” bearing the Mark. In my view, it can fairly be concluded that Mr. Hutchison not drawing a link between any of the products shown in Exhibits “B” and “C” and the specific goods listed in the registration renders the evidence somewhat ambiguous. Any ambiguity in the evidence should be interpreted against the Registrant as it bears the full burden of proof [*Diamant Elinor Inc v 88766 Canada Inc* (2010), 90 CPR (4th) 428 (FC) at para. 16].

[45] Furthermore, both in its written representations and at the hearing, the Registrant generally relied on the exhibits to the Hutchison affidavit as showing use of the Mark in association with the registered goods. In other words, the Registrant through its representations did not clarify the nexus between the exhibited products and the registered goods at issue.

[46] As discussed hereafter, when I consider the statement of goods, I conclude that none of the products shown in the exhibits correspond to the registered goods “*glass containers*”, “*latte glass mugs*”, “*steak knife sets*”, “*coffee percolators*”, and “*Dining stands*”, nor encompass these registered goods.

➤ “*glass containers*”

[47] The Registrant generally relies on all of the exhibits as showing use of the Mark for “containers, including but not limited to decanters, vases, containers, pots such as coffee pots and bowls”. It is of note that the Registrant does not reference glass containers [my underlining]. In my view, this only adds to the ambiguity resulting from Mr. Hutchison not drawing a link between the good “*glass containers*” and any of the products shown in the exhibits.

[48] Even though I accept that decanters, vases, and coffee pots may correspond to containers, it remains that “*glass containers*”, “*decanters*”, “*vases*”, and “*coffee pots*” are listed separately in the registration. In other words, the Registrant itself distinguished these goods by listing them separately in the registration. Thus, when considering the good “*glass containers*”, the fact that Exhibit “A” shows an “everyday decanter lead-free crystal” product, which I have accepted to maintain the good “*decanters*”, does not assist the Registrant’s case. The same is true for the fact that Exhibit “B” shows a “glass cylinder vases” product and a “glass replacement carafe” product, which I have accepted to maintain the goods “*vases*” and “*coffee pots*” respectively.

[49] I find it is not necessary to engage into a lengthy discussion of the other products shown under Exhibits “B” and “C” to conclude that none of them correspond to “*glass containers*”, nor encompass “*glass containers*”. Suffice it to say that any of the other exhibited products that I would accept as corresponding to a “container”, based on a common sense understanding of this term, are clearly not glass containers [my underlining]. For instance even if I accept that the PRESIDENT’S CHOICE cookie jars shown in the holiday season flyer may correspond to containers, they are not glass cookie jars.

[50] I would add that had the Registrant used the Mark in association with “*glass containers*” other than the exhibited “everyday decanter lead-free crystal”, “glass cylinder vases” and “glass replacement carafe” products, I consider that it would not have been overly cumbersome for the

Registrant to furnish evidence of such use. In other words, I consider that it would not have been overly cumbersome for the Registrant to provide a sample of the use of the Mark for a glass container other than the three aforementioned products.

➤ “*latte glass mugs*”

[51] Based on my understanding of its representations, the Registrant considers that this good falls within the category of “glassware”, which is not a term found in the statement of goods, and generally relies on all the exhibits as relevant evidence. That being said, I find it is telling that the Registrant did not specifically reference the good “*latte glass mugs*” in its representations.

[52] It is clear that Exhibit “A”, which was provided to show how the Mark appears on alcohol and wine related goods, is not relevant.

[53] It is common sense to conclude from a fair reading of the statement of goods that “*latte glass mugs*” and glass café latte mugs are one and the same. Yet, even if one accepts that the coffee mugs shown by Exhibits “B” and “C” may be used for drinking café latte, they are clearly not glass coffee mugs; they are either porcelain or stoneware coffee mugs [my underlining].

[54] As the Registrant did provide samples of use of the Mark for glassware goods not listed in the registration (for instance the “champagne glasses” shown in Exhibit “A”), I consider that it would not have been overly cumbersome for the Registrant to furnish evidence of use of the mark for “*latte glass mugs*”.

➤ “*steak knife sets*”

[55] This good is one of several registered goods for which the Registrant generally relies on all the exhibits as relevant evidence.

[56] Once again, it is clear that Exhibit “A” is not relevant when considering “*steak knife sets*”. Also, I do not consider that this good corresponds to or is encompassed by any of the PRESIDENT’S CHOICE products shown in Exhibit “C”.

[57] I acknowledge that Exhibit “B” shows a “jumbo steak knife” product. While this product and “*steak knife sets*” are related or fall under the same general category, in my view, they are

still distinct goods. The exhibited product is clearly one steak knife as opposed to a set of steak knives [my underlining]. Thus, I do not accept that the “jumbo steak knife” product encompasses the registered good “*steak knife sets*”.

[58] Finally, although I accept that “*steak knife sets*” may be a subset of “*knife sets*”, these goods have been separately listed in the registration. As the Registrant did provide a packaging for a “ceramic knife set” product, which I have accepted to maintain “*knife sets*” in the registration, it seems that it would not have been overly cumbersome for the Registrant to furnish a product packaging for “*steak knife sets*”.

