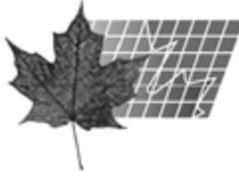


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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2018 TMOB 54

Date of Decision: 2018-05-29

IN THE MATTER OF A SECTION 45 PROCEEDING

MILLER THOMSON S.E.N.C.R.L.

Requesting Party

and

Renée's Gourmet Foods Inc.

Registered Owner

TMA605,574 for GREEN ENERGY

Registration

[1] This decision pertains to a summary expungement proceeding with respect to registration No. TMA605,574 for the trade-mark GREEN ENERGY (the Mark), owned by Renée's Gourmet Foods Inc.

[2] The Mark is registered in association with the following goods:

Fresh fruit, dried fruit, fruit beverages, namely non-alcoholic fruit juices, non-alcoholic fruit smoothies, and fruit-flavoured drinks, vegetable beverages, preserved fruits and vegetables

[3] For the reasons that follow, I conclude that the registration ought to be amended to delete all goods other than "fruit beverages, namely non-alcoholic fruit smoothies".

THE PROCEEDING

[4] On June 21, 2016, the Registrar of Trade-marks sent a notice under section 45 of the *Trade-marks Act* RSC 1985, c T 13 (the Act) to Renée's Gourmet Foods Inc. (the Owner). The notice was sent at the request of MILLER THOMPSON S.E.N.C.R.L. (the Requesting Party).

[5] The notice required the Owner to furnish evidence showing that it had used the Mark in Canada, at any time between June 21, 2013 and June 21, 2016 (the Relevant Period), with respect to each of the goods specified in registration No. TMA605,574. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used in Canada and the reasons for the absence of use since that date.

[6] The relevant definition of "use" in the present case, in association with goods, is set out in section 4(1) of the Act as follows:

4(1) 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] Section 45 proceedings are considered to be summary and expeditious for clearing the register of non-active trade-marks. The expression "clearing deadwood" has often been used to describe these proceedings. The threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD); *Austin Nichols & Co v Cinnabon, Inc* (1998), 82 CPR (3d) 513 (FCA)]. Nevertheless, sufficient facts must be presented to allow the Registrar to conclude that the Mark was used in association with each of the registered goods at any time during the Relevant Period [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448, 31 CPR (4th) 270]. Mere assertions of use are insufficient to prove use of the Mark [*Aerosol Fillers Inc v Plough (Canada) Ltd* (1980), 53 CPR (2d) 62 (FCA)].

[8] In response to the Registrar's notice, the Owner furnished the affidavit of Charles Fung, sworn September 16, 2016, with accompanying Exhibits "A" to "D".

[9] Neither party filed written representations or requested a hearing.

THE OWNER'S EVIDENCE

[10] Mr. Fung presents himself as the brand manager for ARTHURS smoothies fruit drinks and an employee of Kraft Heinz Canada ULC (Kraft Heinz).

[11] Mr. Fung states that Kraft Heinz is the parent company of the Owner. Mr. Fung states that he has worked for Kraft Heinz and its predecessor companies since April 2011. Mr. Fung goes on to state that as such, and as brand manager for ARTHURS smoothies fruit drinks, he has knowledge of the matters set out in his affidavit and has also access to the relevant business records of Kraft Heinz and the Owner and has consulted them where necessary.

[12] In his affidavit, Mr. Fung asserts that the Mark is owned by the Owner and the latter also owns the trade-mark and trade-name ARTHUR'S FRESH COMPANY. He also explains that the French version of the Mark is VERT DE VIE.

[13] For ease of reference, I reproduce paragraph 3 of Mr. Fung's affidavit with respect to the use of the Mark in Canada:

3. The trade-mark GREEN ENERGY was use in Canada prior to June 21, 2016 and is in use now for non-alcoholic fruit smoothies and vegetable beverages.

[14] Mr. Fung states that "GREEN ENERGY smoothies are advertised on the internet and that a "description of the product is available" at <http://www.arthurfresh.com/en/green-energy.aspx>. He explains that "GREEN ENERGY is available in Canada in 325 ml and 900 ml bottles".

[15] Mr. Fung asserts that in 2015, the Owner "sold over 80,000 325 ml bottles of GREEN ENERGY smoothies for sales revenues of over \$200,000 and over 250,000 900 ml bottles of GREEN ENERGY smoothies for sales revenues of over \$970,000".

