

THE REGISTRANT'S BURDEN OF PROOF IN A SECTION 45 PROCEEDING REVIEWED BY THE FEDERAL COURT

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Brouillette Kosie Prince v. Orange Cove-Sanger Citrus Association, 207 FC 308 (CanLII)

In an appeal to the Registrar of Trade-marks' decision to maintain the registration of the POM-POM trade-mark pursuant to section 45 of the *Trade-marks Act* (hereinafter the "Act"), the appellant Brouillette Kosie Prince (hereinafter "Brouillette") challenged the quality of the evidence submitted by its owner, the Orange Cove-Sanger Citrus Association (hereinafter "Orange Cove").

As proof of use of its POM-POM trade-mark in association with "fresh citrus fruits" in Canada, Orange Cove filed before the Registrar an affidavit evidencing the nature of the owner's business, namely of grower and packer of citrus fruits. As such, Orange Cove is a grower, member of Sunkist Growers Inc., a cooperative which assists its members in the distribution and invoicing of their citrus fruits. This being said, the POM-POM trade-mark nevertheless appears on the fruit boxes when sold to Canadian distributors.

Although new evidence was adduced on appeal, the Federal Court held that said evidence would not have materially affected the Registrar's decision, the new evidence simply being a confirmation of the evidence already filed with the Registrar. Therefore, the standard of review applied by the Federal Court was that of reasonableness *simpliciter*.

In analysing Brouillette's arguments that the quality of the evidence submitted by Orange Cove was insufficient to demonstrate use of the POM-POM trade-mark in association with fresh citrus fruits, the Federal Court found that the Registrar's decision was reasonable and that overall, the submitted evidence supported the determination that said trade-mark was used during the relevant period. Indeed, while it would have been possible for Orange Cove to prove use of its trade-mark

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with additional relevant documentation, the Court noted that the trade-mark owner's burden in a section 45 proceeding was not a stringent one. Moreover, as the evidence brought by Orange Cove went well beyond being a mere broad statement of use of the POM-POM trade-mark, the Court was unable to find any error warranting its interference. Accordingly, Brouillette's appeal was rejected.

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