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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2019 TMOB 63

Date of Decision: 2019-06-28

IN THE MATTER OF A SECTION 45 PROCEEDING

Rogers Media Inc.

Requesting Party

and

La Cornue

Registered Owner

**TMA704,341 for
“LE CHATEAU” DESIGN**

Registration

[1] At the request of Rogers Media Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on November 3, 2016 to La Cornue (the Owner), the registered owner of registration No. TMA704,341 for the trademark “LE CHATEAU” DESIGN shown below (the Mark):

"LE CHATEAU"

[2] The Mark consists of the words “LE CHATEAU” in upper case, within quotation marks, all in a plain, serif font.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods specified in the registration, at any time between November 3, 2013, and November 3, 2016. If the Mark had not been so used, the Owner was

required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act as follows:

4(1) A trademark 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. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448, 31 CPR (4th) 270]. A registered owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184, 90 CPR (4th) 428 at para 2].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Benoît Favier, solemnly affirmed on May 30, 2017, in France. Both parties filed written representations; a hearing was not requested.

[7] On June 6, 2017, at the Owner’s request, the registration was amended to delete certain goods from the statement of goods. The Mark is currently registered for use in association with the following goods only: “*appareils de cuisson, nommément: cuisinières, fours, fourneaux, tables de cuisson; hottes*” (cooking appliances, namely: ranges, ovens, ranges/ovens, cooktops; range hoods) (the Goods).

THE OWNER’S EVIDENCE

[8] In his affidavit, Mr. Favier identifies himself as the Owner’s “*Directeur Général*” (general manager), having occupied that position since February 2017 and having previously been the Owner’s “*Directeur Financier*” (chief financial officer) and “*Directeur Délégué*” (executive director). He confirms that, by virtue of his positions and functions, he can attest to the truth of the facts described in his affidavit. In particular, he states that, by virtue of his

position with the Owner, he is able to confirm that the photographs at Exhibit BF-5, discussed below, are representative of how retailers' showrooms in Canada appeared during the relevant period.

[9] Mr. Favier states that the Owner, founded in 1908, designs and manufactures cooking appliances and related accessories, which it distributes internationally, including in Canada. He notes that the Owner is a wholly-owned subsidiary of AGA Rangemaster Group plc, whose subsidiaries also include the Owner's North American distributor, AGA Marvel.

[10] Mr. Favier asserts the Owner's continuous use of the trademark CHÂTEAU in Canada during the relevant period in association with various cooking appliances, in particular ranges—including models "120", "150" and "165"—and range hoods. He explains that the Owner manufactures the CHÂTEAU ranges and hoods in France and then sells them through AGA Marvel to various retailers, including Canadian retailers such as Meubles JC Perreault Inc., doing business as Signature Bachand.

[11] Mr. Favier attests to display of the Mark directly on the exterior surface of the ranges and hoods sold, on their accompanying user manuals, on technical sheets displayed next to the products at the point of sale, and in the Owner's catalogues for these products.

[12] In support, Mr. Favier attaches various exhibits to his affidavit, each of which is identified as an exhibit and endorsed by both Mr. Favier and the notary commissioning the affidavit. However, although Mr. Favier identifies each exhibit by number in the body of his affidavit, the exhibits themselves are not numbered; only the handwritten placeholder "*Pièce*" or "*Pièce n°*" (Exhibit or Exhibit no.) appears at the top of each exhibit's cover page. Nevertheless, I am able to identify each exhibit from the descriptions provided by Mr. Favier in his affidavit. I will accordingly refer to the exhibits by the numbers assigned to them in the body of the affidavit. The exhibits are attached to the affidavit in that numerical order—except for the third and fourth exhibits, which are inverted.

- Exhibit BF-1 consists of extracts from an illustrated book about the Owner published in 2001. Mr. Favier refers to these extracts in providing a brief history of the Owner and its sales of "*cuisinières*" (ranges) under the trademarks CHÂTELAINES and later LE

CHÂTEAU, and then simply CHÂTEAU. He also mentions that the book is displayed next to CHÂTEAU ranges in the showroom depicted at Exhibit BF-5, discussed below. I note that page 162 of the book depicts and describes the range “Le *Château 120*” and that page 166 depicts the range “Le *Château 147*”, as well as a similar range with the caption “Modèle “Le Château” (8 styles available)”. However, Mr. Favier does not specify whether these particular pages are brought to purchasers’ attention in any way.

