Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 073

Date of Decision: 2023-05-01

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: CPST Intellectual Property Inc.

Registered Owner: InjaNation Fun and Fitness Inc.

Registration: TMA979,781 for INJANATION

INTRODUCTION

[1] This is a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA979,781 for the trademark INJANATION (the Mark). The Mark is registered for use in association with the following goods and services:

Cl 21 Drinking bottles for sports; Water bottles

Cl 25 Athletic clothing; Casual clothing; Hats.

(the Goods)

Cl 41 Entertainment services, namely the provision of an indoor trampoline park, climbing centre and obstacles courses; Entertainment services, namely providing party planning, birthday planning services and organizing children's party entertainment activities; Organization and administration of group activities, team building and corporate events and sporting contests in the nature of obstacle courses, fitness training, indoor climbing and indoor trampolining; Physical fitness

instruction in the fields of trampoline fitness, obstacle course training and climbing; Providing training gym facilities; Summer camps; Organizing and providing educational and recreational activities, namely, day camps and recreational camps.

Cl 43 Café services.

(the Services)

[2] I conclude that the registration ought to be maintained.

THE PROCEEDING

[3] At the request of CPST Intellectual Property Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on June 28, 2021 to the registered owner of the Mark, InjaNation Fun and Fitness Inc. (the Owner).

[4] The notice required the Owner to show whether the Mark was used in Canada in association with the Goods and Services 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 June 28, 2018 to June 28, 2021 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the absence of use is due to special circumstances.

[5] The relevant definitions of use 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.
>
> 4(2) A trademark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[6] 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 need not be perfect; indeed, the Owner need only establish a *prima facie* case of use within the meaning of sections 4 and 45 of the Act. This burden of proof is light;

evidence must only supply facts from which a conclusion of use may follow as a logical inference [*Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184].

[7] In response to the notice, the Owner furnished the Affidavit of Timothy Michael Ritchie, the Co-Founder and General Manager of the Owner, sworn on September 27, 2021, together with Exhibits 1 to 20.

[8] Neither party submitted written representations. No hearing was held.

THE EVIDENCE

[9] Mr. Ritchie states that the Owner operated an indoor adventure and activity centre in Calgary, Alberta in association with the Mark during the Relevant Period. The centre featured a climbing park, trampoline park with foam pits, dodgeball courts, high performance trampoline, birthday and events center, lounge and café (the Facility).

[10] Mr. Ritchie states that the Owner provided the Services to customers at the Facility in association with the Mark during the Relevant Period. In support, he provides:

(a) Exhibit 2: a photograph of an employee uniform which displays the Mark. Such employee uniforms which would have been worn by all or substantially all employees when interacting with customers at the Facility during the Relevant Period.

(b) Exhibit 3: a photograph of padding which displays the Mark. Such padding was used throughout the Facility during the Relevant Period.

(c) Exhibit 4: a record of customers using the Facility in 2018 and 2019 (more than 196,000 customers between July 2018 and December 2019).

(d) Exhibit 5: a digital representation of a wrist band which displays the Mark. All customers using the Facility during the Relevant Period had to wear such a wrist band as a condition of admission and proof of payment.

(e) Exhibit 6: a screen shot from a safety video which displays the Mark. All customers were required to watch the safety video before using the Facility during the Relevant

Period and the video ran on a continuous loop in the Facility at all hours of operation during the Relevant Period.

(f) Exhibit 7: screenshots from a "InjaNation Facility Tour" video posted on YouTube in February 2020 showing the Mark as it was displayed during the Relevant Period on the exterior of the Facility and also showing various indoor areas including: welcome and customer queue area, climbing area, children's obstacle course and play area, military obstacle course and "warped walls" training facility, trampoline park, obstacle, exercise and training courses, and party area and party room used to host events.

(g) Exhibit 8: photographs showing the Mark as it was displayed in the café located in the Facility during the Relevant Period.

(h) Exhibit 9: a digital representation of a receipt showing how the Mark would have been displayed on customer receipts issued in the café during the Relevant Period.

