



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

**Citation: 2016 TMOB 95**  
**Date of Decision: 2016-06-20**

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

**Multi Food Industries**

**Requesting Party**

**and**

**Munaza Jubbin Syed**

**Registered Owner**

**TMA644,936 for Mazedar**

**Registration**

[1] At the request of Multi Food Industries (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 December 12, 2013 to Munaza Jubbin Syed, the registered owner of registration No. TMA644,936, for the trade-mark Mazedar (the Mark).

[2] The Mark is registered in association with the following goods: “Pastries, cake, breads namely samosa, seekh kabab, shami kabab, chicken tikkah, tandoori, biryani, curry”.

[3] The Mark is also registered in association with the following services: “Manufacturing & wholesale to order and /or specifications of others of Food products, pastries, cake, breads namely samosa, seekh kabab, shami kabab, chicken tikkah, tandoori, biryani, curry”.

[4] 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 and services 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 the trade-mark 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 December 12, 2010 and December 12, 2013.

[5] The relevant definitions of “use” are set out in sections 4(1) and 4(2) 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.

4(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] 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 and services specified in the registration during the relevant period.

[7] With respect to services, the display of the trade-mark in advertising is sufficient to meet the requirements of section 4(2) when the trade-mark owner is offering and prepared to perform those services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

### The Owner’s Response

[8] As a preliminary matter, I note that the Owner originally responded to the Registrar’s notice by way of letter dated February 21, 2014. That letter included four photographs and two building schematics. Although the Owner’s letter was entitled “Subject: Affidavit Section 45 Proceedings TMA 644936”, contrary to section 45 of the Act, the Owner’s response was not in the form of an affidavit or statutory declaration.

[9] Unfortunately, the Registrar proceeded at that time as if it were an acceptable response and sent a letter to the parties on February 27, 2014, acknowledging that “evidence has been received by the Registrar” and inviting the Requesting Party to file its written representations. The Requesting Party subsequently did so and, by way of correspondence dated June 19, 2014, the Registrar invited the Owner to furnish its written representations. The Owner responded by way of letter dated October 18, 2014.

[10] At that point, the Registrar realized that she had erred in accepting the Owner’s February 21, 2014 response as evidence. As explained in the Registrar’s October 29, 2014 letter to the parties, as the Owner’s letter with attachments was not an affidavit or statutory declaration, it could not be made of record as evidence in the proceeding. Furthermore, it was “the normal practice of the Registrar to correspond with registered owners who attempt to furnish evidence that is not in proper form and give them an opportunity to submit proper evidence in accordance with the Act.” In view of this oversight by the Registrar – and despite the progression of the proceeding – the Owner was given an opportunity to request an extension of time and furnish its evidence in proper form.

[11] Ultimately, the Owner furnished his own statutory declaration and the statutory declaration of Jawed Manzur Syed, both declared on December 19, 2014 in Oakville, Ontario. Only the Requesting Party filed further written representations; an oral hearing was not requested.

#### The Owner’s Evidence

[12] First, I note that the statutory declarations are very brief and were accompanied by a “Check List” and a covering letter dated December 30, 2014. As discussed below, in addition to the covering letter and the two statutory declarations, the checklist refers to “Sample of Products” and “Photos (4)”.

[13] The substantive portion of the Owner’s statutory declaration is as follows:

I, Munaza Jubbin Syed, of Mississauga, Ontario, DO SOLEMNLY DECLARE THAT:

1. I am the Owner of registered trade mark Mazedar TMA 644936 July 26, 2005. It is in

use. Copies of proof are enclosed.

I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

[14] The substantive portion of Jawed Manzur Syed's statutory declaration is as follows:

I, Jawed Manzur Syed, of Mississauga, Ontario, DO SOLEMNLY DECLARE THAT:

1. I am Managing Director of Millennium Foods Inc. Mississauga, Ontario confirm that registered trade mark Mazedar TMA 644,936 is in use with us under licenses from Munaza Jubbin Syed who is the current owner of the trade mark.

I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath.

[15] Although the Owner states in his declaration that "Copies of proof are enclosed", it is not clear whether the accompanying "Sample of Products" and four photographs form part of his statutory declaration. Indeed, they have not been endorsed by the Notary Public and are not specifically referenced in either declaration.

