



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 084

Date of Decision: 2023 05 24

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Shift Law Professional Corporation

Registered Owner: Apollo Motorhome Holidays Pty. Ltd.

Registration: TMA696,963 for APOLLO

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. TMA696,963 for the trademark APOLLO (the Mark) registered for use in association with the following goods and services:

- CI 12 Land motor vehicles namely motor homes and campervans;
- CI 35 Wholesaling and retailing services relating to the sale of ex-rental motor vehicles including motor homes and campervans;
- CI 37 Maintenance, servicing and repair of motor vehicles, including motor homes and campervans;
- CI 39 Vehicle leasing and rental services.

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

THE PROCEEDING

[3] At the request of Shift Law Professional Corporation (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on March 16, 2021, to the registered owner of the Mark, Apollo Motorhome Holidays Pty. Ltd. (the Owner).

[4] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods and 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 March 16, 2018 to March 16, 2021 (the Relevant Period). In the absence of use, the registration is liable to be expunged, unless the absence of use was due to special circumstances.

[5] 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. As such, the evidentiary threshold is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448] and evidentiary overkill is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the Mark was used in association with the goods and services specified in the registration.

[6] In response to the Registrar's notice, the Owner furnished the Statutory Declaration of Tennille Carrier, the Company Secretary of the Owner, declared in Brisbane, Australia on October 29, 2021, together with Exhibits 1 to 10 (the Declaration).

[7] Both parties submitted written representations and attended a hearing.

THE EVIDENCE

[8] Ms. Carrier states that the Owner, which was incorporated in Queensland, Australia on April 2, 1991, specializes in campervan rentals, sales and maintenance with seven branches located across Canada (paras 5 and 6).

[9] Ms. Carrier states that the Owner offers its “APOLLO brand campervan rental and sales services” through its website at *canadream.com* which links the Owner’s customer base to its seven physical “RV Rental pick-up and drop-off locations across Canada” (para 7). In support, she provides, as Exhibit 2, printouts from the Wayback Machine, all of which appear to be dated within the Relevant Period. She describes the printouts as captures of the home page of the Owner’s Canadian website which she asserts show use of the Mark from September 2018 to October 2021 (para 8).

[10] The Exhibit 2 printouts are of poor quality (as are all the exhibits) and much of the text is illegible. I have set forth below the relevant text which I am able to read (all page numbers are references to the page numbers in the Affidavit):

- Page 13 (dated September 14, 2018): the phrase “Explore further with Apollo RV” appears at the bottom of the page. At the hearing, the Owner referred to other text which appears on this page but, as I am unable to read the other text in the material of record before me, I have not taken it into consideration.
- Page 14 (January 9, 2019): the following text appears at the top of the page: “A worry free RV experience with 24/7 roadside assistance for the duration of your rental”; “Convenient locations with 7 RV rental sites across Canada”; and “Online trip planning tools to enhance your Canadian RV Vacation experience”. At the bottom of the page, the following appears: to the left, the heading CANADREAM and the text “Imagine the freedom of experiencing Canada as our Guest, as you cruise through breathtaking landscape at your own pace and stop where and when you want”; in the middle, a menu of items which includes “Locations”, “RV Sales” and “Service”; and, in the bottom right, the Mark positioned above the text “Part of the Apollo Motorhome Holidays Family”. The same text is found at the bottom of page 16 (dated January 9, 2021), page 20 (dated March 2, 2021), page 24 (dated April 25, 2020) and page 28 (dated March 6, 2021).
- Page 15 (dated August 12, 2020): the text “Buy a Caravan/RV” appears at the top of the page immediately above the Mark. At the hearing, the Owner referred to other text which appears on this page but, as I am unable to read the other text in the material of record before me, I have not taken it into consideration.

- Pages 17 and 18 (dated March 2, 2021): At the top of page 17 is a menu of items including “RV Rentals”, “RV Sales” and “Service & Parts”. Below that is the heading “CanaDream Corporation About Us”. Lower down page 17 and continuing on to page 18, the following text appears:

CanaDream is committed to providing Guests with a memorable RV vacation experience as they “experience Canada at their own pace” in a CanaDream motorhome.

From small beginnings in the 1990’s, CanaDream has grown into one of the largest RV rental and sales companies in Canada. The company’s leadership position has been achieved through a combination of investments in experienced and well trained Cast members at all locations, proprietary technology and continual investment, upgrading and maintenance of its systems and RV fleet. In 2017, CanaDream became part of the Apollo Tourism & Leisure Group of companies.

While CanaDream is based in Canada, its fleet of over 1000 RVs can be seen on the road throughout both Canada and the United States. RV Guest and Sales locations can be found in cities offering an incredible variety of natural experiences and include Calgary and Edmonton (Alberta), Vancouver (British Columbia), Whitehorse (Yukon), Toronto (Ontario), Montreal (Quebec) and Halifax (Nova Scotia).

Through its RV rental and sales fleets, CanaDream provides Guests and Customers with the means to discover their own piece of Canada. While some would say CanaDream is an RV Rental Company, CanaDream prefers to say that their product is Canada and the memories their Guests and Customers share with family and friends of their experience of Canada at their own pace in a CanaDream RV.

