



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

Citation: 2013 TMOB 2
Date of Decision: 2013-01-04

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Bijoux Caroline Néron Inc. against
registration No. TMA686,998 for the trade-mark (N)
NUSHIN EUROPEAN DESIGNER FASHION DESIGN
in the name of Nushin Nadoiski**

[1] At the request of Bijoux Caroline Néron Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on May 26, 2010 to Nushin Nadoiski (the Registrant), the registered owner of registration No. TMA686,998 for the trade-mark (N) NUSHIN EUROPEAN DESIGNER FASHION DESIGN (the Mark), shown below:



[2] The Mark is registered for use in association with the services “retail sale of designer clothing and accessories” and in association with the following wares:

Designer clothing, namely business attire, formal wear, casual blouses, pants, dresses and skirts, shoes, leather purses, belts and costume jewellery.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services specified 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 between May 26, 2007 and May 26, 2010 (the Relevant Period).

[4] The definition of “use” is set out in section 4 of the Act:

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.

[5] In response to the Registrar’s notice, the Registrant furnished her own statutory declaration, declared on August 23, 2010. Only the Requesting Party filed written representations and attended at an oral hearing.

[6] In her statutory declaration, Ms. Nadoiski identifies herself as a business woman and the registered owner of the Mark. She further declares that she has operated a retail business under the name of Nushin Boutique Ltd. (Nushin) for approximately 31 years and has continuously used the Mark in Victoria, British Columbia since January 19, 2007.

[7] Ms. Nadoiski deposes that she has operated a retail business selling designer apparel and attached as Exhibit A to her statutory declaration are printouts from two pages of her website, *www.nushin.com* (the Website). Ms. Nadoiski states that the printouts show “advertising [of] designer clothing, purses, shoes, belts and jewelry”. I note that the printouts from the Website contain references to “NUSHIN” and “(N)” separately but do not contain any references to the Mark as registered. I also note that the exhibit makes reference to Nushin carrying “...the hottest designer labels from around the world” and lists a number of third party designers including VERSACE, ANNE KLIEN and HILARY RADLEY. However, the exhibited printouts do not contain reference any wares marked or displayed in association with the Mark. I further note

that the Website does not reference the Registrant, but rather to “Nushin Boutique Ltd. 635 Fort St.” and “Visit Nushin at 635 Fort St. Victoria”. Lastly, I note that the printouts are all dated after the Relevant Period and that Ms. Nushin’s statutory declaration is silent with respect to the content of the Website during that period.

[8] Ms Nadoiski also attaches to her statutory declaration as Exhibit B, a copy of one of her business cards and states that it shows the Mark and the “current address of Nushin Boutique at 635 Fort Street, Victoria, B.C.”. The business card displays the Mark as registered, includes a reference to the services of “Sales Consultant” and “Wardrobing by Appointment” and the website, *www.nushin.com*. However, I note that the business card does not reference the Registrant, Nushin Nakoiski, and no details are provided in the statutory declaration regarding the normal course of her trade or whether and how this business was used in the sale or advertisement of the Registrant’s wares and services during the Relevant Period.

[9] Lastly, attached as Exhibit C to her statutory declaration is a Certificate of Registration issued by the Ministry of Small Business and Revenue of British Columbia for “Nushin Boutique Ltd.”.

Use with respect to the wares

[10] For the purpose of establishing use of a trade-mark in association with wares pursuant to section 4(1) of the Act, it must be shown that the mark is either marked on the wares or their packaging or “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”. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)] and there is no specific type of evidence necessary to show use [*Lewis Thomson & Sons Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD) at 486], a simple allegation of use of the Mark is not sufficient to evidence its use in association with each of the wares specified in the registration within the meaning of section 4 of the Act [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

[11] In this case, the evidence is not strong and, in particular, there is no documentary evidence of any sales of the registered wares before me and, indeed, the Registrant makes no

clear assertion of use with respect to any of the wares. Other than Ms. Nakoiski's statement at paragraph 2 of her statutory declaration that she has continuously used the Mark since January 19, 2007, I have no evidence before me that the Mark has been used in association with any of the registered wares. Given this lack of evidence, I find that the Registrant has only made a bald assertion of use of the Mark.

Use with respect to the services

[12] The evidence with respect to the services is also not strong and, in particular, there is no documentary evidence before me demonstrating that the Registrant performed any retail sales of designer clothing and accessories in association with the Mark in Canada. Accordingly, in this case, to find use of the Mark in Canada within the meaning of section 4(2) of the Act, I must be satisfied that the Registrant displayed the Mark in the advertising of the services through her website and business cards.

[13] In some circumstances, including where business cards have indicia of the relevant services on them or there are clear statements alleging use in the affidavit, business cards can be considered evidence of the advertisement of services [see, for example, *88766 Canada Inc v RH Lea & Associates Ltd*; 2008 CarswellNat 4513 (TMOB); *Tint King of California v Canada (Registrar of Trade-marks)* (2006), 56 CPR (4th) 223 (FCTD)]. However, in this case, the Registrant makes no clear statements alleging use of the Mark in association with the services as registered and I do not consider the references to "Sales Consultant" and "Wardrobing by Appointment" on the exhibited business card as constituting advertisement of the registered services *per se*. As such, I am not prepared to accept the exhibited business card as evidence of use of the Mark in association with the services during the Relevant Period in Canada.

[14] With respect to the Website, as mentioned above, the Website does not reference the Registrant, the Mark is not visible on the Website and the exhibited printouts are all dated after the Relevant Period.

[15] Although the evidence as a whole must be considered and focusing on individual pieces of evidence is not the correct approach [*Kavas Miller Everitt v Compute (Bregent) Limited* (2005), 47 CPR (4th) 2009 (TMOB)], given the deficiencies in the evidence before me discussed

above, I find that there is insufficient evidence before me to conclude that the services were performed or were available to be performed by the Registrant during the Relevant Period in Canada in association with the Mark.

[16] In view of all of the foregoing, I find that the Registrant has not demonstrated use of the Mark in association with the wares and services in accordance with sections 4 and 45 of the Act. Furthermore, the Registrant has provided no evidence of special circumstances excusing the absence of such use.

Disposition

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

Darlene H. Carreau
Chairperson
Trade-marks Opposition Board
Canadian Intellectual Property Office