- Exhibits BF-2 and BF-3 (BF-3 being the *fourth* document attached to the affidavit) consist of screenshots taken from the Owner’s website at *www.lacornue.com* on May 9, 2017, which Mr. Favier attests are representative of the relevant period, as well as screenshots from the Internet Archive at *www.archive.org*, showing archived webpages from *www.lacornue.com* from March 16, 2014. The webpages advertise a line of eight ranges under the headings “Cuisinières Château” (in 2014) and “CHÂTEAU G4” (in 2017). The line comprises models CHÂTEAU 120, CHÂTEAU 150 and CHÂTEAU 165—each of which is advertised as having two vaulted ovens and a customizable cooktop—as well as the models GRAND PALAIS 180, GRAND CHÂTELET 135, CHÂTELET 120, GRAND CASTEL 90 and CASTEL 75. I note that these webpages appear to identify the ranges using the terms “*cuisinières*” and “*fourneaux*” interchangeably, while using the term “*four*” to refer to the vaulted oven.
- Exhibit BF-4 (the *third* document attached to the affidavit) is a copy of the Owner’s Canadian catalogue for 2015, where CHÂTEAU ranges and range hoods are advertised, along with some complementary kitchen products. The line of ranges consists of the aforementioned CHÂTEAU, GRAND PALAIS, GRAND CASTEL and CASTEL models. Mr. Favier does not indicate to whom this catalogue was distributed or where it was made available. However, I note that the “Project Request” form at the back of the catalogue targets “dealers” and provides the option of obtaining a quote for a custom order for “Final Customer” or “Display”. Space is provided for both the dealer and the customer to sign the form.
- Exhibit BF-5 contains photographs of two ranges, which Mr. Favier attests are the Owner’s CHÂTEAU ranges on display in the Montreal showroom of authorized retailer

Signature Bachand. Mr. Favier states that the photographs were taken by the Owner’s agents on April 1, 2017 and are representative of how Signature Bachand’s showroom—and those of other Canadian retailers—appeared during the relevant period. One of the photographs highlights a small metal plate that is attached to the first depicted range and that features an embossed LA CORNUE FRANCE logo, under which “CHATEAU 165” is engraved, as follows:



A technical sheet titled “Chateau 120SL” (reproduced in the affidavit at Exhibit BF-6, discussed below) is displayed in a stand on top of this first range. I also note that “Château 1908” appears at the top of a large panel or backsplash above the second depicted range (the panel’s contents are otherwise out of focus, as with a reflective surface, and the nature of this display is not clear).

- Exhibit BF-6 contains two technical sheets: one titled “Chateau 120SL” and one titled “Chateau 150SL”. I note that the Owner’s LA CORNUE FRANCE logo is displayed under the title “Chateau 120SL” and at some distance above the title “Chateau 150SL”. The sheets describe these two range models, occasionally referring to them as “Château” or “Chateau”, without the “120SL” or “150SL”. Each is described as having a pair of patented “château” type vaulted ovens (“*four de type château voûté breveté*”) and only one particular style of cooktop. For those seeking further information and service, the sheets provide contact particulars for AGA Marvel at SOFA Galleries in Mississauga and the website address www.la-cornue.com/ca. I note that the diagrams on the sheets show the “Chateau 120SL” range to have a width of “1200” while the “Chateau 150SL” range has a width of “1500”.
- Exhibit BF-7 contains four partially-redacted, representative invoices from the relevant period for CHÂTEAU ranges sold by the Owner to AGA Marvel’s office in Michigan.

For example, one of the invoices is for a “COOKER LA CORNUE "CHATEAU 120" WIDTH 1200 mm” and a “COOKTOP LA CORNUE "CHATEAU 150" WIDTH 1500 mm”. Both are described as a “CENTENAIRE” model of range, having two vaulted ovens, a cooktop, a backsplash, and a blank “I.D PLATE”, without engraving. I note that the plates for the other invoiced ranges are also blank, although the last invoice offers the option of an “INSCRIPTION TO ENGRAVE ON LA CORNUE LOGO: TO BE CONFIRMED WITHIN 5 DAYS – OTHERWISE BLANK PLATE”.

