

Federal Court



Cour fédérale

Date: 20230920

Docket: T-395-23

Citation: 2023 FC 1262

Ottawa, Ontario, September 20, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

**HONEYBEE ENTERPRISES LTD.,
DBA HONEYBEE CENTRE**

Applicant

and

MARKS & CLERK

Respondent

JUDGMENT AND REASONS

[1] Honeybee Enterprises Ltd., dba Honeybee Centre, appeals a decision of the Trademarks Opposition Board, on behalf of the Registrar of Trademarks, bearing the citation 2022 TMOB 267 [Decision]. In the Decision, made pursuant to section 45 of the *Trademarks Act*, RSC 1985, c T-13, the Registrar expunged certain goods and services from Honeybee's trademark registration No. TMA728,046, HONEYBEE CENTRE & Design:



Honeybee Centre

[Description of image: A stylized bee design appears above the words HONEYBEE CENTRE, written in block title case letters.]

[2] Honeybee appeals the Decision only in respect of one of the goods deleted from the registration, namely “creamed honey.”

[3] Honeybee filed new evidence on the appeal pursuant to subsection 56(5) of the *Trademarks Act*, namely an affidavit from Andrew Gluck, the General Manager of Honeybee. Mr. Gluck states that in the relevant period—the three-year period prior to the issuance of a notice under section 45 on May 11, 2021—Honeybee used the HONEYBEE CENTRE & Design trademark in association with creamed honey. Mr. Gluck attached to his affidavit:

- a photograph he took of one of Honeybee’s creamed honey products, identifying it as representative of the trademark used in association with the product during the relevant period;
- a printout from the Internet Archive of a web page accessible on August 27, 2020, showing an image of the creamed honey product available at that time;
- a sales report showing multiple sales in the relevant period of a product bearing the description “CREAMED CLOVER HONEY – 500GM” and product code Mr. Gluck identifies as signifying one of Honeybee’s creamed honey products, a 500 g jar of unpasteurized creamed clover honey; and
- a copy of a point-of-sale receipt showing a sale on October 2, 2020 of the same creamed clover honey product, which sale correlates to one of the line items in the sales report.

[4] The sales report contains multiple entries bearing a customer description “THIS IS A CASH CUSTOMER,” which Mr. Gluck states refers to in-store purchases made in Honeybee’s store in Surrey, British Columbia. Mr. Gluck states that between December 1, 2018 and November 30, 2020, Honeybee sold about \$40,000 of the creamed clover honey product.

[5] The labels on the jars of creamed clover honey product shown in the photograph and Internet Archive printout bear the following variation of the trademark:



[Description of image: Within an oval containing a golden background, a stylized bee design appears between the words HONEYBEE and CENTRE, each written in block title case letters.]

[6] The Registrar referred to this variation of the trademark as “Logo No. 2”: Decision at para 10. Applying the established case law, the Registrar concluded that Logo No. 2, along with two other logos, bore only minor differences from the registered HONEYBEE CENTRE & Design trademark, and did not cause the mark to lose its identity: Decision at paras 24–25, citing *Registrar of Trade Marks v CII Honeywell Bull*, [1985] 1 FC 406 (CA) and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA). The Registrar therefore concluded that use of Logo No. 2 constituted use of the trademark as registered.

[7] The respondent, Marks & Clerk, the original requester under section 45, does not contest this finding on this appeal. I agree with and adopt the Registrar’s conclusions that the minor differences between Logo No. 2 and the mark as registered do not cause the mark to lose its identity, and that use of Logo No. 2 therefore constitutes use of the trademark as registered. I

also agree with Honeybee that the variation in this case bears similarities to that accepted by the Registrar as use of the registered trademark in *Aird & Berlis LLP v Sonaco SARL*, 2014 TMOB 37 at paras 1, 10, 13.

[8] I am satisfied the evidence filed by Honeybee in the form of the Gluck affidavit is new and material, in the sense that it is sufficiently substantial and significant, and of probative value: *Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 21, citing *Vivat Holdings Ltd v Levi Strauss & Co*, 2005 FC 707 at para 27 and *Tradition Fine Foods Ltd v Group Tradition'l Inc*, 2006 FC 858 at para 58. The evidence shows a creamed honey product bearing a label with a trademark that is a minor variation of the registered trademark. It also provides evidence of sales of this product during the relevant period. Mr. Gluck was in a position to speak to the matters in his affidavit and was not cross-examined. I am satisfied his evidence is reliable and probative.