➤ “*coffee percolators*”

[59] This good is one of several registered goods for which the Registrant generally relies on Exhibits “B” and “C” as relevant evidence. Yet, in my view, none of the exhibited products correspond to “*coffee percolators*”, nor encompass “*coffee percolators*”.

[60] For one thing, I understand the term “*coffee percolators*” as referring to machines for making coffee by circulating boiling water through ground beans [see the definition of “percolator” in the online version of the *Canadian Oxford Dictionary* (2 ed.)].

[61] Furthermore, I find that the “*coffee makers*” shown by the exhibited products do not encompass “*coffee percolators*”. In this regard, I note that the “10-cup coffee maker” and “digital coffee maker” products shown in Exhibit “B” are automatic drip coffee makers. The same is true for the PRESIDENT’S CHOICE coffee maker shown in Exhibit “C”. In other words, although related, “*coffee makers*” and “*coffee percolators*” are distinct goods; the Registrant itself distinguished these goods by listing them separately.

[62] Finally, since the Registrant provided product packaging for small appliances not listed in the registration (for instance the “mini donut maker” product shown in Exhibit “B”), I consider that it would not have been overly cumbersome for the Registrant to furnish a product packaging for “*coffee percolators*”.

➤ “*Dining stands*”

[63] This good is one of several “household items” for which the Registrant generally relies on Exhibit “B” as relevant evidence. Yet, in my view none of the exhibited products correspond to “*Dining stands*”, nor can be accepted as encompassing “*Dining stands*”.

[64] Here also, I consider that it would not have been overly cumbersome for the Registrant to furnish a sample of use of the Mark for “*Dining stands*”, especially since the Registrant provided documentary evidence for the registered goods “*chairs*”, “*cushions*”, and “*tables*”, all of which have been categorized as household items by the Registrant in its written representations.

[65] In closing, I note that although it was not necessary for the Registrant to provide evidence concerning the value of sales, I am mindful that it did so. However, I do not consider the sales figures, as provided by Mr. Hutchison, to be assistance to the Registrant in this case. For one thing, in my view it is reasonable to conclude that the sales exceeding \$145 million are not restricted to sales of goods listed in the registration. In this regard, I stress that Mr. Hutchison stated that the Mark “has been continuously applied to the packaging of a wide range of houseware products” and both Exhibits “A” and “B” show product packaging for goods that are not listed in the registration. Furthermore, the sales are introduced generally as sales of housewares products covered under the registration; not as total sales covering sales of each of the goods covered by the registration. In the end, I am not satisfied that I may conclude that the \$145 million of sales only encompasses the goods listed in the registration, nor for that matter each of the goods listed in the registration.

[66] In view of the above, I am not satisfied that sufficient evidence has been presented to enable me to conclude to the use of the Mark during the relevant period in Canada, within the meaning of sections 4(1) and 45 of the Act, in association with the following registered goods:

- (1) [...] glass containers; latte glass mugs, [...] steak knife sets, [...] coffee percolators, [...]
- (5) Dining stands, [...].

[67] Furthermore, the Hutchison affidavit does not put forward special circumstances to justify the absence of use of the Mark in association with these registered goods.

[68] Accordingly, these goods will be deleted from the registration for the Mark.

Disposition

[69] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, registration No. TMA671,829 will be amended to delete the goods “*glass containers*”, “*latte glass mugs*”, “*steak knife sets*”, “*coffee percolators*”, and “*Dining stands*”.

[70] The amended statement of goods will read as follows:

- (1) Cutlery, vases; decanters, coffee pots, chinaware, ceramic serveware, wine glasses, martini glasses, beer glasses, tumblers, knife sets, pots and pans, salad bowls, kitchen utensils, can openers, juicers, small appliances, namely toasters, blenders, coffee makers, coffee grinders, kettles, food choppers, toaster ovens, sandwich makers, rice cookers, grills, electric slow cookers, deep fryers; chopping boards.
- (2) Napkins, oven mits.
- (3) Paper towel holders, incense, incense burners, candle holders, rugs.
- (4) Bed and bath products namely sheets, duvets, pillows, polar fleece blankets, towels, shower curtains, bath mats.
- (5) Chairs, cushions, tables.
- (6) Hammocks, lawn chairs, garden tools, flower pots, flower pot holders, hampers.
- (7) Laundry bags, door mats, umbrellas.

Céline Tremblay
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Schedule “A”

Statement of Goods of Registration No. TMA671,829

- (1) Cutlery, vases; glass containers; latte glass mugs, decanters, coffee pots, chinaware, ceramic serveware, wine glasses, martini glasses, beer glasses, tumblers, knife sets, steak knife sets, pots and pans, salad bowls, kitchen utensils, can openers, juicers, small appliances, namely toasters, blenders, coffee makers, coffee percolators, coffee grinders, kettles, food choppers, toaster ovens, sandwich makers, rice cookers, grills, electric slow cookers, deep fryers; chopping boards.
- (2) Napkins, oven mits.
- (3) Paper towel holders, incense, incense burners, candle holders, rugs.
- (4) Bed and bath products namely sheets, duvets, pillows, polar fleece blankets, towels, shower curtains, bath mats.
- (5) Dining stands, chairs, cushions, tables.
- (6) Hammocks, lawn chairs, garden tools, flower pots, flower pot holders, hampers.
- (7) Laundry bags, door mats, umbrellas.