



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

Citation: 2013 TMOB 93
Date of Decision: 2013-05-15

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Osler, Hoskin & Harcourt LLP against
registration No. TMA626,353 for the trade-mark
SYMPHONY in the name of SORIN CRM S.a.s.**

[1] At the request of Osler, Hoskin & Harcourt LLP, the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on March 25, 2011 to Ela Medical S.A., the registered owner at that time of registration No. TMA626,353 for the trade-mark SYMPHONY (the Mark).

[2] Subsequent to issuance of the notice, Ela Medical S.A. informed the Registrar that it had changed its name to SORIN CRM S.a.s. (the Registrant), effective January 1, 2010. This change of name is not at issue in this proceeding.

[3] The Mark is registered for use in association with the following wares: “Appareils chirurgicaux et médicaux implantables pour le traitement de dysfonctionnement cardiaque nommément stimulateurs cardiaques, sondes de stimulation cardiaque, défibrillateurs”.

[4] The wares as translated on the CIPO database are as follows: “Implantable surgical and medical apparatus for the treatment of cardiac disorders, namely implantable pacemakers, pacemaker probes, defibrillators”.

[5] 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 March 25, 2008 and March 25, 2011 (the Relevant Period).

[6] The relevant definition of “use” in association with wares is set out in section 4(1) 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.

[7] In response to the Registrar’s notice, the Registrant furnished the affidavit of Sylvain Rousseau sworn in Turin, Italy on October 19, 2011. Neither party filed written representations; an oral hearing was not held.

[8] In his affidavit, Mr. Rousseau attests to being the “proxy holder” of the Registrant, having complete access to the Registrant’s records and the “capacity and authority” to sign the affidavit on behalf of the Registrant. He states that, during the Relevant Period, the Registrant sold pacemakers in association with the Mark in Canada. He concedes, however, that the Registrant “does not commercialize cardiac pacing and defibrillators in Canada under the trade mark SYMPHONY”. Indeed, the evidence appears to be limited to pacemakers and does not otherwise reference the remaining wares, “pacemaker probes” and “defibrillators”.

[9] Mr. Rousseau goes on to state that the sale and distribution of SYMPHONY pacemakers in Canada is carried out by the Registrant’s distributor, Sorin Group Canada, which sells “mainly” to hospitals. As evidence of how the Mark is associated with the pacemakers, Mr. Rousseau attaches to his affidavit reproductions of the labels affixed to the pacemakers and copies of two manuals that were distributed to physicians during the Relevant Period. Mr. Rousseau attests that the manuals were supplied every time a pacemaker was sold in Canada during the Relevant Period and I note that both the labels and manuals clearly display the Mark.

[10] As evidence of sales in Canada during the Relevant Period, Mr. Rousseau attests that sales of SYMPHONY pacemakers exceeded eight million dollars between 2008 and 2011. Furthermore, he includes copies of 33 invoices that show sales of SYMPHONY pacemakers in Canada during the Relevant Period. I note that the product codes appearing on the invoices are consistent with the codes listed in the exhibited pacemaker manuals.

Disposition

[11] In view of the foregoing, I am satisfied that the Registrant has shown use of the Mark in association with “stimulateurs cardiaques” within the meaning of sections 4 and 45 of the Act; however, use has not been shown for the remaining wares and there is no evidence before me of special circumstances excusing the absence of use.

[12] Consequently, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be amended to delete “sondes de stimulation cardiaque, défibrillateurs”.

[13] The amended statement of wares will be as follows: “Appareils chirurgicaux et médicaux implantables pour le traitement de dysfonctionnement cardiaque nommément stimulateurs cardiaques.”

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office