



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 91

Date of Decision: 2020-07-31

IN THE MATTER OF A SECTION 45 PROCEEDING

MLT Aikins LLP

Requesting Party

and

P.A. Fine Foods and Distributors Ltd.

Registered Owner

TMA766,007 for TINY TIM

Registration

INTRODUCTION

[1] At the request of MLT Aikins LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on August 29, 2017, to P.A. Fine Foods and Distributors Ltd. (the Owner), the registered owner of Registration No. 766,007 for the trademark TINY TIM (the Mark).

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

Prepared food products, namely: sandwiches.

[3] For the reasons that follow, I conclude that the registration ought to be maintained.

[4] The notice required the Owner to show whether the Mark has been used in Canada in association with the goods 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 such use since that date. In this case, the relevant period for showing use is August 29, 2014, to August 29, 2017.

[5] The relevant definition of use for goods is set out in section 4 of the Act as follows:

4(1) A trademark 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.

[6] It is well established that bare statements that a trademark is in 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 trademark in association with each of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Steve Schultz, the Vice-President and General Manager of the Owner, sworn November 27, 2017. Both parties filed written representations; only the requesting party was represented at an oral hearing.

THE OWNER'S EVIDENCE

[8] Mr. Schultz explains that the Owner is a direct-to-store distributor of packaged food, beverages, and other convenience goods, selling and distributing such products to convenience stores, gas stations, and garages in Manitoba, Saskatchewan, Alberta, and the northern territories. He states that in the normal course of trade, customers will place orders for delivery of the Owner's goods by way of an information sheet, attached to Mr. Schultz's affidavit as Exhibit A. He states that the Owner's goods include sandwiches, some of which are identified by type and others by a brand, such as the Mark.

[9] Mr. Schultz states that during the relevant period, the Owner sold at least 5,000 sandwiches bearing the Mark to its customers in Canada. In support, as Exhibit B, he attaches two invoices dated within the relevant period, showing sales of various goods to customers based in Saskatchewan. One of the goods on each invoice is identified as “SF Tiny Tim Sub 8”, with sales of two such items on the first invoice and one on the second; the Owner explains that this refers to a sandwich sold in association with the Mark.

[10] Mr. Schultz states that the Mark is displayed prominently on the packaging of these sandwiches when they are sold and delivered to the Owner’s customers. In support, as Exhibit C, he attaches copies of sandwich labels, including the label attached to the Owner’s “Tiny Tim” sandwiches at the time of delivery to the Owner’s customers. This label prominently displays the Mark. Mr. Schultz explains that this label, or a substantially similar one, was attached to all Tiny Tim sandwiches sold in Canada during the relevant period.

[11] Finally, as Exhibit D, Mr. Schultz attaches a sample price list which was in use during the relevant period to advertise the Owner’s goods. A “SF Tiny Tim Sub” is included on the list.

ANALYSIS

[12] The Requesting Party submits that the Owner’s evidence does not establish use of the Mark within the meaning of sections 4 and 45 of the Act because Mr. Schultz’s affidavit consists of a number of “bald statements”, documents that should be disregarded, and invoices which may not have accompanied the goods at the time of transfer and do not display the Mark as registered.

[13] In particular, the Requesting Party characterizes Mr. Schultz’s sworn attestations that the Owner sold approximately 5,000 sandwiches during the relevant period, and that the Exhibit C labels were attached to the goods at the time of transfer, as “bald statements” or mere assertions of use unsupported by the evidence. However, absent evidence to the contrary, an affiant’s sworn statement is to be accepted at face value, and statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. In this case, Mr. Schultz’s statements regarding the quantity of goods sold and the placement of the labels on the products are not bare assertions of

use, but sworn statements of fact demonstrating use. Further, although the Requesting Party submits that Mr. Schultz's assertion that 5,000 Tiny Tim sandwiches were sold during the relevant period is undermined by the fact that the two invoices only show sales of three such sandwiches, I accept that these invoices are representative of the Owner's sales during the relevant period and do not reflect the totality of such sales.

[14] The Requesting Party notes that Mr. Schultz indicated that the label shown at Exhibit C, or a substantially similar one, was attached to all sandwiches during the relevant period, and submits that no information is provided as to what a "substantially similar" label would look like. However, given the prominence of the Mark on the label, I am satisfied that any substantially similar label would also include the Mark, especially given that the totality of the evidence shows that the sandwiches in question were consistently identified as "Tiny Tim" sandwiches during the relevant period.

[15] The Requesting Party further submits that there is no evidence to suggest that the invoices accompanied the goods at the time of transfer, and further submits that the invoices display the words "SF Tiny Tim Sub 8" rather than the Mark as registered, and therefore cannot serve to establish use of the Mark in association with the registered goods. However, invoices do not need to bear the trademark when the trademark is shown to appear on the registered goods themselves or their packaging. In such cases, the invoices may serve to establish sales. In this case, as discussed above, the Mark is displayed prominently on the packaging of the registered goods, namely, the sandwich labels. As such, the Exhibit B invoices simply demonstrate that such goods were sold in Canada during the relevant period.

[16] In sum, the Owner's evidence demonstrates that the Mark was displayed on the packaging for its sandwich goods, and that such goods were sold in Canada in the normal course of trade during the relevant period. As such, I am satisfied that the Owner has established use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[17] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

G.M. Melchin
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE July 2, 2020

APPEARANCES

No one appearing

For the Registered Owner

Lorraine Pinsent

For the Requesting Party

AGENTS OF RECORD

Moffat & Co.

For the Registered Owner

MLT Aikins LLP

For the Requesting Party