(i) Exhibit 10: a Facebook page dated December 1, 2017 (i.e. before the Relevant Period) promoting the café.

(j) Exhibit 11: a December 2019 Marketing Report which highlights various marketing approaches used by the Owner during the Relevant Period including social media, e-mail direct marketing and promotional cards.

(k) Exhibit 12: a breakdown of the Owner's marketing spend for 2018 and 2019 (in excess of $192,000 for the period July 2018 to December 2019). All or substantially all of the marketing initiatives would have featured the Mark.

(l) Exhibits 13 to 17: screenshots from the Owner's Facebook page during the Relevant Period promoting the Services offered at the Facility such as the party rooms, day camps, summer camps, birthday parties, teen and tween nights, group events and parties, competitions and tournaments.

[11] Finally, Mr. Ritchie states that, during the Relevant Period, the Owner sold the Goods, each of which displayed the Mark. In support, he provides:

(a) Exhibit 18: photographs of socks, headbands, a toque and t-shirts displaying the Mark, which goods were sold to customers by the Owner during the Relevant Period.

(b) Exhibit 20: excerpts from the Owner's sales records from time periods within the Relevant Period which Mr. Ritchie states are a true and accurate representation of the Owner's sales of Goods bearing the Mark. The sales records list the following products – socks, headbands, padlocks (which are not included in the Goods), wristbands, hats, shirts, jackets, and water bottles. In each case, the product name provided in the sales report is prefaced by INJANATION – for example, INJANATION wristband, INJANATION staff jacket and INJANATION water bottle.

REASONS FOR DECISION

[12] In assessing the evidence, I have kept in mind that it must be considered as a whole [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)] and that reasonable inferences can be made from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64].

Goods

[13] The evidence described above shows that the Owner sold socks, headbands, wristbands, hats, shirts, jackets, and water bottles in Canada in the normal course of trade during the Relevant Period. However, the evidence only includes photographs showing the Mark on socks, headbands, toques and t-shirts – it does not include photographs showing how the Mark was displayed on the other products, namely wristbands, jackets and water bottles. That said, given Mr. Ritchie's statements that each of the Goods displayed the Mark and that the sales records are a true and accurate representation of the Owner's sales of Goods bearing the Mark, as well as the way in which the products are described in the sales report as noted above, it is reasonable to infer that the Mark would have been displayed on wristbands, jackets and water bottles in a manner similar to that shown in the photographs of the other products when they were sold to customers.

[14] Further, I am satisfied that the goods sold, namely socks, headbands, wristbands, hats, shirts, jackets, and water bottles, correlate to the Goods. In particular, I am satisfied that water bottles are both water bottles and drinking bottles for sports,

and that socks, headbands, wristbands, shirts and jackets are both athletic clothing and casual clothing, and that toques are hats.

[15] Accordingly, I am satisfied that the Mark was used in Canada by the Owner in association with the Goods during the Relevant Period within the meaning of sections 4(1) and 45 of the Act.

Services

[16] Mr. Ritchie states that the Services were offered in the Facility during the Relevant Period which is entirely consistent with the nature of the Facility as shown in the evidence. Accordingly, I am satisfied that the Services were performed at the Facility during the Relevant Period.

[17] Further, the evidence shows that, during the Relevant Period, the Mark was displayed on the exterior of the Facility, on padding throughout the interior of the Facility, on employee clothing and on the wristbands worn by users of the Facility as well as on advertising and promotional material.

[18] Accordingly, I am satisfied that the Services were performed in association with the Mark in Canada during the Relevant Period.

[19] Accordingly, I am satisfied that the Owner has demonstrated use of the Mark in association with the Services during the Relevant Period within the meaning of sections 4(2) and 45 of the Act.

DISPOSITION

[20] 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.

Robert A. MacDonald
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: CPST Intellectual Property Inc.

For the Registered Owner: Norton Rose Fulbright Canada LLP / SENCRL, SRL