[16] In support of his assertions, Mr. Fung furnishes the following exhibits to his affidavit:

- Exhibit "A" consists of the product description printed out from the website on August 9, 2016. Mr. Fung attests that this page was in this form and accessible on line "in the period immediately prior to June 21, 2016". It describes the GREEN ENERGY

product as “a complex blend of delicious fruit, spirulina, and flax seed oil, and provides a wide spectrum of nutrients! [...]”

- Exhibit “B” consists of two pages of what Mr. Fung identifies as “proof labels” that were in use at the date of his affidavit and in the period prior to June 21, 2016. Although the reproduction is of poor quality, each of the pages appears to be a label mock-up for smoothies. One is dated 11/23/2010; the other is dated 03/04/2011. I am able to discern the Mark on each label mock-up.
- Exhibit “C” consists of a picture of a 900 ml bottle, reproduced below, that Mr. Fung attests is “available for sale and sold in Canada”. The Mark is displayed on the label.



- Exhibit “D” consists of four invoices that Mr. Fung attests “are invoices showing representative sales in Canada of GREEN ENERGY smoothies to Loblaws and to Metro in 2014 and to Metro Richelieu in 2015”. Mr. Fung asserts that where the invoices relate to sales in Quebec, they show the product as VERT DE VIE, but the product at all time was packaged and sold with the bilingual label displaying both the Mark and the trademark VERT DE VIE. The four invoices are dated within the Relevant Period and appear to be issued by the Owner. Also, the Mark or its French equivalent appears in one of the item descriptions on each invoice.

ANALYSIS AND REASONS FOR DECISION

[17] I note that while the affidavit of Mr. Fung speaks to the Mark being used in association with non-alcoholic fruit smoothies and vegetable beverages, the affidavit and evidence are silent with respect to all other remaining registered goods, namely:

Fresh fruit, dried fruit, [...] non-alcoholic fruit juices, [...], and fruit-flavoured drinks, [...] preserved fruits and vegetables.

[18] As no special circumstances have been brought forth which excuse the absence of use of the Mark with respect to these goods, they will be deleted from the registration.

[19] I turn to Mr. Fung's assertions and evidence of use of the Mark in association with non-alcoholic fruit smoothies and vegetable beverages.

[20] With respect to "non-alcoholic fruit smoothies", I am satisfied that the Owner has demonstrated use of the Mark in compliance with sections 4(1) and 45 of the Act. In this regard, Mr. Fung has provided a picture of a 900 ml bottle of "ARTHUR'S FRESH COMPANY Smoothies" with the Mark displayed on the label. In addition, he has provided representative invoices which show the sale of smoothies during the Relevant Period in Canada, together with supporting sales volume and revenue figures.

[21] However, I am not satisfied that the Owner has demonstrated use of the Mark in association with "vegetable beverages" in compliance with sections 4(1) and 45 of the Act.

[22] Indeed, for one thing, it is apparent that the product description, the mock-up labels and the picture of the bottle all pertain to fruit smoothies.

[23] Furthermore, Mr. Fung's statement that the Mark "was use in Canada prior to June 21, 2016" is not without ambiguity, as it is unclear whether the Mark was used in association with vegetable beverages during the Relevant Period. For instance, use of the Mark predating the Relevant Period could qualify as use "prior to June 21, 2016". Unlike "non-alcoholic fruit smoothies", the Owner did not provide invoices showing sales of "vegetable beverages" during the Relevant Period, nor did it provide at least some evidence, such as volume

of sales, dollar value of sales, or equivalent factual particulars, for concluding to sales of “vegetable beverages” in the normal course of trade during the Relevant Period.

[24] In the end, I am satisfied that the Owner has established a *prima facie* case of use of the Mark with respect to “fruit beverages, namely non-alcoholic fruit smoothies”, but not with respect to “vegetable beverages”. As no special circumstances have been brought forth which excuse the absence of use of the Mark with respect to “vegetable beverages”, these goods will be deleted from the registration.

DISPOSITION

[25] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be amended to delete the following goods in compliance with the provisions of section 45 of the Act:

Fresh fruit, dried fruit, [...] non-alcoholic fruit juices, [...], and fruit-flavoured drinks, vegetable beverages, preserved fruits and vegetables.

[26] The amended statement of goods will read as follows:

Fruit beverages, namely non-alcoholic fruit smoothies.

Céline Tremblay
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE No Hearing Held

AGENTS OF RECORD

NORTON ROSE FULBRIGHT CANADA
LLP/S.E.N.C.R.L., S.R.L.

FOR THE REGISTERED OWNER

MILLER THOMPSON S.E.N.C.R.L.

FOR THE REQUESTING PARTY