

SECTION 45 PROCEEDINGS
TRADE-MARK: VITTO
REGISTRATION NO. TMA241,737

On February 1, 2005, at the request of Zakłady Przemysłu Cukierniczego Mieszko S.A., the Registrar issued the notice prescribed by s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the “Act”) to Vitto Brand Foods Limited, the registered owner of registration No. TMA241,737 for the trade-mark VITTO (the “Mark”). The Mark is registered in association with “(1) Italian style frozen prepared foods, namely, soups, sauces, meat entrees and pasta entrees.(2) Sausages, soups, meat sauce, meatballs and sauce, cooked meat rolls and loaves; smoked meats; cured meats; sliced cooked meats; hot dogs and bacon.

Section 45 requires the registered owner of a trade-mark to indicate whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years preceding the date of the notice, in this case between February 1, 2002 and February 1, 2005. If the mark has not been used during that time period then the registered owner is required to indicate the date on which it was last used and the reason why it has not been used since that date.

What qualifies as use of a trade-mark is defined in s. 4 of the Act, which is reproduced below:

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.
- (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.
- (3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

In response to the s. 45 notice, the registrant filed the affidavit of Ralph Khun. Only the registrant filed a written argument. An oral hearing was not requested.

Mr. Khun, the registrant's President, attests that the registrant manufactures meat products, which it sells to food retailers such as A & P Company of Canada. He further attests that the VITTO trade-mark was in use in Canada continuously during the relevant three year period in association with sausages, meatballs and sauce, cooked meat rolls and loaves; smoked meats; cured meats; sliced cooked meats; hot dogs and bacon. Mr. Khun provides samples of representative packaging featuring the Mark as used by the registrant during the relevant period as well as copies of invoices evidencing the sale of wares during the relevant time period. This evidence suffices to maintain the following wares in the registration: sausages, meatballs, cooked meat rolls and loaves, smoked meats, cured meats, sliced cooked meats, hot dogs and bacon. However, as Mr. Kuhn has not evidenced any use of the Mark in association with the remaining wares of the registration, those wares will not be maintained.

Registration TMA241,737 will therefore be restricted to sausages, meatballs, cooked meat rolls and loaves; smoked meats; cured meats; sliced cooked meats; hot dogs and bacon, in accordance with the provisions of s. 45(5) of the Act.

DATED AT GATINEAU, QUEBEC THIS 21st DAY OF NOVEMBER 2007.

Jill W. Bradbury
Member
Trade-marks Opposition Board