



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

Citation: 2017 TMOB 28
Date of Decision: 2017-03-07
[UNREVISED ENGLISH
CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 SUMMARY EXPUNGEMENT PROCEEDING

Goudreau Gage Dubuc S.E.N.C.R.L./LLP **Requesting Party**

and

Aliments La Bourgeoise Inc. **Registered Owner**

TMA752,154 for MONAMORE **Registration**

The record

[1] On May 27, 2015 at the request of Goudreau Gage Dubuc S.E.N.C.R.L./LLP (the Requesting Party), the Registrar sent the notice stipulated in section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Aliments La Bourgeoise Inc. (the Registered Owner), registered owner of registration No. TMA752,154 for the MONAMORE trade-mark (the Mark).

[2] This notice enjoined the Registered Owner to provide an affidavit or a solemn declaration proving that its Mark was used in Canada at any time between May 27, 2012 and May 27, 2015 (the relevant period), in association with the goods specified in the registration, namely [TRANSLATION] "Foods, namely coated and breaded entrées and hors-d'œuvres, cheese hors-d'œuvres, cheese fondues, cheese sticks" and, in the negative, the date when the Mark was used for the last time and the reason for its failure to use it since that date.

[3] In response to the Registrar's notice, the Registered Owner filed a document entitled "SOLEMN DECLARATION", signed by its President Martin Roy on July 20, 2015 before the "witness" Jacques Roy (hereinafter sometimes referred to as the "Roy Document").

[4] Only the Requesting Party filed written representations and participated in a hearing.

Analysis

[5] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing "deadwood" from the register; this is why the applicable test is not very stringent. As stated by Judge Russell in *Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC), at p. 282:

We know that the purpose of s. 45 proceedings is to clean up the "deadwood" on the register. We know that the mere assertion by the owner that his trade-mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owner's business and merchandising practices.

[6] In the present case, section 4(1) of the Act defines use in association with goods as follows:

A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[7] This leads me to review the evidence filed by the Registered Owner.

[8] Mr. Roy declares two things in the Roy Document:

- [TRANSLATION] "That the [Mark] was used in 2013 and 2014 in the context of a project concerning: Foods, namely coated and breaded cheese hors-d'œuvres, cheese fondues, cheese sticks for presentation to a customer with branches throughout Canada"; and

- "[That he makes] this solemn declaration believing in all good conscience that it is true and knowing that it has the same force and the same effect as if it were made under oath. "

[9] A colour photocopy of what seems to be packaging of a box of "FETA & OLIVE" hors-d'œuvres displaying the Mark is attached to the Roy Document, without any form of presentation or reference.

[10] At the hearing, the Requesting Party argued that the probative evidence filed by the Registered Owner does not meet the criteria stated above to establish the use of the Mark during the relevant period, both on the form and on the substance.

[11] I agree.

The admissibility of the Roy Document

[12] First considering the form of the evidence submitted by the Registered Owner, I agree with the Requesting Party that the Roy Document does not fulfill the conditions required to be considered a solemn declaration, for the following reasons.

[13] Under section 41 of the *Canada Evidence Act*, RSC (1985), c. C-5 (the *Evidence Act*), a solemn declaration must be made before:

Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary
authorized by law to administer an oath in any matter [...] [My emphasis]

[14] This declaration must also be made according to the formula stipulated in this same section of the Act, "in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing".

[15] In the case at bar, Jacques Roy, in his mere capacity as "witness", cannot be considered a person authorized to receive the so-called solemn declaration of Martin Roy. Moreover, the Roy Document does not conform to the formula stipulated in section 41 of the *Evidence Act*, in that Mr. Roy does not "solemnly" declare the facts alleged therein.

[16] I agree with the Requesting Party that these irregularities are not mere technical details the Registrar may disregard. Although the proceedings under section 45 are administrative and summary in nature, it nonetheless remains that the evidence filed must be in the form of an affidavit or a solemn declaration within the meaning of section 41 of the *Evidence Act*. The purpose of this formality is to ensure the veracity of its content, especially since the Requesting Party cannot cross-examine its author [see *88766 Canada Inc v 167407 Canada Inc*, 2010 TMOB 167 at paragraph 16].

[17] It is appropriate to note in this regard that the Requesting Party objected to the admissibility of the Roy Document in its written representations. Even though it was thus notified, the Registered Owner did not attempt to correct the situation.

[18] Given that the evidence submitted by the Registered Owner is not presented in the required form of an affidavit or a solemn declaration, I must conclude that this situation is equivalent to a default in providing the evidence requested.

[19] In conclusion on this point, I will add that the colour photocopy attached to the Roy Document is not referenced anywhere therein, nor has it been authenticated.

[20] In view of all the foregoing, I agree with the Requesting Party that I have no other choice than to expunge the registration.

[21] If the Roy Document had proved admissible, I nonetheless would have concluded that the use of the Mark during the relevant period was not proved, for the following reasons:

The use of the Mark proved by the Roy Document

[22] I agree with the Requesting Party that Mr. Roy's affirmations pose a problem for several reasons.

[23] Even though Mr. Roy affirms that the Mark "was used" by the Registered Owner, it is not possible to determine the extent to which the mark was actually "used" within the meaning of section 4(1) of the Act.

[24] Mr. Roy refers to the use of the Mark "in the context of a project" for "presentation to a customer". The Requesting Party rightly questions what this means.

[25] Given the common meaning of the words "project" and "presentation", I agree with the Requesting Party that it cannot be concluded that the Mark was used within the meaning of section 4(1) of the Act during relevant period. The terminology used by Mr. Roy in no way allows the inference that there was a sale or transfer of ownership of the goods described by Mr. Roy in the normal course of trade. Instead, this seems to involve mere business proposals.

[26] The Requesting Party rightly notes in this regard that the Roy Document provides no sales figure or any invoice in support of any transaction whatsoever. It also notes that the colour photocopy of what seems to be packaging identifies the place of business of the Registered Owner as being based in the municipality of "Saint-Nicolas (Quebec)", whereas such municipality in 2002 became a district of the city of "Lévis (Quebec)". The Requesting Party submits that the Registrar may automatically take note of this fact. It submits that it is more than doubtful that such packaging was not modified more than 10 years after the name change of the municipality of Saint-Nicolas. I find these submissions are not without merit.

[27] In view of all of the foregoing, I find that the Registered Owner has not discharged the burden that was incumbent on it under the terms of section 45 of the act to prove the use of the Mark in association with the goods described in the registration during the relevant period. The contents of the Roy Document are akin to a mere assertion of use of the Mark. It does not prove how the Mark was used by the Registered Owner within the meaning of section 4(1) of the Act, during the relevant period. Moreover, the Registered Owner did not provide any evidence of special circumstances justifying the non-use of the Mark during the relevant period.

Disposal

[28] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, and in compliance with the provisions of section 45 of the Act, the registration will be expunged.

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Certified true translation
Arnold Bennett

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

DATE OF HEARING: 2017-02-14

APPEARANCES

No appearance

FOR THE REGISTERED
OWNER

Chantal Desjardins

FOR THE REQUESTING
PARTY

AGENT(S) OF RECORD

No agent

FOR THE REGISTERED
OWNER

Goudreau Gage Dubuc S.E.N.C.R.L./LLP

FOR THE REQUESTING
PARTY