- Exhibit BF-8 contains three partially-redacted, representative invoices from the relevant period for sales of the Owner’s ranges and hoods by AGA Marvel to Meubles JC Perreault Inc. in Montreal. The products listed include “CHATEAU 90”, “CHATEAU 120 USA CENTENAIRE”, “CHATEAU 150 SL-CH150 K1”, “CHATEAU 90 HOOD”, and “CHATEAU 150 HOODFAN-MATTE BLACK”. I note that the recipient’s billing and shipping addresses are the same, and that each invoices specifies a shipping method and payment term.
- Exhibit BF-9 is a printout of the corporate particulars for Meubles JC Perreault Inc. from the Québec Enterprise Register database, showing Signature Bachand as one of the company’s tradenames.
- Exhibit BF-10 contains two partially redacted invoices, dated “26 Feb 16 13 OCT 16” and “23 Jul 16 31 JAN 17”, to addresses in Montreal and Saint Sauveur, Quebec, respectively. Mr. Favier attests that these invoices were issued on February 23, 2016, and July 23, 2016, and are representative of invoices from Signature Bachand to purchasers of the Owner’s CHÂTEAU ranges. The invoiced ranges are identified by product number; the Mark is not displayed on the invoices.
- Exhibit BF-11 contains partially-redacted printouts from Signature Bachand’s inventory, showing that the two product numbers indicated on the invoices at Exhibit BF-10 correspond respectively to the Owner’s “36" CHATEAU 90” and “CHATEAU CUISINIÈRE 120SL” ranges, supplied by AGA Marvel.

[13] No examples of the user manuals mentioned by Mr. Favier are provided.

[14] I note that the Owner's CHÂTEAU product line is described in the catalogue at Exhibit BF-4 as consisting of customizable "ranges" with customizable "cooktops" and vaulted ovens.

[15] The first part of the catalogue is titled "CREATE YOUR CHÂTEAU" and comprises the sections "Choose your size", "Choose your cooktop", "Choose your finishes" and "Choose your hood".

[16] The "Choose your size" section consists of a single page showing the correlation between the available range widths and the ranges' model names, going from the GRAND PALAIS 180 at 1800 units wide to the CASTEL 75 at 750 units wide.

[17] The cooktop section further describes each range model. I note that the models identified in the table of contents as "Le Château 165", "Le Château 150" and "Le Château 120" are identified in the individual page headings as "LE CHÂTEAU® 165", "LE CHÂTEAU® 150" and "LE CHÂTEAU® 120". Each page provides particulars for the range model and its corresponding cooktops, identified respectively as "*Château*" and "*Table Château*", followed by the model number. For example, particulars for the "Château 90" range and "Table Château 90" cooktop configurations are provided under the heading "LE GRAND CASTEL® 90", while particulars for the "Château 75" range and "Table Château 75" cooktop configurations are provided under the heading "LE CASTEL® 75".

[18] Options for colour and trim are described in the next section, and I note that they include the option to "Engrave your plate" at no cost. Each of the three depicted examples shows a different phrase below the Owner's logo, on a small metal plate of the type highlighted at Exhibit BF-5.

[19] Similar to the cooktop section, the hood section provides particulars for various range hoods, including "Château Hood" models 165, 120, 90 and 75, and "Hotte Château 150", as well as the "Villa Hood" model in sizes "Hotte Villa" 180, 165, 150, 129, 90 and 75.

[20] The second part of the catalogue is titled "Create your Design". Its "Complementary products" section features a rotisserie (LA FLAMBERGE®), countertops, stainless steel wall backsplashes, sinks, faucets, and "props" (trays, drawers, and baskets). The "Cabinets" section

features the subsections “Meubles «Château»” (cabinetry featuring stainless steel and enamel finishes) and “Meubles «Mémoire»” (cabinetry featuring wood, glass and stainless steel finishes).

[21] The final section provides the Project Request form, to be used to generate a quote for a custom order. The form lists a choice of ranges that includes “Château” models 180, 165, 150, “Châtelet 120”, “Grand Castel 90” and “Castel 75”, as well as a choice of hoods that includes “H Château” models 180, 165, 150 and 120 and also the “Villa Hood” model. A different choice of cooktops is provided for each range, but the Mark is not displayed separately in association with the form’s choices for cooktops. The form is followed by information on ordering, shipping, service and warranty, including contact particulars for AGA Marvel in Michigan for service and parts information.

PRELIMINARY REMARKS REGARDING THE IDENTIFICATION OF THE EXHIBITS

[22] As a preliminary matter, the Requesting Party submits that the inconsistencies in the numbering and ordering of the exhibits to the affidavit make them impossible to accurately identify, such that “it is never certain to which of the appended documents the Affidavit refers, or if the documents that were intended to be appended were in fact attached”. In the Requesting Party’s submission, the inconsistencies “necessarily cast a shadow of doubt on the veracity of the contents of the Affidavit, and raise questions as to whether any meaningful weight can be given to Mr. Favier’s statements therein”.

