



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 083

Date of Decision: 2023-05-17

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Resto Pub Délice Inc.

Registered Owner: Délice Resto Lounge Inc.

Registration: TMA681,179 for DÉLICE RESTAURANT and Design

INTRODUCTION

[1] This is a decision related a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c. T-13 (the Act) with respect to registration No. TMA681,179 for the trademark DÉLICE RESTAURANT and Design (the Mark) shown below:



[2] The statement of services, including the Nice classes (CI) is reproduced below:

[TRANSLATION]

CI 39 (1) Restaurant services, namely home delivery of restaurant meals

CI 43 (2) Restaurant services, namely dining room, take out of restaurant meals

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

THE PROCEEDING

[4] At the request of Resto Pub Délice Inc. (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on October 13, 2021, to Délice Resto Lounge Inc. (the Owner), the registered owner of the Mark.

[5] The notice required that the Owner show whether the trademark has been used in Canada in association with each of the services 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 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 between October 13, 2018, and October 13, 2021.

[6] The relevant definition of “use” is set out in section 4 of the Act as follows:

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.

[7] In the absence of use as defined above, a trademark registration is liable to be expunged, unless the absence of use is due to special circumstances.

[8] In response to the Registrar’s notice, the Owner produced the solemn declaration of Christopher Létourneau, signed on January 10, 2022, to which were attached exhibits CL-1 to CL-5.

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

THE EVIDENCE

[10] In his declaration, Mr. Létourneau identifies himself as the Owner's manager since 2014.

[11] Mr. Létourneau asserts that the Mark was used in Canada during the relevant period in advertising or in the performance of services in the normal course of the Owner's trade. In particular, he asserts that the Mark was displayed on the restaurant's menus and on brochures, posters and publications posted on social media during that period [paras 5–6].

[12] In support of his declaration, Mr. Létourneau attaches the following relevant exhibits:

Use of the Mark in association with restaurant services, in general:

- An image that Mr. Létourneau describes as being a brochure [Exhibit CL-3]. The image shows a page entitled [TRANSLATION] "Tartare Thursday -20% discount" with a photo in the centre of a plate of steak tartare with fries and salad. The Mark is displayed below the plate, at the bottom of the page. Mr. Létourneau asserts that the brochure was included in the menu distributed in the dining room during the relevant period [para 10].

Use of the Mark in association with restaurant take out and home delivery services:

- An image of a mock-up of a box [Exhibit CL-1]. The image shows the top and three flaps of a mock-up of a pizza box. The Mark is displayed in the lower right corner of the top of the box. A Quebec address, a telephone number and the indications [TRANSLATION] "Take out" and "Delivery" are displayed on one of the flaps. The size of the box, [TRANSLATION] "Small 10" is indicated on the other two flaps. Mr. Létourneau asserts that the box was intended to contain meals, including pizzas, and that it was used in the performance of the two services referred to above in Canada during the relevant period [para 8].

- An image that Mr. Létourneau describes as being a promotional poster [Exhibit CL-4]. The image shows a page entitled [TRANSLATION] “Online orders – Take out + Delivery” followed by the address *www.delice.ca* and a photograph of a cell phone showing a salad, a “Poke Bowl” and a pizza. The Mark is displayed in the lower right corner of the page. Mr. Létourneau asserts that that poster was used for advertising the two services and was displayed inside the restaurant during the relevant period [para 11].
- An image that Mr. Létourneau describes as being a “story” publication (the Publication) [Exhibit CL-5]. The image shows a page entitled [TRANSLATION] “Asian Sunday, -20% discount on woks for take out and delivery *www.delice.ca*”, followed by a photo of a cardboard container containing chicken, rice and vegetables. The Mark is displayed at the top of the page. Mr. Létourneau asserts that the image was used on social media to advertise the two services in Canada during the relevant period [para 12].

REASONS

[13] As a preliminary matter, I note that, in its written representations, the Requesting Party refers to elements that are not in evidence. In particular, it refers to an application filed by the Owner after the notice and a hyperlink to the Owner’s menu dated May 17, 2020. However, in a section 45 proceeding, the Registrar may only receive evidence tendered by or on behalf of the registered owner [see *Meredith & Finlayson v Canada (Registrar of Trade Marks)* (1991), 40 CPR (3d) 409 (FCA)]. Moreover, although the Registrar has the discretion to check files under its supervision, it does not generally exercise that power in a section 45 proceeding [*2001237 Ontario Ltd v Footstar Corp*, 2003 CanLII 71192 (TMOB)]. I have no reason to exercise such discretion in this case. Regardless, the fact that the owner applied to register a new trademark has no impact on this proceeding. I will therefore not consider the elements in question in my decision.

[14] Otherwise, in its written representations, the Requesting Party submits that all the exhibits must be dismissed on the ground that they do not show a date. It also submits that the exhibits do not [TRANSLATION] “truly” show the use of the Mark

[Requesting Party's written representations, page 2]. For example, it submits that the brochure is not valid evidence of use without a photo of the menu containing it. Similarly, it submits that the promotional poster and the Publication are not valid evidence without a photo showing the poster in the restaurant and a screen capture of the Publication on a given social media. The Requesting Party also submits that the take out and delivery services are distinguishable from each other and that the evidence does not show use of the Mark for *each* of those services.

[15] As noted in the Owner's response, there is no particular type of evidence that must be provided in a section 45 proceeding and the evidence need not be perfect [see *Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)]. Moreover, 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 and that a registered owner must only establish *prima facie* evidence of use within the meaning of sections 4 and 45 of the Act. The burden of proof is low; evidence must only supply facts from which a conclusion of use may follow as a logical inference [see *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9].

[16] In this case, in support of his allegations of use, Mr. Létourneau provides several images displaying the Mark in association with all the services in Canada and explicitly asserts that the images correspond to the relevant period. In this respect, it is well established that an affiant's sworn statements are to be accepted at face value, and statements in an affidavit must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79 at para. 25]. In that context, a photograph of the menu containing the brochure was not needed, nor was a photograph of the poster displayed on the walls of the restaurant or screen captures showing the Publication.

[17] Finally, the evidence shows that both the take out and home delivery services were advertised in two separate ways, namely on posters in the restaurant and on social media. Mr. Létourneau also expressly indicated that the pizza box used for take out restaurant meals is the same one used for home deliveries [Létourneau declaration,

para 8]. In light of that assertion, I accept that that evidence shows use of the mark in association with both the take out and delivery services [for similar conclusions, see *GMAX World Realty Inc. v RE/MAX, LLC*, 2015 TMOB 148, at para 70; *Borden Ladner Gervais LLP v TLM Media Group Inc.*, 2021 TMOB 161, at para 45].

[18] For all these reasons, I am satisfied that the Owner has established use of the Mark in association with each of the registered services within the meaning of sections 4(2) and 45 of the Act.

DISPOSITION

[19] Pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Gerald Woodard
Certified true translation

Appearances and Agents of Record

No hearing held

AGENTS OF RECORD

For the Requesting Party: Stein Monast S.E.N.C.R.L./L.L.P.

For the Registered Owner: ROBIC

The English is WCAG compliant