



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2021 TMOB 72

Date of Decision: 2021-04-15

IN THE MATTER OF A SECTION 45 PROCEEDING

Barrette Legal Inc.

Requesting Party

and

Bramic Sales Inc.

Registered Owner

TMA553,489 for MONTEGO

Registration

INTRODUCTION

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13, (the Act) with respect to registration No. TMA553,489 for the trademark MONTEGO (the Mark).

[2] For the reasons that follow, I conclude that the registration ought to be maintained in part.

THE PROCEEDINGS

[3] At the request of Barrette Legal Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 30, 2018, to Montego Distributors Limited, the registered owner of the Mark as recorded on the registry at that time. The registration at issue

was subsequently updated, on May 23, 2018, to reflect the amalgamation of Montego Distributors Limited into Bramic Sales Inc. (the Owner) on August 1, 2016.

[4] The Mark is registered for use in association with the following goods:

Vegetables, fruits, jams & jellies, sauces, browning for gravies, meat tenderizers, flavouring syrups, spices, seasonings in general, extracts used as flavouring for foods and drinks, essences used as flavouring to make drinks and baked goods, food and drink flavourings, artificial flavours for food and drinks, baking powder, rice, vegetable and fruit juices and carbonated soft drink beverages (the Goods).

[5] The notice required the Owner to show whether the Mark has been used in Canada, in association with each of the Goods, at any time within the three-year period immediately preceding the date of the notice and, if not, the date when the Mark 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 April 30, 2015, to April 30, 2018.

[6] The relevant definition of use in the present case 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.

[7] In response to the Registrar's notice, the Owner furnished the affidavit of its Vice President, Irene Liu, sworn on June 18, 2018 (the Affidavit).

[8] While only the Requesting party submitted written representations, both parties were represented at an oral hearing held on January 26, 2021, jointly with the hearing for the summary expungement proceeding regarding registration No. TMA194,193 for the trademark MONTEGO. The latter proceeding is the subject of a separate decision.

THE EVIDENCE

[9] In the Affidavit, Ms. Liu states that the Owner has sold Goods in association with the Mark since 1968. As evidence of such sales in Canada throughout the relevant period, she

attaches 62 invoices as Exhibits 12.1 – 12.4 to the Affidavit, demonstrating that Goods were being sold to companies in the food industry, such as grocery stores, a wholesaler, and a restaurant, in different provinces across Canada. All but one of the invoices are dated within the relevant period.

[10] I note that all of the invoices are in the name of Bramic Sales Inc., including those that predate the August 1, 2016 amalgamation. At that time, the Owner’s name was Montego Distributors Limited, and yet the relationship between Bramic Sales Inc. and Montego Distributors Limited prior to amalgamation is not explained. However, for the purposes of this proceeding, it is sufficient to consider only the invoices from the relevant period dated after August 1, 2016, for the reasons set out below. It is therefore not necessary to consider the implications of the earlier invoices bearing the name of Bramic Sales Inc.

[11] With respect to display of the Mark during the relevant period, Ms. Liu divides the aforementioned Goods into ten categories and furnishes screen captures from the Owner’s website showing one or more products in each category, with the Mark displayed on each product label. For each product, she furnishes a spreadsheet listing its invoiced sales. These images and spreadsheets are attached as Exhibits 3 to 11 to the Affidavit.

[12] Also attached to the Affidavit, as Exhibit 2, is a screen capture printed from the Owner’s website, depicting multiple goods that are sold by the Owner. The printout indicates that it was made on May 8, 2018, *i.e.* eight days after the end of the relevant period. Attached as Exhibit 13 is a summary table providing annual sales figures for goods sold in association with the Mark from 2015 to 2018.

ANALYSIS AND REASONS FOR DECISION

[13] 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. The evidence in a section 45 proceeding need not be perfect; indeed, 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]. This burden of proof is light; evidence

need only supply facts from which a conclusion of use may follow as a logical inference [per *Diamant* at para 9].

[14] At the hearing, the Owner conceded that the evidence does not establish use of the Mark in association with “meat tenderizers, [...] extracts used as flavouring for foods and drinks, [...] artificial flavours for food and drinks, baking powder, rice, vegetable and fruit juices and carbonated soft drink beverages” during the relevant period. Indeed, the evidence is silent in this respect. There is also no evidence before me of special circumstances excusing non-use of the Mark. Accordingly, these Goods will be deleted from the registration.

[15] The Requesting Party raised that the screen capture with images of the products in Exhibit 2 is from outside the relevant period. Therefore, the Requesting Party submits that the images in Exhibits 3 to 11, showing how the Mark is displayed on product labels, may also be from outside the relevant period.

[16] However, I find that the Requesting Party’s dissection of the Owner’s evidence amounts to an overly technical approach that is inconsistent with the purpose of section 45 proceedings. It is the evidence as a whole that must be considered [see *Dundee Corp v GAM Ltd*, 2014 TMOB 152 at para 21; *Reckitt Benckiser (Canada) Inc v Tritap Food Broker*, 2013 TMOB 65 at para 27].

[17] The images in Exhibits 3 to 11 are not dated and Ms. Liu does not state explicitly that they are representative of the labelling for the products sold by the Owner during the relevant period. However, I am satisfied that the products as depicted in the images at Exhibits 3 to 11 were sold in Canada during the relevant period. In this regard, at paragraph 10 of the Affidavit, Ms. Liu provides a chart correlating each of her nine categories of Goods with at least one product image, a numeric code for that product, and a spreadsheet listing invoiced sales of that product, and she attests that this chart provides “a full account on the sales of [these Goods] during the relevant period”. I am prepared to accept that the images in the “full account” of sales during the relevant period are intended to be representative of the relevant period.