[23] However, it has been established that technical deficiencies in evidence should not stop a party from successfully responding to a section 45 notice where the evidence provided could be sufficient to show use [see *Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)]. Especially in the context of section 45 proceedings—which are intended to be summary and expeditious—the Registrar has frequently considered certain deficiencies in affidavits to be mere technicalities [see, for example, *Brouillette, Kosie v Luxo Laboratories Ltd* (1997), 80 CPR (3d) 312 (TMOB); and *88766 Canada Inc v Tootsie Roll Industries Inc* (2006), 56 CPR (4th) 76 (TMOB)]. In particular, the Registrar has accepted exhibits that were neither clearly identified as such nor properly endorsed where the exhibits were instead identified or explained in the body of the affidavit, without reducing the weight of the exhibits or of the affiant’s statements [see, for example, *Borden & Elliot v Raphaël Inc* (2001), 16 CPR (4th) 96 (TMOB)].

[24] In the present case, I am able to readily identify each exhibit from its detailed description in the body of the affidavit. In the circumstances, I consider the omission of the page numbers from the exhibits' cover pages, and the obvious inversion of Exhibits BF-3 and BF-4, to be only minor errors in the assembly of the affidavit. I do not consider these technical errors to have any impact on the weight to be accorded to the exhibits or to Mr. Favier's sworn statements.

PRELIMINARY REMARKS REGARDING HEARSAY

[25] The Requesting Party further submits that the website screenshots at Exhibits BF-2 and BF-3, the showroom photographs at Exhibit BF-5, the invoices from AGA Marvel and Signature Bachand at Exhibits BF-8 and BF-10, and Signature Bachand's inventory records at Exhibit BF-11 all constitute hearsay evidence.

[26] The Requesting Party argues that Mr. Favier does not explain how he obtained these documents, other than by referring to unidentified "agents" taking the photographs at Exhibit BF-5.

[27] The Requesting Party further argues that there is no evidence that Mr. Favier represents AGA Marvel or Signature Bachand or would otherwise be in a position to give "admissible evidence capable of holding any weight" regarding their relationship, their normal course of trade, or the Signature Bachand showroom. In particular, the Requesting Party questions how Mr. Favier, a resident of France, would have knowledge of the appearance of a showroom in Montreal. The Requesting Party further submits that the exhibited photographs of the showroom do not meet the criteria of necessity and reliability or the common law business records exception.

[28] In general, hearsay evidence is *prima facie* inadmissible, unless it satisfies the criteria of necessity and reliability [*Labatt Brewing Co v Molson Breweries, A Partnership* (1996), 68 CPR (3d) 216 (FCTD)]. However, it is generally appropriate to apply these criteria less strictly in the context of a section 45 proceeding than in an adversarial proceeding intended to determine the rights of competing parties (see *FCA US LLC v Pentastar Transportation Ltd*, 2019 FC 745). The summary nature of section 45 proceedings is such that concerns regarding hearsay should generally only go to the weight of the evidence, rather than its admissibility [see *Eva Gabor*

International Ltd v 1459243 Ontario Inc, 2011 FC 18; see also *Derby Cycle Werke GmbH v Infinité Cycle Works Ltd*, 2013 TMOB 134; and *Wishbuds Inc v Sandoz GmbH*, 2013 TMOB 208].

[29] In particular, documents issued by third parties can be admissible to the extent that they support admissible statements. In this respect, the Federal Court has held that a distributor's invoice may be admitted as corroboration of a statement made by an officer of the trademark owner regarding sales of marked goods in Canada, if that statement is based on personal knowledge [see *Quarry Corp v Bacardi & Co* (1996), 72 CPR (3d) 25 (FCTD)].

[30] In the present case, given the nature of his position with the Owner, I accept that Mr. Favier would generally be knowledgeable about the branding, sale and distribution of the Owner's products and product-related literature [for similar conclusions, see *Prollenium Medical Technologies, Inc v Teoxane, SA*, 2016 TMOB 191; and *FCA US LLC v Pentastar Transportation Ltd*, 2018 TMOB 80, aff'd *FCA US LLC, supra* (FC)]. Indeed, in this case, Mr. Favier specifically states that, by virtue of his positions and functions with the Owner, he can attest to the truth of the facts described in his affidavit, and to the appearance of the Signature Bachand showroom in particular. I am also prepared to accept that a corporate officer in Mr. Favier's position would generally be knowledgeable about the appearance of his company's website.

