



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 049

Date of Decision: 2023-03-15

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Caldera Distilling Inc.

Registered Owner: Arctica Food Group Canada Inc.

Registration: TMA955,263 for Mountain, maple leaf & Arctica

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. TMA955,263 for the trademark Mountain, maple leaf & Arctica (the Mark). The Mark is shown below:



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

(1) Food, namely fish namely: halibut, turbot, pollock, cod, flounder, seafood, namely: sea cucumber, shrimp, whelk, scallop, crab, lobster, meats namely: chicken, beef, veal, pork, duck, lamb, turkey, unprocessed cereals, beverages namely: red and white wines, beers, apple juice, orange juice, energy drinks and bottled water.

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

THE PROCEEDING

[4] At the request of Caldera Distilling Inc. (the Requesting Party), the Registrar of Trademarks issued a restricted notice under section 45 of the Act on March 18, 2022, to Arctica Food Group Canada Inc. (the Owner), the registered owner of the Mark, for the following goods listed in the registration:

Beverages namely: red and white wines, beers, apple juice, orange juice, energy drinks and bottled water (the Goods).

[5] The notice required the Owner to show whether the Mark was 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 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 March 18, 2019 to March 18, 2022.

[6] The relevant definitions of “use” in the present case are set out in section 4 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] Where the owner has not shown “use”, the registration is liable to be expunged or amended, unless there are special circumstances that excuse the absence of use.

[8] In response to the Registrar’s notice, the Owner furnished the affidavit of Lory Wang sworn on June 9, 2022, to which were attached Annexes A to C.

[9] Both parties submitted written representations and no oral hearing was held.

THE EVIDENCE

[10] In her affidavit, Ms. Wang states that she has been the Owner's CEO since 2013. She also states to be in charge of developing products under the Mark and sales related thereto [paras 1 and 2].

[11] Ms. Wang asserts that the Mark has been used in association with the Goods since at least as early as August 10, 2019. In particular, she states that the Mark has been displayed on bottled water since that date and that the Owner "provided" such bottled water to its customers at various fairs. She also states that the Mark has been used in association with Kombucha based beverages since as early as July 2021. With respect to the latter product, she states that in June 2021 samples of Kombucha based beverages were exchanged with Kefiplant manufacturer (the Manufacturer). She further states that the Kombucha juices' samples were bottled under the Mark [paras 4 to 8].

[12] In support, the following Annexes are attached to Ms. Wang's affidavit:

- Five pictures [Annex A]. The first two pictures show, respectively, one plastic 500ml bottle of water and several packages of bottled water placed on a pallet. The bottles' labels prominently display the Mark and read "Natural Spring Water – Eau de source naturelle" and "Ozonated – Ozonée". Two other pictures show sponsors' posters displaying the Mark among other trademarks for two events: The 2019 Quebec Chinese Enterprise Excellence Awards Gala and the Sino-Quebec Tourism Forum. The last picture shows an event's stand with a background poster displaying the Mark followed by Chinese characters, images of white plastic bottles, stand-up pouches and several unidentifiable goods. I note that none of the products shown on the background poster are beverages. A trade show table displaying several products is placed before the background poster. Some of the products on the table appear to be those shown in the background poster. I note that some black bottles displaying a gold label are also displayed on the table.

- One invoice and three email exchanges [Annex B]. The invoice, dated June 8, 2021, is issued by the Manufacturer to the Owner. The description field reads [TRANSLATION] “various laboratory - product development”. The emails are exchanged between Ms. Wang and a Manufacturer’s representative and are dated between June 8 and 30, 2021. They refer to product development fees and to the results of a Kombucha based beverage tasting session performed among Ms. Wang’s team. In the email dated June 21, 2021, Ms. Wang explains that despite the mixed results of the tasting session, it was decided to move forward with respect to three recipes, including the recipe against the hangover. On the last paragraph of that email, Ms. Wang writes: [TRANSLATION] “I will be able to sign everything for you and send you the payment at the same time as the samples. We are talking of 600mg per 330ml. How many grams will you need?”.
- One picture of a 330ml bottle filled with an orange liquid [Annex C]. The bottle’s label prominently displays the word Kombucha followed by “Concombre de mer et gengimbre – Sea Cucumber & Ginger”. The Mark is displayed on the top right side of the bottle followed by two speech balloons which read “Allô, lendemain de veille!” - “Hi, hangover!”.

REASONS FOR DECISION

[13] The Requesting Party submits that the Owner has failed to describe its normal course of trade and has not provided sufficient facts from which the Registrar can make any inference. The Requesting Party also submits that Ms. Wang’s affidavit only contains mere assertions of use of the Mark as the evidence does not establish the transfer of the Goods. In particular, it submits that the evidence related to bottled water is ambiguous and that there is no evidence of sales of the Kombucha based beverages.