[18] Moreover, in the Exhibit 12 invoices, each product sold is identified with its brand name (for example, MONTEGO), a brief description of the product, and this numeric code. These

invoices are numbered and the exhibited spreadsheets made by the Owner correlate each depicted product with specific invoices and confirm the dates on which that product was sold. Even without taking into consideration invoices prior to August 1, 2016, and the one invoice outside the relevant period, there are multiple invoices for each of the depicted products.

[19] For each category of Goods listed in the chart, there are one or more products that demonstrate the use of the Mark in association with those Goods. For example, with respect to the category “Vegetables”, Exhibit 3.1 is an image of the product “CALLALOO”, which is a canned vegetable. This product is listed as product number 2665 in the chart, which is consistent with the spreadsheet and the invoices.

[20] Similarly, Exhibits 4.1.1 and 4.1.2 are images of the canned fruits “ACKEE” and “BREADFRUIT”, Exhibit 5.1.1 is an image of the jam “GUAVA JAM”, Exhibit 5.1.2 is an image of the jelly “GUAVA JELLY”, Exhibit 6.1 is an image of the sauce “SCOTCHBONNET PEPPER SAUCE”, Exhibit 7.1 is an image of the browning for gravies “BROWNING” (labelled as being “FOR GRAVIES”), Exhibits 8.1.1 – 8.1.5 are images of a variety of syrups, such as “GINGER BEER SYRUP” and “STRAWBERRY SYRUP”, Exhibit 10.1.1 is an image of the seasoning “JERK SEASONING”, and Exhibits 11.1.1 – 11.1.5 are images of a variety of essences, such as “ALMOND ESSENCE” and “VANILLA ESSENCE”. The images are consistent with the corresponding spreadsheets and invoices.

[21] Regarding the category “Spices”, the chart refers to two distinct products: “MONTEGO – CURRY POWDER – MILD 450g” and “MONTEGO – CURRY POWDER – HOT 624g”, having product codes 9196 and 9200 respectively. This is consistent with the spreadsheet and the invoices, but not with the screen captures. Exhibits 9.1.1 and 9.1.2 are images of a single canned product, which is “HOT CURRY POWDER”, but shown in two different sizes: “450 G” and “110 G”. Despite the apparent discrepancy between the versions of the products depicted in the screen captures and the ones listed in the chart, I am satisfied that at least the version of the product depicted in the screen capture in Exhibit 9.1.2 is included among the Owner’s invoices (albeit under product code 9199) and that this product can be described as “spices”. Indeed, the invoices show that “MONTEGO – CURRY POWDER – MILD” and “MONTEGO – CURRY POWDER – HOT” are each available in two sizes, and the screen capture at Exhibit 2 shows the

MILD product in two versions and the HOT product in two versions. Each depicted version displays the Mark on the can's label in the same manner.

[22] Regarding the category “Food and drink flavourings”, at the hearing, the Owner correlated this good to the Exhibit 8.1.6 image of “TEA CHOCOLATE”, which is consistent with Ms. Liu's characterization of the product in the chart. In light of Ms. Liu's characterization, I am prepared to accept that the product shown in Exhibit 8.1.6—a package of what appear to be compact balls and whole spices labelled as “tea” chocolate—can be described as drink flavouring. However, in the absence of any further explanation from Ms. Liu, I find that the evidence falls short of establishing that this product can also be considered a food flavouring.

[23] Having distinguished “drink” flavourings from “food” flavourings in the registration, the Owner must establish a *prima facie* case of use of the Mark in association with each of the goods specified in the registration [per *John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. As no evidence has been provided with respect to “food flavourings”, these Goods will be deleted from the registration.

[24] With respect to the remaining Goods, the invoices provided in Exhibit 12 show that all of these Goods were sold by the Owner, during the relevant period, to purchasers in Canada. Moreover, each image furnished for these Goods shows the Mark displayed on the product label and correlates to one or more of the Owner's invoices from the relevant period.

[25] Taking the evidence as a whole, based on the invoices indicating that vegetables, fruit, jam & jellies, sauces, browning for gravies, drink flavourings, flavouring syrups, spices, seasoning in general, and essences used as flavouring to make drinks and baked goods were sold to purchasers in Canada in the normal course of trade during the relevant period, and the corresponding screen captures showing the Mark displayed on the labels of such Goods, I accept that the Owner sold these Goods bearing the Mark in Canada during the relevant period.

[26] In view of the above, I am satisfied that the Owner has shown use of the Mark in association with the registered goods “vegetables, fruit, jam & jellies, sauces, browning for gravies, [...] flavouring syrups, spices, seasoning in general, [...] essences used as flavouring to

make drinks and baked goods, [...] and drink flavourings [...]” within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[27] In view of all of the foregoing, 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 amended to delete “meat tenderizers, [...] extracts used as flavouring for foods and drinks, food [... flavourings,] artificial flavours for food and drinks, baking powder, rice, vegetable and fruit juices and carbonated soft drink beverages” from the Goods.

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

vegetables, fruit, jam & jellies, sauces, browning for gravies, flavouring syrups, spices, seasoning in general, essences used as flavouring to make drinks and baked goods, and drink flavourings.

Oksana Osadchuk
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2021-01-26

APPEARANCES

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Yann Canneva For the Requesting Party

AGENTS OF RECORD

Nelligan O'Brien Payne LLP For the Registered Owner

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