[31] Accordingly, I accept that the screenshots, photographs, invoices and inventory reports in the aforementioned exhibits are admissible in support of Mr. Favier's assertions regarding the marketing and sale of the Owner's products. Given the summary nature of section 45 proceedings, I am of the view that it would be evidentiary overkill to require the Owner to furnish additional affidavits from its distributors and retailers, or to require Mr. Favier to travel to Canada personally to photograph use of the Mark. The fact that Mr. Favier is in a position to attest to the nature of the exhibited documents and to confirm whether they are representative suffices for the purposes of the present proceeding.

[32] That said, I agree with the Requesting Party that the exhibited webpages at least are not particularly probative, since there is no indication that it was possible to make purchases through the website or that these pages were otherwise displayed at the time of transfer of the goods in

Canada, during the relevant period or otherwise. Indeed, there is no information as to whether these pages were ever accessed by Canadians. At best, the webpages provide information on how the Owner characterizes its ranges, rather than evidence of trademark use in Canada.

ANALYSIS

[33] Otherwise, in its written representations, the Requesting Party makes three principal submissions:

1. Any demonstrated use of the Mark in Canada was not by the Owner.
2. References to “Chateau” in the evidence do not constitute use of the Mark as registered or a permissible deviation thereof.
3. The exhibits furnished by the Owner are insufficient to demonstrate use of the Mark as defined by section 4 of the Act.

[34] I will address each of these submissions in turn.

Use by the Owner

[35] The Requesting Party submits that any demonstrated use of the Mark by AGA Marvel or Signature Bachand would not enure to the Owner’s benefit, because the Owner has not established the requisite control over use of the Mark or otherwise met the requirements set out in section 50 of the Act.

[36] However, it is well established that a trademark owner’s ordinary course of trade will often involve distributors, wholesalers and/or retailers, and that distribution and sale of the owner’s goods through such entities can constitute trademark use that enures to the owner’s benefit [see *Manhattan Industries Inc v Princeton Manufacturing Ltd* (1971), 4 CPR (2d) 6 (FCTD); *Lin Trading Co v CBM Kabushiki Kaisha* (1988), 21 CPR (3d) 417 (FCA)].

[37] In the present case, I am satisfied that AGA Marvel and Signature Bachand are merely a distributor and a retailer of the Owner’s goods, respectively. Accordingly, evidence of licensed use under section 50 of the Act is not required. Indeed, as the designer and manufacturer of the Goods, the Owner necessarily has direct control over their character and quality, and is itself the first link in the distribution chain between the manufacturer and the ultimate consumer.

[38] In the circumstances, I am satisfied that any evidenced of use of the Mark through sales by AGA Marvel or Signature Bachand enures to the Owner's benefit for the purposes of this proceeding.

Deviation

[39] The Requesting Party submits that display of CHATEAU 165 below the Owner's logo on the metal plate affixed to the range depicted at Exhibit BF-5 does not constitute display of the Mark as registered. Similarly, the Requesting Party submits that display of CHATEAU 120SL and CHATEAU 150SL on the technical sheets at Exhibit BF-6 does not constitute display of the Mark as registered.

[40] In this respect, the Requesting Party seeks to draw an analogy with the Registrar's decision in *Mendelsohn Rosentzveig Shacter v Parmalat Dairy & Bakery Inc* (2004), 40 CPR (4th) 443 (TMOB), where it was found that display of the trademark LA CRÈME did not constitute display of the registered trademark LA CRÈME DU YOGOURT.

[41] The Owner, for its part, submits that the word CHATEAU is an acceptable variation of the Mark as registered. The Owner submits that "120SL" or "150SL" would be perceived as a reference to a specific size or model of CHATEAU range, citing *Smart & Biggar v Oy Lahden Polttimo AB* (2004), 35 CPR (4th) 348 (TMOB) in support. The Owner further submits that its logo would be perceived as a separate trademark. In the Owner's submission, the Mark is not altered by these types of additions.

[42] In considering whether the display of a trademark constitutes display of the trademark as registered, the question to be asked is whether the trademark was displayed in such a way that it did not lose its identity and remained recognizable, in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see whether the "dominant features" of the registered trademark have been preserved [*Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)].

[43] Furthermore, generally, use of a trademark in combination with additional words or

design features qualifies as use of the trademark if the public, as a matter of first impression, would perceive the trademark *per se* as being used. The issue is a question of fact, dependent upon such factors as whether the trademark stands out from the additional material, for example, by virtue of different lettering or sizing, or whether the additional material would be perceived as purely descriptive matter or as a separate trademark or tradename [*Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB)]. In this respect, it is well established that two trademarks may be used at the same time so long as they are not combined in a way that renders the individual marks indistinguishable [see *AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD) at 272].