[14] In response, the Owner submits that Ms. Wang’s statements should be accepted at face value and that the evidence must be considered as a whole. In particular, it submits that the registrar can infer from the evidence that the Goods bore the Mark and were delivered within the normal course of trade through [TRANSLATION] “purchase-sale

transactions” to the Owner’s customers at the fairs [Owner’s written representations, paras 9 and 10].

[15] As rightly observed by the Owner, evidence must be considered as a whole and an affiant’s statements must be accorded substantial credibility in a section 45 proceeding [see *Kvas Miller Everitt v Compute (Bridgend) Ltd* (2005), 47 CPR (4th) 209 (TMOB), and *Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para 25]. It is also well established that while the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448 at para 38] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD) at para 3], sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with the Goods within the registered owner’s normal course of trade.

[16] In the present case, the Owner does not provide sufficient facts regarding its business and normal course of trade. First, I note that while Ms. Wang states that it develops its own products for further sales, the documented evidence appears to show that products are developed by a third party manufacturer. Furthermore, while the evidence shows that the Owner provides samples measured in grams to its manufacturer, no further information is provided as to the sample’s nature or as to whether they are related to its core business. Second, while I accept that the Owner is in the business of sales, the evidence is silent as to whether it is a distributor, a wholesaler or a retailer, and as to whether it sells to retailers or directly to end customers. Indeed, Ms. Wang provides no detail about the Owner’s customers attending the events she refers to in her affidavit. In this respect, I note that while both events seem to be addressed specifically to Chinese people, neither the gala nor the tourism fair appear to target people from a particular business model or rather to target end customers. Lastly, I note that Ms. Wang provides no detail about the Owner’s business practices, including marketing and sales practices.

[17] Thus, per *Performance Apparel* and *Union Electric Supply Co, supra*, and in view of the evidence as a whole, I am not satisfied that the Owner has sufficiently demonstrated what is its normal course of trade.

[18] Even if I were to accept that sufficient facts were provided with respect to the normal course of trade, the evidence fails to demonstrate transfer of the Goods in Canada during the relevant period.

[19] In this respect, I note that although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD) at 486], some evidence of a transfer in the normal course of trade in Canada is necessary [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)]. Such evidence can be in the form of documentation like invoices, sales reports, but can also be through clear sworn statements regarding volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79].

[20] With respect to the bottled water, although Ms. Wang states that the Owner *provided* them to its customers at the fairs, she does not clearly state that bottled water was sold [my emphasis]. Furthermore, given that the the Owner's business practices have not been detailed, I am not in a position to infer that the bottled water was "provided" for the purpose of soliciting orders of such product from prospective customers at the fairs. Consequently, it is not clear from the evidence that the bottled water was "provided" as an object of trade in and of itself rather than as a means of promoting other products or services [see *Premier School Agendas Ltd v Styles* (2007), 62 CPR (4th) 66 (TMOB); and *Smart & Biggar v. Sutter Hill Corp.* 2012 TMOB 121 at para 10].

[21] With respect to the Kombucha based beverages, I note that Ms. Wang does not even state that such goods were "provided". Indeed, She simply states that samples of Kombucha based beverages were bottled under the Mark. Moreover, as noted by the Requesting Party, the evidence does not show that this product went further than the tasting stage and that it was commercialized.

[22] Further, Ms. Wang does not provide any invoices, purchase orders or other documents establishing that bottled water and Kombucha based beverages were sold or otherwise transferred. Nor does she provide any figures or clear factual particulars to allow me to reasonably infer any transfer. Therefore, without further evidence from Ms. Wang, I am not prepared to accept that sales of bottled water and Kombucha based beverages actually occurred in Canada during the relevant period.

[23] As for the remaining Goods, the evidence is completely silent with respect to them.

[24] Therefore, Ms. Wang's general statements amount to a mere assertion of use only, rather than statements of fact showing use of the Mark in association with the Goods. Given this finding, I do not need to determine if notice of association has been given to the customers during the relevant period or whether the beverage shown on Annexes B and C correlates to "energy drinks" or to any of the remaining Goods.

[25] Based on all the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the Goods within the meaning of sections 4(1) and 45 of the Act. As the Owner furnished no evidence of special circumstances excusing the absence of use of the Mark, the registration will be amended to delete the Goods.

DISPOSITION

[26] 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 amended to delete the following goods "Beverages namely: red and white wines, beers, apple juice, orange juice, energy drinks and bottled water".

[27] Consequently, the amended statement of goods will read as follows:

(1) Food, namely fish namely: halibut, turbot, pollock, cod, flounder, seafood, namely: sea cucumber, shrimp, whelk, scallop, crab, lobster, meats namely: chicken, beef, veal, pork, duck, lamb, turkey, unprocessed cereals.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

No hearing held

AGENTS OF RECORD

For the Requesting Party: Cynthia D. Mason (Mason Professional
Corporation)

For the Registered Owner: Richard Tetreault