



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

**Citation: 2015 TMOB 151**  
**Date of Decision: 2015-09-02**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Smart & Biggar**

**Requesting Party**

**and**

**Smucker Foods of Canada Corp. (Corp.  
de Produits Alimentaires Smucker du  
Canada)**

**Registered Owner**

**TMDA50867 for GOOD MORNING**

**Registration**

[1] At the request of Smart & Biggar (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 September 16, 2013 to Smucker Foods of Canada Corp. (Corp. de Produits Alimentaires Smucker du Canada) (the Owner), the registered owner of registration No. TMDA50867 for the trade-mark GOOD MORNING (the Mark).

[2] The Mark is registered for use in association with the following goods: (1) Marmalades. (2) Fruit juices, namely orange juice, grapefruit juice and blended juice. (3) Coffee and tea. (4) Frozen concentrated orange juice when reconstituted into an orange beverage.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods specified in the registration, at any time between September 16, 2010 and September 16, 2013. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definition of use with respect to goods is set out in section 4(1) of the Act as follows:

4(1) 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.

[5] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with all of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984) 80 CPR (2d) 228 (FCA)].

[6] In response to the Registrar's notice, the Owner furnished the affidavit of Tom Fife, Director, Foodservice Canada of the Owner, sworn on April 14, 2014. Both parties filed written representations; an oral hearing was not requested.

#### The Owner's Evidence

[7] In his affidavit, Mr. Fife attests that the Owner is in the food service industry and that it "markets, promotes, distributes and sells" its products in Canada. He states that the Owner's Foodservice Division "specializes in meeting the needs of foodservice professionals and providing products bearing its family of brands, including GOOD MORNING."

[8] Mr. Fife attests that the Owner has sold over \$5,000,000 worth of the registered goods annually, including sales of over 350,000 "cases" annually. He also attests that the Owner spends "considerable dollars on advertising and promoting the GOOD MORNING products in Canada", stating that this included approximately \$80,000 spent on updates to the GOOD MORNING product packaging in the year previous. Although Mr. Fife's statements appear to

be with respect to all of the registered goods, the exhibits he attaches to his affidavit relate primarily to single-serving packages of fruit spreads, jellies, honey and syrups.

[9] As evidence of use of the Mark, Mr. Fife attaches the following exhibits to his affidavit:

- Exhibit A consists of promotional material that Mr. Fife attests includes representations of the labelling and lids of the Owner's products bearing the Mark that were sold in Canada during the relevant period. The materials show various single-serving packages of different spreads including orange marmalade, honey spread, apple jelly, and table syrup. The Mark is displayed prominently on the labels. Of the registered goods, only "marmalades" is represented.
- Similarly, Exhibit B consists of two screenshots from the Owner's website, *www.smuckerfoodservice.ca*, which Mr. Fife attests displays and advertises the Owner's GOOD MORNING products. Although the screenshots are dated after the relevant period, they show the same GOOD MORNING spreads – including marmalade – shown at Exhibit A.
- Exhibit C consists of one invoice, which Mr. Fife attests "demonstrates sales of the products that bear the [Mark] in Canada". The invoice, which is dated during the relevant period, shows that a variety of products were sold to a customer in Quebec. The product descriptions include "GOOD MORNING GM 10 ML ORANGE MARM", "GOOD MORNING GM 16 ML ORANGE MARM" as well as other GOOD MORNING spreads and jellies. None of the other registered goods appear to be represented in the invoice.

### Analysis

[10] With respect to the registered goods "marmalades", the Owner's evidence shows that the Mark was displayed to customers during the relevant period on the product labels and on the Owner's invoices.

[11] Although the Owner furnished only one invoice, it is well established that evidence of a single sale may be sufficient to establish use of a trade-mark in the normal course of trade, so long as it follows the pattern of a genuine commercial transaction and is not seen as being

deliberately manufactured or contrived to protect the registration of the trade mark [see *Eva Gabor International Ltd v 1459243*, 2011 FC 18, 90 CPR (4th) 277 and *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD)]. In this case, Mr. Fife attests to significant sales in Canada of the Owner's GOOD MORNING products during the relevant period, which the exhibits show included "marmalades".

[12] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with "marmalades" within the meaning of sections 4 and 45 of the Act.

[13] With respect to the remaining registered goods, the Requesting Party notes that "none of the exhibits show any promotion, advertisement, offer for sale or sale of fruit juices ..., coffee or tea, or frozen concentrated orange juice". Indeed, Mr. Fife's affidavit is essentially silent with respect to the remaining registered goods. He does not even make a clear assertion of use of the Mark in association with such goods, instead allowing the exhibits to demonstrate use. In any event, the Owner's evidence does not show any clear evidence of transfers of such goods in association with the Mark or otherwise.

[14] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark only in association with "marmalades" within the meaning of sections 4 and 45 of the Act.

#### Disposition

[15] In view of all of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be amended to delete goods (2), (3) and (4). The amended statement of goods will be as follows:  
(1) Marmalades.

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

No Hearing Held

Agents of Record

Gowling Lafleur Henderson LLP

For the Registered Owner

Smart & Biggar

For the Requesting Party