



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

Citation: 2013 TMOB 109
Date of Decision: 2013-06-19

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Goudreau Gage Dubuc against registration
No. TMA646,653 for the trade-mark LE TEMPS DES
CERISES in the name of 2430-2614 Quebec Inc.**

[1] On April 28, 2011, at the request of Goudreau Gage Dubuc, the Registrar forwarded a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T -13 (the Act) to 2430-2614 Quebec Inc. (the Registrant), the registered owner of registration TMA646,653 for the trade-mark LE TEMPS DES CERISES (the Mark). The Mark is registered for use in association with:

Men's, women's and children's activewear, namely shirts, sweaters, jackets, pants, jeans, jogging suits, sweat suits, blouses, T-shirts, skirts, dresses, bathing suits and outerwear, namely jackets, coats and skiwear (the Wares).

[2] Section 45 of the Act 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 April 28, 2008 to April 28, 2011.

[3] In response to the Registrar's notice, the Registrant filed the affidavit of Mr. Kenneth Hollinger, the Registrant's President and Secretary since February 16, 1987 together with Exhibits A to H. Both parties filed written submissions and were represented at a hearing.

[4] I wish to point out that the Registrant requested on June 6, 2013, a week prior to the hearing, a retroactive extension of time under section 47(2) of the Act to file additional evidence. By decision rendered on June 11, 2013 the Registrar refused that request for the reasons detailed in his that decision.

[5] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such there is no need for evidentiary overkill and, the threshold to establish use is quite low [see *Woods Canada ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[6] However, 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, and ambiguity in the evidence filed shall be interpreted against the Registrant [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 furnished by the Registrant enables me to conclude that the Mark was used by the Registrant in Canada in association with each of the Wares during the relevant period.

[8] In his affidavit, Mr. Hollinger states that he is also the President of RD International Style Collections Ltd. (RD) since December 1st, 1994. RD is in the business of selling and distributing men’s, women’s and children’s clothing.

[9] Mr. Hollinger asserts that on December 5, 2005 the Registrant gave a licence to RD to use the Mark. The said agreement ensures that the Registrant has direct control over the character and quality of the wares under licence. A copy of the licence is attached to his affidavit.

[10] Mr. Hollinger further states that each of the Wares bears a label or hangtag purchased by RD on which appears the Mark. He filed, as Exhibit C, pictures of various garments to which is attached such labels and hangtags. However, only label 1178 and hangtag 624 seem to have been ordered during the relevant period.

[11] Mr Hollinger also filed, as Exhibit F, what he describes to be invoices issued during the relevant period by RD to illustrate the sale of the Wares bearing the Mark. Except for a few of them, they all bear a date within the relevant period and make reference to the Mark.

[12] Mr. Hollinger alleges that each year RD provides a booklet of its wares offered to its customers. He filed, as Exhibit G, the booklet for the Fall 2010. He finally alleges that RD attends several trade shows to promote its wares including shows in Atlanta, Los Angeles, New York and Las Vegas. I note that all of these trade shows took place outside Canada.

[13] During the hearing the Requesting Party tried to isolate each allegation contained in paragraphs 8 to 11 of Mr. Hollinger's affidavit in order to establish that there is no reference to Canada and/or the relevant period and thus these allegations cannot support the contention that the Mark was used in Canada in association with the Wares during the relevant period.

[14] However, I agree with the Registrant that those paragraphs must be read in conjunction with the content of paragraph 6 of Mr. Hollinger's affidavit which reads:

6. RD has been using and continues to use the Mark in Canada with respect to the wares under license and has done so on an ongoing basis since July 22, 2005.

[15] Nevertheless, as I mentioned at the hearing, in order to establish use of the Mark in Canada within the meaning of section 4(1) of the Act, there has to be evidence of at least one commercial transaction that occurred during the relevant period in Canada wherein there has been a transfer of property in the normal course of trade of the Wares from the Registrant or its licensee to a customer located in Canada. Consequently Mr. Hollinger's statement is not sufficient to enable the Registrant to discharge its burden of proof.

[16] As described above, the Registrant has provided evidence that its licensee purchased labels and hangtags bearing the Mark and that those hangtags and labels are affixed to articles of clothing. However what has been identified by Mr. Hollinger as 'invoices' (exhibit F to his affidavit) are not so. In fact, they appear to be purchase orders issued by the Registrant's licensee to its suppliers located abroad. At the hearing, the Registrant did not dispute this conclusion.

[17] There is no specific evidence that the goods ordered by RD and described in these purchase orders were delivered in Canada and then resold by RD to Canadian customers. For the Requesting Party, this omission is sufficient to rule in favour of the expungement of the registration of the Mark.

[18] On the other hand the Registrant cited *Diamant Elinor Inc v 88766 Canada Inc* 2010 FC 1184 and *Baker & McKenzie LLP v Dart Industries Inc*, 2012 TMOB 20 to support its contention that, from the evidence in the record, I can infer that at least one sale took place in Canada during the relevant period. The Registrant argues that I am able to draw an inference from the fact that on the purchase orders there are instructions to insert on the label a CA number. According to the Registrant, this number serves the purpose of identifying the business name and address of companies selling in Canada textile goods as required under the *Textile Labelling Act*. In its written submissions the Registrant argues that CA numbers are only used when goods are sold in Canada. However, I note that there is no evidence in the file to support such a contention.

[19] *Diamant Elinor* provides general guidelines as to when the Registrar can draw inferences from the evidence as a whole. Each case has to be assessed according to the evidence filed as a whole. For example in the case of *Eclipse International Fashions Canada Inc v Cohen*, 2005 FCA 6, cited in *Diamant Elinor*, there were invoices filed in the record. I am mindful of the fact that the filing of invoices, even though the best possible evidence to establish the transfer of property of goods, is not a prerequisite to establish use of a trade-mark in accordance with section 4(1) of the Act.

[20] In the present case, the content of paragraph 6 of Mr. Hollinger's affidavit is equivalent to what has been characterized as a 'bald statement of use'. I acknowledge that the deponent filed labels bearing the Mark, pictures of garments bearing the labels and purchase orders issued by RD, but there is no clear evidence that the wares identified on the purchase orders and bearing the Mark were sold to retailers in Canada during the relevant period.

[21] I note that Exhibit C to Mr. Hollinger's affidavit does contain pictures of garments with a hangtag bearing the Mark and a label bearing a CA number. I may add that, on the purchase

orders, also included with Exhibit C, the style numbers of garments do not match the style numbers on the labels of the garments appearing on the pictures.

[22] If at least one invoice issued by RD to a Canadian retailer had been filed in the record evidencing the sale of Wares bearing the Mark during the relevant period to establish clearly that there had been a transfer of property, I would have had no hesitation to conclude that the Registrant had made use of the Mark in Canada in association with such Wares.

[23] I would point out that the Registrant acknowledged at the hearing that there is no evidence in the record that showed use of the Mark in Canada during the relevant period in association with men's clothing, bathing suits for women and skiwear. Consequently if I were to be wrong in concluding that there was no proper evidence of use of the Mark in association with the Wares in Canada during the relevant period, the registration would have to be amended to delete from the list of wares: men's clothing, bathing suits for women and skiwear.

Disposition

[24] Pursuant to the authority delegated to me under section 63(3) of the Act, registration No TMA646,653 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