



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 031

Date of Decision: 2023-03-02

IN THE MATTER OF A SECTION 45 PROCEEDING

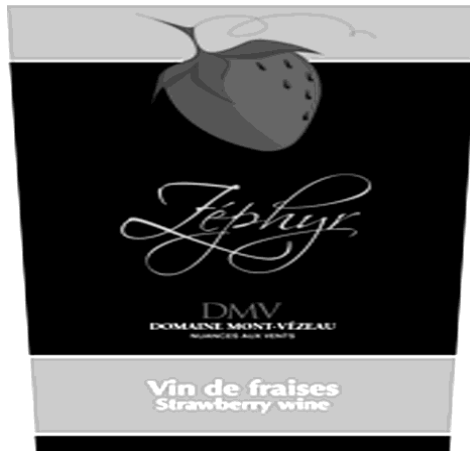
Requesting Party: Blu Spirit Importing, LLC

Registered Owner: Domaine Mont-Vézeau

Registration: TMA847,948 for ZÉPHYR DMV DOMAINE MONT-VÉZEAU
VIN DE FRAISES STRAWBERRY WINE & DESIGN

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) in respect of registration No. TMA847,948 for the mark ZÉPHYR DMV DOMAINE MONT-VÉZEAU VIN DE FRAISES STRAWBERRY WINE & DESIGN (the Mark), shown below.



[2] The statement of goods consists of a strawberry wine.

[3] For the reasons that follow, I conclude that the registration ought to be expunged.

THE PROCEEDING

[4] At the request of Blu Spirit Importing, LLC (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on November 12, 2021, to Domaine Mont-Vézeau. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the Mark had been used in Canada in association with the good 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 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 November 12, 2018 to November 12, 2021.

[6] The relevant definition of “use” 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 declaration of Mr. Marc Renaud, Co-owner, sworn and signed on February 10, 2022, in Ripon, Quebec, including three photos.

[8] Both parties submitted written representations, and no hearing was held.

THE OWNER'S EVIDENCE

[9] Mr. Renaud's declaration is short and reproduced in its entirety below.

[Translation]

"We hereby want to let you know that we are still using trademark TMA847,948. This trademark is used in our advertising at Domaine, and the product is still available on our shelves. Please find attached three photos: the first and the second the advertising outside our domain and the third our bottles on shelves (the three photos were taken on February 9, 2022)."

[10] In support, Mr. Renaud attached three photographs to his declaration:

- Photograph 1 and 2: A wooden building on which you can see three posters displaying bottles and glasses of wine. No words or details are visible on the posters.
- Photograph 3: A shelf with bottles on it. It is impossible to make out or read what is on the labels of the bottles.

ANALYSIS AND REASONS FOR DECISION

Evidence submitted in written submissions is inadmissible

[11] As a preliminary matter, I note that in its written representations, the Owner submitted an affidavit that refers to facts not in evidence. These submissions will be disregarded [*Ridout & Maybee LLP v Encore Marketing International, Inc* (2009), 72 CPR (4th) 204 (TMOB)]. I also note that the Owner was informed that this affidavit would not be considered as evidence in a letter from the Registrar dated September 15, 2022.

Use of the mark

[12] Although invoices are not required to satisfactorily respond to a section 45 notice [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)], some evidence of transfer in the normal course of trade in Canada during the relevant period is necessary [*John Labatt Ltd v. Rainier Brewing Co.* (1984), 80 CPR (2d) 228 (FCA)]. This evidence may take the form of documents such as invoices or sales reports, but can also be through clear sworn statements concerning sales volumes, dollar value of sales or equivalent factual details [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79].

[13] In this case, no invoice was provided, and there is no further evidence to support a commercial transaction in the normal course of trade during the relevant period, namely, between November 12, 2018 and November 12, 2021. The applicant's declaration reproduced in its entirety above is not sufficient for the Registrar to conclude that there were sales of goods during the relevant period; it is too broad and generic and amounts to a bare assertion of use.

[14] As for the photographs submitted, the Mark cannot be seen, they were taken outside the relevant period, and there is no indication or explanation to determine whether they are representative of how the goods would have been sold to customers in Canada during the relevant period.

[15] Had Mr. Renaud provided invoices from the Owner for strawberry wine dated between November 12, 2018 and November 12, 2021, *in a timely manner* (emphasis added) and provided clear photographs showing how the Mark appears on the bottles of strawberry wine, my decision could have been different.

[16] In view of the foregoing, I am not satisfied that the Owner has shown use of the Mark in Canada within the meaning of sections 4 and 45 of the Act. Moreover, the declaration does not provide any particular circumstances to justify the absence of use.

DECISION

[17] 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 expunged.

Martin Béliveau
Chairperson
Trademarks Opposition Board
Canadian Intellectual Property Office

Certified translation
Daniel Lepine

The English is WCAG compliant.

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: Ridout & Maybee LLP

For Registered Owner: N/A