[44] In the present case, notwithstanding the Requesting Party's submissions, I consider the word CHATEAU to be the dominant feature of the Mark as registered. In my view, the definite article "LE" and the omission of the circumflex accent from the capital letter A are minor features. Likewise, I consider the design and punctuation aspects of the subject design Mark—the simple font, the capitalization, and the quotation marks—to be minor features.

[45] Accordingly, I agree with the Owner that the dominant feature of the Mark as registered, namely the word CHATEAU, has been maintained. I consider the changes to the lettering and punctuation to be only minor deviations. Such changes, as well as the omission of the article "LE", do not significantly affect the visual impression, pronunciation or meaning of the Mark.

[46] Furthermore, I do not consider the addition of the model codes to alter the Mark's identity, despite them being in the same size and style of lettering as CHATEAU. In this respect, I agree with the Owner that such additional matter would likely be perceived as a designation identifying a specific size or model of CHATEAU range, and that CHATEAU *per se* would be perceived as the trademark. In this respect, I note that the technical sheets also refer to the ranges using the trademark CHATEAU on its own, without the product code, thus reinforcing the impression that CHATEAU as a trademark stands on its own.

[47] Similarly, I agree with the Owner that its logo above the Mark on the metal plate (or below the Mark on the CHATEAU 120SL technical sheet) would be perceived as a separate trademark. By virtue of the difference in size and lettering, the logo and the Mark stand out from each other.

[48] In my view, the case cited by the Requesting Party, *Parmalat Dairy & Bakery*, is distinguishable. In that case, the words DU YOGOURT, although descriptive, were nevertheless found to form a “dominant and essential” element of the registered trademark [at paragraph 17]. Their omission from the mark in use resulted in a trademark that was “totally different from the registered trade-mark” [at paragraph 19]. However, LA CRÈME DU YOGOURT is a phrase whose meaning differs substantively from that of just LA CRÈME. By contrast, in the present case, I do not find that omission of the definite article LE or of the quotation marks—or any other of the additions or omissions shown in the evidence—changes the substantive meaning of the Mark or otherwise creates a “totally different” trademark. Similarly, I do not find that the presence or absence of model codes affects the meaning of the Mark in the same way as the meaning of LA CRÈME DU YOGOURT was affected by deletion of the portion DU YOGOURT.

[49] Consequently, I am satisfied that display of CHATEAU constitutes display of the Mark as registered. Neither the additions nor the minor deviations discussed above alter the Mark’s identity. The Mark remains recognizable.

Sufficiency of the evidence

[50] The Requesting Party presents several additional arguments challenging the sufficiency of the evidence. In essence, the Requesting Party argues that the evidence fails to show that the Mark was displayed on or in association with any of the Goods at the time of their transfer in the normal course of trade in Canada during the relevant period.

[51] With respect to display of the Mark on the Goods themselves and at the point of sale, the Requesting Party submits that the photograph showing “CHATEAU 165” engraved on the bottom portion of the metal plate affixed to the range depicted at Exhibit BF-5 is not representative of the typical appearance of such plates, since the evidence shows that this portion of the plate is meant for custom text chosen by the purchaser. The Requesting Party also notes that the photograph in question was taken after the relevant period.

[52] The Requesting Party further submits that there is no evidence that the ranges on display in Signature Bachand’s showroom are in physical proximity to “the place at which the property

or possession of the Registrant's Goods is transferred to a purchaser".

[53] The evidence is not clear as to whether the Mark was displayed on the Goods themselves at the time of transfer in the normal course of trade during the relevant period. The metal plate bearing the Mark is affixed to what appears to be a model in a showroom. One of the functions of the Project Request form at Exhibit BF-4 appears to be to provide estimates for custom-ordered display models. However, Mr. Favier provides no explanations in this regard and, in any event, there is no indication as to whether the ranges depicted at Exhibit BF-5 or any others with a CHATEAU-branded plate were purchased by Signature Bachand or any other retailer during the relevant period. With respect to the metal plates on the goods transferred to customers, the catalogue at Exhibit BF-4 and the invoices at Exhibit BF-7 indicate that they would be either blank or custom-engraved.

