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

Citation: 2019 TMOB 42

Date of Decision: 2019-05-03

IN THE MATTER OF A SECTION 45 PROCEEDING

A. Bosa & Co. Ltd.

Requesting Party

and

**Saputo Produits laitiers Canada
S.E.N.C./Saputo Dairy Products
Canada G.P.**

Registered Owner

TMA596,025 for CHÈVREDART

Registration

INTRODUCTION

[1] At the request of A. Bosa & Co. Ltd. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) on May 16, 2017 to Saputo Produits laitiers Canada S.E.N.C./Saputo Dairy Products Canada G.P. (the Owner), the registered owner of registration No. TMA596,025 for the trade-mark CHÈVREDART (the Mark).

[2] The Mark is registered for use in association the goods, “Cheese”.

[3] 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 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 May 16, 2014 to May 16, 2017.

[4] The relevant definition of use for goods is set out in section 4 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.

[5] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary, and expeditious procedure for removing “deadwood” from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Pamela Nalewajek, a Vice President of the Owner, sworn on December 11, 2017 in Montreal, Quebec. Both parties filed written representations; an oral hearing was not requested.

THE OWNER’S EVIDENCE

[7] In her brief affidavit, Ms. Nalewajek states that, during the relevant period, the Owner sold cheese in association with the Mark to customers in Canada. She attests that the Owner’s cheese is sold in grocery stores in packaging that features the Mark; attached as Exhibit 1 to her affidavit is a photograph depicting packaged cheese bearing the words “Chèvre d’Art”.

[8] As Exhibit 2 to her affidavit, Ms. Nalewajek attaches four partially-redacted invoices showing sales of “FAP CAM CHEVRED’ART”, which she states represent sales of the Owner’s cheese goods. The invoices are dated within the relevant period, between May 28, 2014 and September 11, 2014. She states that these invoices are representative of the Owner’s continuous use of the Mark in the normal course of trade during the relevant period.

ANALYSIS

[9] In its written representations, the Requesting Party raises three main issues with respect to the Owner's evidence.

[10] First, the Requesting Party argues that the Owner's name does not appear legibly on the packaging shown in Exhibit 1. However, as noted in the Owner's submissions, there is no requirement under the Act for the name of the registered owner to appear in association with the trade-mark [*Blaney, McMurtry, Stapells, Friedman v Spectra Computer Services Ltd* (2000), 5 CPR (4th) 106 (TMOB) at para 12; see also *Vogue Brassiere Inc v Sim & McBurney* (2000), 5 CPR (4th) 537 (FCTD) at para 36].

[11] Second, the Requesting Party notes that each of the invoices shown in Exhibit 2 is dated in 2014, and argues that this evidence is insufficient to support Ms. Nalewajek's "bare statement" that the goods were sold continuously in the normal course of trade. However, as the Owner notes, it is well-established that evidence of a single sale can be sufficient to establish use for the purposes of section 45 expungement proceedings, so long as it follows the pattern of a genuine commercial transaction and is not seen as deliberately manufactured or contrived to protect the registration [see *Philip Morris Inc v Imperial Tobacco Ltd* (1987), 13 CPR (3d) 289 (FCTD) at para 12]. In this case, the evidence shows four such sales and is accompanied by Ms. Nalewajek's clear sworn statement that these transactions took place in the Owner's normal course of trade.

[12] Third, the Requesting Party takes issue with the fact that Ms. Nalewajek's affidavit does not identify the Owner's customers. However, as the Owner notes in response, for the purposes of this proceeding, it is sufficient that Ms. Nalewajek identified the Owner's customers as grocery stores in Canada. The particulars of those store customers are neither relevant nor necessary.

[13] Lastly, I note that the Mark as registered does not appear in the supporting exhibits to the affidavit. Rather, "Chèvre d'Art" appears on the cheese packaging shown in Exhibit 1 and CHEVRED'ART appears on the invoices shown in Exhibit 2. While this issue is not raised by the Requesting Party, it is referenced in the Owner's representations, in which the Owner

concedes that it has used a slight variation of the Mark as registered. Nevertheless, I agree with the Owner that these variations are minor, as the Mark has not lost its identity and remains recognizable despite, for example, the insertion of spacing with an apostrophe [for a similar conclusion, see *Reckitt Benckiser (Canada) Inc v Tritap Food Broker*, 2013 TMOB 65 at para 20]. As such, I am satisfied that the evidence shows use of the registered Mark *per se*.

[14] In view of all of the foregoing, I am satisfied that the Owner has established use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[15] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be maintained.

Andrew Bene
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

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

AGENTS OF RECORD

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For the Registered Owner

Kirsten Severson

For the Requesting Party