



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

**Citation: 2016 TMOB 60**  
**Date of Decision: 2016-04-14**

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

**Osler, Hoskin & Harcourt LLP**

**Requesting Party**

**and**

**Childs and Weatherbie Inc.**

**Registered Owner**

**TMA728,681 for  
are you living your life yet**

**Registration**

[1] At the request of Osler, Hoskin & Harcourt 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 June 12, 2014 to Caveman Health Foods Inc., the registered owner at that time of registration No. TMA728,681 for the trade-mark “are you living your life yet” (the Mark).

[2] The Mark is registered in association with the following goods:

- (1) Food Bars, namely nutritional energy bars, protein bars, energy bars and meal replacement bars.
- (2) Clothing, namely t-shirts and caps.

[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 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 relevant period for showing use is between June 12, 2011 and June 12, 2014.

[4] The relevant definition of “use” 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 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 section 45 proceedings is quite 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 each of the goods specified in the registration during the relevant period.

[6] Subsequent to the issuance of the section 45 notice, the Registrar recorded a change in title of the registration to Kelly Childs Inc. (the Owner). This change in title is not at issue in this proceeding.

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Kelly Childs, sworn on September 11, 2014 in Toronto. Both parties filed written representations; an oral hearing was not requested.

[8] Subsequent to the filing of written representations, the Registrar recorded a further change in title of the registration to Childs and Weatherbie Inc. This further change in title is also not at issue in this proceeding.

#### The Owner's Evidence

[9] In her affidavit, Ms. Childs identifies herself as Chief Executive Officer and founder of the Owner. She attests that the Owner, through its licensee Kelly's Bake Shoppe, has manufactured food bars, t-shirts and caps for sale since October 2008. Ms. Childs attests that she founded and co-owns Kelly's Bake Shoppe, and as co-owner she operates and controls that business on a day-to-day basis. She explains that, during the relevant period, the Owner

maintained direct control over the character and quality of the products sold in association with the Mark.

[10] Ms. Childs attests that, through its licensee, the Owner sold an average of 250 “nutritional energy, protein and meal replacement food bars” per week during the relevant period. She attests that the total sales of such food bars were in excess of \$130,000 during the relevant period.

[11] With respect to the nature of these food bars, Ms. Childs explains that the ingredients are “all naturally high in energy and are protein rich”. She attests that “given the high nutritional content of the food bars, they are also an effective meal replacement”. As such, she attests that the food bars sold by the licensee are “variously marketed as, protein bars, nutritional energy bars and meal replacement bars”.

[12] With respect to the registered clothing goods, Ms. Childs attests that t-shirts bearing the Mark were sold through Kelly’s Bake Shoppe during the relevant period. She states that, during the relevant period, sales of such t-shirts exceeded \$1,500.

[13] Similarly, Ms. Childs attests that caps bearing the Mark were also sold at Kelly’s Bake Shoppe during the relevant period, and that sales from these caps exceeded \$500.

[14] In support, Ms. Childs attaches the following exhibits to her affidavit:

- Exhibit A consists of a sample sheet of labels displaying the Mark. Ms. Childs explains that, during the relevant period, these labels were affixed to the individual food bars sold at Kelly’s Bake Shoppe.
- Exhibit B consists of two invoices detailing purchase of the labels shown at Exhibit A by Kelly’s Bake Shoppe. The Mark appears in the line item description. Ms. Childs explains that these labels were ordered and used during the relevant period by the Owner’s licensee, Kelly’s Bake Shoppe.
- Exhibit C consists of five photographs of a store display. Various goods appear on the display, including food bars with labels displaying the Mark. Also visible in three of the

photographs are t-shirts displaying the Mark. The food bars are set out on the table in front of a sign displaying the Mark. Although the photographs are from after the relevant period, Ms. Childs attests that the photographs are representative of the marketing of the food products during the relevant period.

- Exhibit D consists of photocopies of 30 sales receipts dated within the relevant period. Ms. Childs attests that these receipts detail sales to customers at Kelly’s Bake Shoppe. Ms. Childs also explains that, due to the software used by Kelly’s Bake Shoppe, the receipts do not bear the Mark. However, she further attests that the products referenced on the receipts are food bars, and that the various descriptions are derived from the particular food bar ingredients.
- Exhibit E consists of a sample invoice, dated during the relevant period, detailing an order by Kelly’s Bake Shoppe for 100 t-shirts that Ms. Childs attests displayed the Mark and were sold at Kelly’s Bake Shoppe during the relevant period.
- Exhibit F consists of a photograph of a t-shirt bearing the Mark. Ms. Childs attests that this is a t-shirt from the order referenced in the Exhibit E invoice.
- Exhibit G is a photograph of several t-shirts stacked in a display. Ms. Childs explains that the display demonstrates how the t-shirts were displayed for sale in Kelly’s Bake Shoppe during the relevant period. The displayed t-shirts bear the Mark.
- Exhibit H is a photograph of a cap, bearing the Mark. Ms. Childs explains that it is representative of the caps sold by the Owner’s licensee during the relevant period.