[54] Regardless, it has been held that the appearance of a trademark on in-store displays in close proximity to the goods at the time of their sale may satisfy the requirements of section 4(1) of the Act, if the display provides notice that the trademark is associated with such goods [see, for example, *Loblaws Ltd v Richmond Breweries Ltd* (1983), 73 CPR (2d) 258 (TMOB); *Lafco Enterprises Inc v Canadian Home Publishers*, 2013 TMOB 44; and *Riches McKenzie & Herbert LLP v Parissa Laboratories Inc* (2006), 59 CPR (4th) 219 (TMOB)].

[55] In the present case, I am satisfied that display of the Mark on the model range's plate, together with display of the Mark on the technical sheet standing on the range, constitutes point-of-sale signage sufficient to create a notice of association between the Mark and the Owner's ranges. Although these displays of the Mark were photographed after the relevant period, Mr. Favier's sworn statement is clear that the photographs are representative of how the showroom in question appeared during the relevant period.

[56] Furthermore, although Mr. Favier does not attest to the exact location within the showroom where purchases are made, I am satisfied that the notice of association would be made and remain contemporaneous regardless of whether the purchase order is placed beside the model range or after walking to a different location within the showroom. In this respect, it has been held that display of a trademark in catalogues and similar documents used for ordering purposes can, in certain circumstances, provide the notice of association required by section 4 of

the Act [see, for example, *Dart Industries Inc v Baker & McKenzie LLP*, 2013 FC 97; and *Swabey Ogilvy Renault v Mary Maxim Ltd* (2003), 28 CPR (4th) 543 (TMOB)]. In the present case, I am prepared to infer that customers would be able to place orders from the showroom after examining the model stoves and related technical sheets and that such customers would perceive the Mark on these items as identifying the range being purchased.

[57] However, in the present case, I am not satisfied that the evidence shows placement of such an order by a store customer combined with a transfer of property in or possession of the ordered goods during the relevant period. In this respect, only one invoice from Signature Bachand in respect of a CHATEAU 120SL range is provided, and it is dated as follows: “23 Jul 16 31 JAN 17”. Mr. Favier attests that the invoice issued on July 23, 2016, which would suggest that January 31, 2017 may be the expected delivery date. However, as noted by the Requesting Party, that date is after the relevant period. Moreover, there is no indication on the invoice as to when payment was due or any other indication that might support an inference as to when property in the goods was transferred. Accordingly, I am not satisfied that this invoice demonstrates a transfer of property in or possession of a range branded in the manner shown at Exhibit BF-5 during the relevant period.

[58] With respect to the remaining invoice at Exhibit BF-10, it is in respect of a “36” CHATEAU 90” range. Mr. Favier has not furnished any photographs of point-of-sale signage for this type of range. Moreover, since Exhibits BF-2 and BF-4 indicate that the 90cm range is also marketed under the name GRAND CASTEL 90, I am not prepared to infer, in the absence of confirmation from Mr. Favier, that the point-of-sale signage for the 90cm range would have featured the trademark CHATEAU as opposed to the trademark GRAND CASTEL.

[59] In this respect, I note the Federal Court’s comments in *Guido Berlucchi & C Srl v Brouillette Kosie Prince*, 2007 FC 245, 56 CPR (4th) 401: a registered owner who relies on a single sale is “playing with fire in the sense that he must provide sufficient information about the context of the sale to avoid creating doubts in the mind of the Registrar or the Court that could be construed against him” [at paragraph 20].

[60] However, I note that the Mark is also displayed on the invoices at Exhibit BF-8, for sales by the Owner’s distributor to the Canadian retailer Signature Bachand.

[61] In this respect, it is well established that display of a trademark on an invoice that accompanies the goods at the time of transfer may satisfy the requirements of section 4(1) of the Act, if it provides the requisite notice of association between the Mark and the goods [see *Gordon A MacEachern Ltd v National Rubber Co Ltd* (1963), 41 CPR 149 (Ex Ct); and *Riches, McKenzie & Herbert v Pepper King Ltd* (2000), 8 CPR (4th) 471 (FCTD)]. The major consideration is “whether the trade-mark is being used as a trade-mark in describing the wares” and “whether appropriate notice of such use is being given to the transferee of the wares” [see *Tint King of California Inc v Canada (Registrar of Trade Marks)*, 2006 FC 1440 at paragraph 32].

[62] In the present case, as discussed above, the Mark appears in the body of the invoices, to identify specific invoiced goods. In the circumstances of this case and considering the evidence as a whole, I am satisfied that the listings “CHATEAU 90”, “CHATEAU 120 USA CENTENAIRE”, “CHATEAU 150 SL-CH150 K1”, “CHATEAU 90 HOOD”, and “CHATEAU 150 HOODFAN-MATTE BLACK” in the invoices from the Owner’s distributor to its Canadian retailer provided the retailer with the requisite notice of association between the Mark and the ranges and hoods it had purchased.

