



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

Citation: 2012 TMOB 221
Date of Decision: 2012-11-23

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by 2077333 Ontario Inc. against registration
No. TMA678,359 for the trade-mark TURF LOGIC &
Design in the name of Logic Alliance Inc.**

[1] On October 25, 2010, at the request of 2077333 Ontario Inc., the Registrar forwarded a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T -13 (the Act) to Logic Alliance Inc. (the Registrant), the registered owner of the trade-mark hereinafter illustrated:



(the Mark)

[2] The Mark is registered for use in association with fertilizers; turf and turf care products, namely seeds and fertilizers (the Wares).

[3] Such notice requires the Registrant to show whether the Mark has been used in Canada in association with the Wares 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 use since that date. The relevant period in this case is any time from October 25, 2007 to October 25, 2010.

[4] In response to the notice, the affidavit of Mr. Robert Corey has been furnished together with schedules A to E. Only the Registrant filed written submissions and there was no hearing.

[5] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such, the threshold test to establish use is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[6] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Wares within the meaning of section 4(1) of the Act. There is no need for evidentiary overkill. However any ambiguity in the evidence filed shall be interpreted against the owner of the Mark [See *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980) 53 CPR (4th) 62 (FCA)].

[7] I therefore have to determine if I am satisfied that the evidence to be described hereinafter enables me to conclude that the Mark has been used by the Registrant in Canada in association with the Wares during the relevant period.

[8] Mr. Corey is the Registrant’s President. He alleges that the Registrant licensed the Mark “for use by Turf Logic Inc.” (the Franchisor). I note that there is no license agreement filed and no date was provided as to when such license was granted. Mr. Corey does not mention if he is an officer, director and/or shareholder of the Franchisor.

[9] Nevertheless Mr. Corey alleges that the Franchisor is in the business of turf care. In particular he states that the Franchisor has developed different turf care products that are “still in commercial use”. Mr. Corey asserts that “Each of the [turf care products] has been in used (sic) in association with the mark within the past 3 years, and continues in use as of the date of this my affidavit”.

[10] Mr. Corey states that the Franchisor grants franchises for the right “to operate a Turf Logic lawn care and treatment business”. He further states that such franchises are granted in accordance with “terms and conditions of a franchise agreement entered into between the Franchisor and each individual franchisee. The franchise agreement contains a license to use the Mark”. Again there is no such franchise agreement attached to Mr. Corey’s affidavit nor there is any allegation of control of the character or quality of the Wares by the Registrant.

[11] Mr. Corey does provide a list of the franchisees. He alleges that the Franchisor has spent approximately \$10,000 in a variety of media to advertise the wares and services in association with which it and its franchisees use the Mark. Moreover he alleges that the franchisees have collectively spent approximately \$30,000 to advertise the wares and services in association with which they use the Mark.

[12] Mr Corey attached to his affidavit a sample of a postcard advertisement used by the Franchisor and its franchisees “on numerous occasions within the past 2 years to promote the wares and services of the Franchisor and its franchisees”, stating that it is mailed to targeted neighbourhoods in proximity of the franchisees. He also filed a copy of a newspaper advertisement used by the Franchisor and its franchisees “on numerous occasions during 2008 and 2009 to promote the wares and services of the Franchisor and franchisees”, stating that it is placed in newspapers having circulation in proximity to the locations of the franchisees.

[13] Mr. Corey did file a sample label “used by the Franchisor to identify [one of its products], in association with the Mark”.

[14] Mr. Corey also filed a screenshot of the Franchisor’s website captured on November 23, 2010 used to promote its wares and services and those of its franchisees in association with the Mark. He alleges that the screenshot is similar to and representative of the Franchisor’s website as it has existed over the past 3 years.

[15] Finally, Mr. Corey concludes his affidavit by listing some of the trade/franchise shows attended by the Franchisor during the relevant period to promote its wares and services in association with the Mark.

[16] In my view, the content of Mr. Corey’s affidavit falls short from establishing use of the Mark in association with the Wares within the meaning of section 4(1) of the Act for the reasons detailed hereinafter.

[17] There is no evidence of use of the Mark by the Registrant *per se*. The products bearing the Mark appear to be those of the Franchisor. Section 50 of the Act stipulates that use of a trade-mark by a licensee is deemed use of that mark by its owner if the latter has direct or indirect control of the character or quality of the wares. There is no allegation or evidence of

control by the Registrant of the quality or the character of the Wares bearing the Mark. As such, even if I were to conclude that there is evidence of use by the Franchisor and/or its franchisees of the Mark in association with the Wares within the meaning of section 4(1) of the Act, such use would not benefit the Registrant [see *Russell & DuMoulin v 947679 Ontario Inc* (1996), 72 CPR (3d) 572 (TMOB)]. This conclusion is sufficient to expunge the trade-mark registration from the register.

[18] In any event section 4(1) of the Act stipulates that, in order to constitute use of the Mark in association with the Wares, there must be evidence of transfer of property of the Wares bearing the Mark in the normal course of trade. It is well established that evidence of advertisement of wares is not sufficient to establish use of a trade-mark in association with such wares [see *Parker-Knoll Ltd v Canada (Registrar of Trade-marks)* (1977), 32 C.P.R. (2d) 148 (FCTD)]. Mr. Corey has not made reference to a single sale of the Wares bearing the Mark during the relevant period. In the present case there is no evidence before me of any commercial transactions during which the property or possession of the Wares bearing the Mark would have been transferred during the relevant period.

[19] Finally I note that there is no evidence that Mr. Corey is a duly authorized representative of the Franchisor or any of the franchisees. Consequently the allegations concerning the activities of the franchisees constitute hearsay evidence.

Disposition

[20] Pursuant to the authority delegated to me under section 63(3) of the Act, registration No TMA678,359 for the Mark will be expunged from the register in compliance with the provisions of section 45 of the Act.

Jean Carrière
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office