[16] In any event, the "Sample of Products" is a page showing labels for three food products: "Nan Kahtai Cookies", "Zeera Cookies" and "Pure Vegetarian Fruit Cake". The Mark is prominently displayed on the labels.

[17] As for the photographs, they depict a cafeteria-style food service counter. The same "Mazedar" logo displayed on the aforementioned labels appears on a piece of paper affixed to the wall behind the food counter. Another sign and a menu board also appear on the wall. From the photographs, there is little indication of where exactly the food counter is located; presumably, it is located in some sort of diner or delicatessen. No pictures showing the exterior of the location were provided. There is also no indication as to when the photographs were taken.

### Analysis

[18] As noted by the Requesting Party in its written representations, the Owner's declaration "does not contain any statements describing how, when or where the trade-mark is or was in use in association with each of the wares and services listed in the registration." Similarly, the

affidavit of Jawed Manzur Syed does not provide any particulars to show how or when Millennium Foods Inc. used the Mark as the Owner's licensee. Moreover, the Owner's declaration simply refers to "copies of proof".

[19] With respect to the accompanying labels and photographs, the Requesting Party submits that the attachments do not appear to be evidence in proper form and should be disregarded.

[20] In the context of section 45 proceedings – which are intended to be summary and expeditious – the Registrar has frequently considered certain deficiencies in affidavits and statutory declarations to be mere technicalities [per *Brouillette, Kosie v Luxo Laboratories Ltd* (1997), 80 CPR (3d) 312 (TMOB); *88766 Canada Inc v Tootsie Roll Industries Inc* (2006), 56 CPR (4th) 76 (TMOB)]. As noted above, however, the "copies of proof" in this case have neither been endorsed by the Notary Public nor have they been referenced in any clear way in the body of either declaration.

[21] In any event, even if I were to accept them as evidence in this case, neither declaration provides any useful context for the labels and photographs. The declarations provide little insight into the Owner's normal course of trade. The Owner does not even confirm, for example, that the labels are representative of labels used on products during the relevant period.

[22] As well, even if I were to accept the exhibited labels as corresponding with the registered goods "pastries" and "cake", the remaining registered goods are unaccounted for. For example, there is no indication what, if any, of the registered goods are depicted in the photographs.

[23] Ultimately, the Owner provides no evidence of any actual sales or transfers in the normal course of trade during the relevant period, in Canada or otherwise, with respect to any of the registered goods.

[24] Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD); *Gowling Lafleur Henderson LLP v Neutrogena Corporation* (2009) 74 CPR (4th) 153 (TMOB)], use must be shown in association with each of the goods as registered [*John Labatt Ltd v Rainier Brewing Co et al* (1984), 80 CPR (2d) 228 (FCA)]. As such, some evidence of transfers in the normal course of trade in Canada is necessary. Such evidence can be in the form of

documentation like invoices or sales reports, but can also be through clear sworn statements. However, it is insufficient to merely assert that the trade-mark was in use [per *Plough, supra*]. In this case, I further note that, in both declarations, the assertion is merely that the Mark “is in use”, without any reference to the relevant period.

[25] As such, I am not satisfied that the Owner has demonstrated use of the Mark in association with any of the registered goods within the meaning of sections 4 and 45 of the Act.

[26] Similarly, with respect to the registered services, the Owner does not confirm whether the photographs are representative of display of the Mark during the relevant period.

[27] In any event, it is not clear how the “Mazedar” logo displayed on the wall behind a food service counter constitutes use of the Mark in association with the particular registered services, being “manufacturing & wholesale to order and/or specifications of others” with respect to particular food products. As noted above, there is no indication that any of the particular food products enumerated in the registration are actually presented on the depicted food counter.

[28] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered services within the meaning of sections 4(2) and 45 of the Act.

[29] Furthermore, there is no evidence of special circumstances excusing non-use of the Mark before me.

### Disposition

[30] Accordingly, 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 expunged.

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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**

No Agent Appointed

For the Registered Owner

Theo Yates

For the Requesting Party