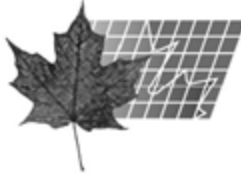


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LE REGISTRAIRE DES MARQUES DE COMMERCE

THE REGISTRAR OF TRADE-MARKS

Citation: 2019 TMOB 16

Date of Decision: 2019-02-28

IN THE MATTER OF SECTION 45 PROCEEDINGS

Arthur B. Renaud

Requesting Party

and

Gabriel Elbaz

Registered Owner

TMA858,014 for CRAB'STEAMER

Registrations

TMA858,016 for LOB'STEAMER

[1] At the request of Arthur B. Renaud (the Requesting Party), the Registrar of Trade-marks issued notices under section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) on February 22, 2017 to Gabriel Elbaz (the Owner), the registered owner of registrations No. TMA858,014 for the trade-mark CRAB'STEAMER and No. TMA858,016 for the trade-mark LOB'STEAMER (collectively the Marks).

[2] The trade-mark CRAB'STEAMER is registered for use in association with the goods "Fresh, frozen, refrigerated, cooked, blanched or raw whole crabs; processed crab meats".

[3] The trade-mark LOB'STEAMER is registered for use in association with the goods "Fresh, frozen, refrigerated, cooked, blanched or raw whole lobsters; processed lobster meats".

[4] 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 goods 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 the trade-mark was last so used and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between February 22, 2014 and February 22, 2017.

[5] The relevant definitions of “use” are set out in sections 4(1) and 4(3) 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.

4(3) A trade-mark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[6] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the goods specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[7] In response to the Registrar’s notices, the Owner furnished his own affidavit, sworn on March 28, 2017, in Montreal. Both parties filed brief written representations; a hearing was not held.

THE OWNER'S EVIDENCE

[8] In his affidavit, Mr. Elbaz identifies himself as the president, sole director and controlling shareholder of Sogelco International Inc. (Sogelco). He states that Sogelco processes products of the sea that it then sells in Canada and abroad from Canada. In particular, he states that Sogelco markets lobsters, crabs, fish and seafood under the trade-marks CRAB'STEAMER, LOB'STEAMER and SOGEL. He confirms that he has licensed Sogelco to use these trade-marks and that he controls the quality and character of the products in association with which they are used.

[9] In support of his assertions, Mr. Elbaz attaches the following exhibits to his affidavit:

- Exhibit A-1 consists of drawings of two labels, each displaying the LOB'STEAMER trade-mark. Mr. Elbaz attests that, during the relevant period, such labels were affixed to boxes containing frozen raw lobster that Sogelco sells under licence.
- Exhibit A-2 consists of drawings of two labels, each displaying the CRAB'STEAMER trade-mark. Mr. Elbaz attests that, during the relevant period, such labels were affixed to boxes containing frozen raw crab that Sogelco sells under licence.
- Exhibit A-3 contains four invoices from May 2016, showing sales of "CRAB'STEAMER" frozen whole raw crab and "LOB'STEAMER" frozen whole raw lobsters by Sogelco in Montreal to two companies in Quebec and to two companies in the United States. Mr. Elbaz confirms that these sales were made by his licensee in the normal course of trade and that the invoices accompanied the invoiced products at the time of their delivery to the recipient. He also confirms that the products are packed in 3.5 kilogram cartons, as indicated on the invoices.

[10] With respect to export sales, Mr. Elbaz attests that the labels depicted in Exhibits A-1 and A-2 were applied to the products' packaging in Canada when the products were exported from Canada to U.S. destinations.

[11] I note that, in each of Exhibits A-1 and A-2, the first depicted label indicates a net weight of "10 x 350g = 3.5 kg (7.7 lb)". The second label in each of these exhibits indicates a net

drained weight of “350 g”, and includes certain elements not present on the first label, including a “Nutrition Facts” table and “Preparation Instructions” for cooking the crab or lobster right in its package, as follows: “Remove pack from the box. Do not tear or puncture the plastic film. Microwave for 5 min. Serve hot or cold. Enjoy!”

THE PARTIES’ REPRESENTATIONS

[12] The Requesting Party concedes that the Marks have been used in respect of frozen whole crabs and frozen lobsters, but only those “that are sold in 3.5-kilogram cartons to other companies who further process the purchased [crab or lobster] into other products for their own distribution and sale”.

[13] The Requesting Party submits that the Owner has not demonstrated sales of “fresh, refrigerated, cooked or blanched” crabs or lobsters or of “processed crab meats” or “processed lobster meats”. The Requesting Party further submits that the evidence “fails to disclose that any of the listed goods are sold at retail to end-user consumers for their consumption”.

[14] Accordingly, the Requesting Party submits that the registrations at issue should be amended to read “Frozen raw whole crabs sold through wholesale channels of trade” and “Frozen raw whole lobsters sold through wholesale channels of trade”, respectively.

[15] The Owner, for its part, submits that the Registrar lacks jurisdiction to modify the registrations in the manner proposed by the Requesting Party.