[63] The Requesting Party submits that there is no evidence of these invoices having accompanied the goods at the time of transfer. However, the invoices indicate that the goods are being sold and shipped to the same address; there is no separate “billing” address. I also note that each invoice specifies a payment term and a shipping method, indicating that the shipment was sent together with the invoice; indeed, there is no separate shipping or delivery date. Accordingly, I am prepared to infer that the exhibited invoices accompanied the goods at the time of shipping and delivery, so as to provide the requisite notice of association at the time of transfer of possession of the goods.

[64] The Requesting Party also submits that the redaction of prices and quantities from the invoices at Exhibit BF-8 suggests that these invoices might not represent transactions in the normal course of trade, and might even represent refunds for cancelled orders.

[65] However, the redaction of prices is not determinative. In this case, Mr. Favier attests that the Owner’s normal course of trade includes the sale of ranges and hoods by its distributor AGA

Marvel to various retailers, including Signature Bachand, and that the documents at Exhibit BF-8 are representative invoices for such goods. The documents at Exhibit BF-8 are consistent with this description. I would also note that each of these documents is titled “Invoice” and specifies a payment term and shipping method; there is nothing to suggest a refund or cancellation.

[66] With respect to display of the Mark on the invoices attached as Exhibit BF-7, as noted by the Requesting Party, the evidence does not establish that these particular invoiced goods were ultimately sent from AGA Marvel in Michigan to a retailer or purchaser in Canada. Indeed, Mr. Favier’s evidence appears to be that AGA Marvel is the Owner’s distributor for all of North America, and would thus not necessarily have sent these particular goods on to Canada. However, the point is moot, given my conclusion with respect to the invoices at Exhibit BF-8.

[67] In view of the foregoing, I am satisfied that the invoices at Exhibit BF-8 demonstrate use of the Mark in association with ranges and hoods within the meaning of sections 4 and 45 of the Act.

[68] Furthermore, I note that, on the Owner’s website, the terms “*cuisinières*” and “*fourneaux*” appear to be used interchangeably in reference to ranges, as shown at Exhibits BF-2 and BF-3. In light of this evidence, I accept that, for the purposes of this proceeding, the terms “*cuisinières*” and “*fourneaux*” are interchangeable and that the evidence in respect of ranges supports maintenance of the registration in respect of both “*cuisinières*” and “*fourneaux*”.

[69] However, in the absence of further information from Mr. Favier, I am not satisfied that the evidence demonstrates use of the Mark in association with “*fours*” (ovens) or “*tables de cuisson*” (cooktops). In this respect, I note that the technical sheets at Exhibit BF-6 refer to a patented “château” type of vaulted oven (“*four de type château voûté breveté*”). However, in the absence of any indication that such ovens are sold separately, the reference to a “château” type of oven appears, at best, to be a reference to the type of oven present in CHATEAU ranges. Similarly, the catalogue at Exhibit BF-4 references “Table Château” cooktops on the pages describing each model of range; however, in the absence of any indication that the cooktops are also sold separately, the references to “Table Château” appear to be to the type of customizable cooktop available for each model of CHÂTEAU range. Indeed, I note that the catalogue’s Project Request form does not identify cooktop choices by brand, but rather, only by model codes

association with each model of “Château” (or Châtelet, Grand Castel or Castel) range. In contrast, hoods are selectable independently and identified by brand (H Château, H Castel and Villa Hood). There is one entry for a CHÂTEAU “COOKTOP” in the exhibited invoices but, as mentioned above, its description makes it clear that this invoiced item is a complete range.

[70] In view of all of the foregoing, I am only satisfied that the Owner has demonstrated use of the Mark in association with the registered goods “*appareils de cuisson, nommément: cuisinières, fourneaux; hottes*” within the meaning of sections 4(1) and 45 of the Act.

[71] As the Owner furnished no evidence of special circumstances excusing non-use of the Mark within the meaning of section 45(3) of the Act, the registration will be amended to delete the remaining Goods.

DISPOSITION

[72] 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 following from the statement of goods:

[Appareils de cuisson, nommément: ...] fours, [...] tables de cuisson [...]

[73] The amended statement of goods will be as follows:

Appareils de cuisson, nommément: cuisinières, fourneaux; hottes.

Oksana Osadchuk
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

Smart & Biggar

FOR THE REGISTERED OWNER

McMillan LLP

FOR THE REQUESTING PARTY