[9] Evidence of this nature was not before the Registrar at the time of the Decision. While Honeybee had filed photographs and sales information before the Registrar, it did not include photographs showing a creamed honey product, and did not include sales information related to creamed honey in particular. This led the Registrar to conclude that Honeybee had not established use of the trademark in association with creamed honey, among other goods: Decision at paras 29, 35–39. I therefore cannot accept Marks & Clerk's argument that the new evidence filed on this appeal is simply more evidence of the same nature as that put before the Registrar. Rather, it is evidence that would have materially affected the Registrar's finding as it

relates to the good “creamed honey”: *Molson Breweries v John Labatt Ltd*, [2000] 3 FC 145 at para 51; *Seara Alimentos Ltda v Amira Enterprises Inc*, 2019 FCA 63 at para 23.

[10] As Honeybee has filed new and material evidence, the Court will review the issue *de novo* and exercise the discretion vested in the Registrar: *Clorox* at para 21; *Trademarks Act*, s 56(5).

[11] Based on the evidence before the Court, I conclude Honeybee has shown the HONEYBEE CENTRE & Design trademark was in use in Canada during the three-year period immediately preceding the date of the notice issued under section 45.

[12] In proceedings under section 45, the “burden of proof is very light,” and the evidence “need not be perfect”: *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9; *The Ideas Law Firm, PLLC and Paul Taschereau*, 2023 TMOB 9 at para 11, citing *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD). Nonetheless, the evidence must show use (in the trademark sense) in the relevant three-year period, and cannot be limited to bald assertions of use: *Alliance Laundry Systems LLC v Whirlpool Canada LP*, 2014 FC 1224 at paras 26–27. 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”: *Trademarks Act*, s 4(1).

[13] The evidence in the Gluck affidavit shows (a) that Honeybee's creamed clover honey product was packaged in jars bearing a label with the Logo No. 2 variation of the registered trademark; and (b) this product, packaged in this way, was sold in the normal course of trade during the relevant three-year period prior to the section 45 notice. As I have adopted the Registrar's conclusion that use of the Logo No. 2 variation constitutes use of the HONEYBEE CENTRE & Design mark as registered, the evidence shows that the registered trademark was marked on the packages in which the good "creamed honey" was distributed at the time of transfer of property in and possession of the good in the ordinary course of trade. Contrary to Marks & Clerk's argument, Honeybee has provided clear evidence of the use of their registered trademark in association with the good at issue during the relevant period.

[14] Based on the new evidence filed, and reviewing the matter *de novo*, I allow Honeybee's appeal of the Decision as it relates to the good "creamed honey." The parties agreed, as do I, that the successful party on the appeal should have its costs.

JUDGMENT IN T-395-23

THIS COURT’S JUDGMENT is that

1. The appeal is allowed, with costs to the applicant. The decision of the Registrar dated December 29, 2022 is varied so as to maintain the good “creamed honey” on the list of goods and services for registration No. TMA728,046, for the trademark HONEYBEE CENTRE & Design.
2. The amended statement of goods and services for registration no. TMA728,046 will read as follows:

(1) Natural honey products, namely: pure honey, pure flavoured honey, creamed honey, raw honeycomb, honey gift packages, namely, honey stix, assorted honey in gift packs; apitherapy products, namely: body care products based on natural bee pollen, propolis, royal jelly and beeswax, namely: soaps, lip balm; nutritional supplements, namely: royal jelly products, bee pollen products, propolis products and honey products; beekeeping apparel, namely: bee suits, helmets; honey containers, namely: plastic squeeze bears, glass honey jars and lids; boxes specifically designed to contain live honeybees and/or their stored honey; bee livestock, namely: live bees; clothing, namely: casual wear.

(1) Beekeeping services, namely: hive inspections, honey extraction, bottling, pest control, beeswax processing; educational courses and seminars on bees and beekeeping; bee pollination services for growers; group tours and events related to bees and beekeeping; visitor and learning centre services related to bees and beekeeping; nest and swarm removal services including honeybee, bumblebee, and wasp nest removal; equipment rentals namely: beekeeping equipment.

(2) Apitherapy courses, candle making courses.

(3) Operations of a café.

(4) Animal handling for the film industry.

(5) Retail services in the field of beekeeping, bees and bee products.

“Nicholas McHaffie”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-395-23

STYLE OF CAUSE: HONEYBEE ENTERPRISES LTD, DBA HONEYBEE
CENTRE v MARKS & CLERK

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: SEPTEMBER 6, 2023

JUDGMENT AND REASONS: MCHAFFIE J.

DATED: SEPTEMBER 20, 2023

APPEARANCES:

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