#### *Evidence of Use – Food Bars*

[15] With respect to goods (1), “food bars, namely nutritional energy bars, protein bars, energy bars and meal replacement bars”, I first note that the Requesting Party made no representations. As described above, the evidence shows that food bars bearing the Mark were sold by the Owner’s licensee in the normal course of trade during the relevant period. As mentioned above, Ms. Childs attests to sales of such food bars exceeding \$130,000 during the relevant period.

[16] The issue, however, is whether such food bars correspond with the food bars specified in the registration, being “food bars, namely *nutritional energy bars, protein bars, energy bars and meal replacement bars*”. When discussing particulars of the subject food bars, for the most part Ms. Childs refers to them as “nutritional energy, protein, and meal replacement food bars” in her affidavit (notably at paragraphs 12, 14, 15 and 16). Indeed, as noted above, at paragraph 9 of her affidavit, Ms. Childs specifically attests that the food bars are “produced and variously marketed as, protein bars, nutritional energy bars and meal replacement bars”.

[17] Accordingly, in view of the evidence as a whole and in the absence of written representations from the Requesting Party, I am satisfied that the Owner has demonstrated use of the Mark in association with “food bars, namely nutritional energy bars, protein bars ... and meal replacement bars” within the meaning of sections 4 and 45 of the Act.

[18] However, with respect to the more general “food bars, namely ... energy bars” in goods (1), I am not satisfied that the Owner has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act.

[19] In this respect, given that the Owner made a distinction in its statement of goods, the Owner is required to provide evidence of use of the Mark for each of the listed registered goods [see *John Labatt Ltd v Rainier Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA); *Sharp Kabushiki Kaisha v 88766 Canada Inc* (1997), 72 CPR (3d) 195 (FCTD); *Fogler, Rubinoff LLP v Canada Safeway Ltd*, 2013 TMOB 227, CarswellNat 5446 and *Stikeman Elliott LLP v Parmx Cheese Co Ltd*, 2015 TMOB 102, CarswellNat 2803].

[20] Similar to these cases, for the Owner to maintain its registration for the broader good “energy bars”, it had to show use in association with such goods otherwise than by reference to “nutritional energy bars”.

[21] As such, while I am satisfied that the Owner has demonstrated use of the Mark in association with “*nutritional energy bars*”, the evidence does not show use of the Mark in association with the broader “energy bars” in view of Ms. Childs statements and the exhibits before me. As the Owner furnished no evidence of special circumstances excusing non-use of

the Mark in association with the broader “energy bars”, the registration will be amended accordingly.

*Evidence of Use – Clothing*

[22] With respect to goods (2), being “Clothing, namely t-shirts and caps”, the Requesting Party submits that the Owner has only made bald assertions of use of the Mark in association with such goods. In this respect, the Requesting Party argues that the Owner “fails” to provide supporting evidence such as packing slips, receipts or invoices documenting the sale of either of the registered clothing goods.

[23] In response, the Owner submits that the “clear and unambiguous” statements made by the Owner regarding the sale of t-shirts and caps are more than sufficient to meet the relatively light burden of showing use of the Mark for the purposes of section 45 of the Act.

[24] It is well established that invoices are not necessary to successfully respond to a section 45 notice. For the purposes of section 45, use can be demonstrated without providing invoices, and the Registrar should not view an affidavit without invoices as “presumptively useless” [per *Lewis Thomson & Sons Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD) at para 9].

[25] In this case, Ms. Childs specifically attests to sales of both t-shirts and caps bearing the Mark during the relevant period. As noted above, she attests that such goods were sold by the Owner’s licensee at Kelly’s Bake Shoppe and provides supporting exhibits showing the manner of display at the Shoppe and confirming that the goods displayed the Mark as registered. With respect to whether the evidence demonstrates that sales of the registered clothing goods were “in the normal course of trade”, combined with the supporting exhibits, I consider Ms. Childs’ statements to be sufficient. In this respect, statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [see *Ogilvy Renault v Compania Roca-Radiadores SA*, 2008 CarswellNat 776 (TMOB)].

[26] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with “Clothing, namely t-shirts and caps” within the meaning of sections 4 and 45 of the Act.

Disposition

[27] Accordingly, pursuant to the authority delegated to me under section 63(3) and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete “energy bars” from goods (1).

[28] The amended statement of goods will be:

- (1) Food Bars, namely nutritional energy bars, protein bars, and meal replacement bars.
- (2) Clothing, namely t-shirts and caps.

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

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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**HEARING DATE:** No Hearing Held

**AGENTS OF RECORD**

Gowling WLG LLP

For the Registered Owner

Osler, Hoskin & Harcourt LLP

For the Requesting Party