ANALYSIS

[16] First, I am satisfied that the Owner has evidenced use of the Marks in Canada in association with frozen whole raw crabs and frozen whole raw lobsters during the relevant period. In this respect, the Owner provides drawings of product labels displaying the Marks and attests that such labels were affixed to boxes containing frozen raw crab and frozen raw lobster. He confirms that the labels were applied in Canada. He also provides representative invoices showing sales of such goods under the Marks during the relevant period, both to companies in Canada and to companies in the United States. He confirms that these sales were made in the normal course of trade and that the invoices accompanied the goods at the time of transfer. I am

satisfied that such use of the Marks satisfies the criteria of both section 4(1) and section 4(3) of the Act.

[17] I am also satisfied that the sales by the Owner's licensee enure to the Owner's benefit under section 50(1) of the Act. In this respect, the Owner attests to having the requisite control over the character and quality of the goods sold under the Marks, and such control may also be inferred from his position as president, sole director and controlling shareholder of the licensee [see *Empresa Cubana del Tabaco v Shapiro Cohen*, 2011 FC 102, 91 CPR (4th) 248, aff'd 2011 FCA 340, 2011 CarswellNat 5405; and *Lindy v Canada (Registrar of Trade Marks)* (1999), 241 NR 362 (FCA)].

[18] Regarding the nature of the goods with which the Marks were used, as noted above, the Requesting Party submits that the subject registrations should be restricted to crabs and lobsters that are "frozen raw whole" and "sold through wholesale channels of trade". In proposing the latter restriction, the Requesting Party contends that there is no evidence of retail sales to end-users for their own consumption. However, as noted by the Owner, it is well established that the Registrar does not have the authority to redefine or amend a statement of goods for which use has been shown [see *Re Scott Paper Co*, 1997 CarswellNat 3231 (TMOB); *Carter-Wallace Inc v Wampole Canada Inc* (2000), 8 CPR (4th) 30 (FCTD)].

[19] Finally, each registration contains two goods, the first of which is defined as "Fresh, frozen, refrigerated, cooked, blanched or raw whole crabs" in the CRAB'STEAMER registration and "Fresh, frozen, refrigerated, cooked, blanched or raw whole lobsters" in the LOB'STEAMER registration. These definitions are constructed using the disjunctive word "or". While the conjunctive "and" might have required the Owner to furnish evidence of use in respect of multiple products, so as to demonstrate each of the qualities "fresh", "frozen", "refrigerated", "cooked", "blanched" and "raw", I consider the disjunctive "or" in this case to allow the Owner to show use in association with any product that fits within the one definition. As I read the statement of goods, the description "fresh, frozen, refrigerated, cooked, blanched or raw" merely confirms that the crabs or lobsters in question may have any one of these characteristics.

[20] Similar conclusions were reached in *LIDL Stiftung & Co KG v Joseph Rutigliano & Sons Inc*, 2005 CarswellNat 4743 (TMOB), where use with "processed olives" constituted use with

the registered goods “canned or processed olives”; *Boughton Law Corp v Kittling Ridge Ltd* (2007), 65 CPR (4th) 116 (TMOB), where use with “rum based cocktails” constituted use with the registered goods “vodka and/or rum based cocktails”; and *Stikeman Elliott SENCRL, srl v Weight Watchers International Inc*, 2010 TMOB 22, 2010 CarswellNat 614, where use with “frozen food entrees” containing “poultry” constituted use with the registered goods “frozen food entrees and/or side dishes consisting primarily of meat, fish, poultry and/or vegetables...”.

[21] In view of the foregoing, I am satisfied that the Owner has demonstrated use in association with the first good in each registration.

[22] However, I cannot reach the same conclusion with respect to the second good in each registration, being “processed crab meats” in the case of CRAB’STEAMER and “processed lobster meats” in the case of LOB’STEAMER.

[23] Goods separated by semi-colons are generally considered to stand on their own. Accordingly, in the present case, crab and lobster “meats” must be considered separately from “whole” crabs and lobsters. Having thus distinguished “whole” products from “meats”, the Owner must now furnish some evidence of use in respect of each [per *Labatt, supra*]. However, the Owner has only furnished evidence of use in respect of *whole* crabs and lobsters. In the absence of evidence to the contrary, I am not satisfied that whole crabs and lobsters also constitute crab and lobster “meats”.

[24] Since there is also no evidence before me of special circumstances excusing non-use of the Marks, the second good will be deleted from each registration accordingly.

DISPOSITION FOR TMA858,014 – CRAB’STEAMER

[25] In view of all the foregoing, I am satisfied that the Owner has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act in association with the goods “Fresh, frozen, refrigerated, cooked, blanched or raw whole crabs” only.

[26] Accordingly, 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 the goods

“processed crab meats”. The amended statement of goods will be as follows: “Fresh, frozen, refrigerated, cooked, blanched or raw whole crabs”.

DISPOSITION FOR TMA858,016 – LOB’STEAMER

[27] In view of all the foregoing, I am satisfied that the Owner has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act in association with the registered goods “Fresh, frozen, refrigerated, cooked, blanched or raw whole lobsters” only.

[28] Accordingly, 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 the goods “processed lobster meats”. The amended statement of goods will be as follows: “Fresh, frozen, refrigerated, cooked, blanched or raw whole lobsters”.

Oksana Osadchuk
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

No Hearing Held

AGENTS OF RECORD

ROBIC

FOR THE REGISTERED OWNER

Arthur B. Renaud

FOR THE REQUESTING PARTY