CanaDream is proudly Apollo, which means we are part of a global RV rental and sale group. With our global head office in Brisbane, Australia, you’ll find our brands offering a wide range of campers and RV’s to suit every style and budget. So, when you are thinking of experiencing Australia, New Zealand, Europe, and Britain at your own pace, think Apollo!

[11] Ms. Carrier states that the Mark has been used in respect of campervan repair and maintenance services on *canadream.com* and she provides, as Exhibit 3, printouts from the Wayback Machine which she describes as captures of the repair and maintenance services page of the Owner’s Canadian website and which she asserts show use of the Mark from April 2020 to March 2021 (para 9).

[12] Exhibit 3 consists of seven pages. Again, the printouts are of poor quality and much of the text is illegible. I have set forth below the relevant text which I am able to read:

- Page 22 (dated April 25, 2020): at the top of the page is a menu of items including “RV Rentals”, “RV Sales” and “Service”. Below that is a reference to

“service” and “book an appointment”. Below that, the following text appears above a list of services and repairs: “CanaDream is happy to provide RV repair services, as well as a wide variety of RV parts”. Also on the page is a reference to “book an appointment today” and “schedule your service appointment today”. A 403 area code phone number is provided. Pages 23 and 24 appear to be a continuation of Page 22.

- Page 25 (dated March 6, 2021): the following text appears above a “Service Menu”: “CanaDream is happy to provide RV repair services, as well as a wide variety of RV parts”; and, “If you are a CanaDream Sales Customer, you qualify for a 20% discount on parts and labour. Please mention this when you make your service appointment.” Pages 26 to 28 appear to be a continuation of Page 25.

[13] Ms. Carrier states that the Mark has been used in various broadcasting and social media sites including YouTube and Facebook (para 10). In support, she provides:

- Exhibit 4: a screenshot from a media clip which Ms. Carrier states was broadcast on YouTube on July 18, 2019 (para 11). The media clip is entitled “Canadream Apollo Safety 2019 – English” and the Mark appears in the upper left hand corner of page 30 and in the lower left hand corner of the page 31 (which appears to be a continuation of page 30) beside the phrase “Apollo Motorhome Holidays”. Other video titles are visible on the two pages: “Canadream Apollo Safety 2019 – French”; “Canadream Apollo Safety 2019 – German”; and, “Family Friendly Holidays with Apollo”.
- Exhibit 5: a screenshot of a post from the Owner’s Facebook page which Ms. Carrier states is dated April 14, 2019 (para 12). The Mark appears beside the phrase “Apollo Motorhome Holidays” and also as part of “Easy as Apollo”. It also appears on the side of the vehicle featured on the Facebook page.

[14] Ms. Carrier states that the Mark has been used and promoted through the Owner’s blog on *canadream.com* (para 13). In support she provides:

- Exhibit 6: a blog entry entitled “The Best Places to Ice Skate in Canada” dated November 2019. The Mark appears in the footer on page 38 as part of the phrase “Driven by Apollo”.
- Exhibit 7: a blog entry entitled “Planning Your Fall RV Location” dated September 2020. The Mark appears in the footer on page 41 as part of the phrase “Driven by Apollo”.
- Exhibit 8: a blog entry entitled “What to Pack for Summer RVing” dated June 2021. The Mark appears in the footer on page 46 as part of the phrase “Driven by Apollo”.

[15] Ms. Carrier states that the Mark has been used and promoted by displaying the Mark on the front of the Owner’s campervans rented or sold in Canada. She provides as Exhibit 9 photos of the Owner’s “campervan fleet which are rented and sold both in Canada and worldwide” (para 15). The photos show the Mark displayed on the front of various vehicles.

[16] Finally, Ms. Carrier states that the Mark has been used and promoted by displaying it on the Owner’s stationery, samples of which are provided as Exhibit 10 (para 16). The samples include the following items:

- Samples of letterhead for locations in Alberta, British Columbia, Ontario and Quebec which show CanaDream in the upper left hand corner and, in the upper right hand corner under the address, the text “A Subsidiary of Apollo”. At the bottom of the page is the text “CanaDream RV Rentals & Sales”.
- Samples of envelopes showing CanaDream on the left and, on the right, the text “A Subsidiary of Apollo”. The text “CanaDream RV Rentals & Sales” appears above the address.
- Samples of business cards which show CanaDream above the text “A Subsidiary of Apollo”.

REASONS FOR DECISION

[17] At the outset, I would like to deal with two evidentiary issues.

[18] First, at the hearing, I noted that Exhibits 7 and 9 in my copy of the Declaration were not notarized. Given that the Requesting Party took no issue with the exhibits and, taking into consideration the purpose and intent of section 45 and that Ms. Carrier described the exhibits in the Declaration, I accept the exhibits as part of the evidence.

[19] Second, the Requesting Party noted that Ms. Carrier misstated the relevant period as being March 2018 to October 15, 2021, which rendered the evidence contained in her declaration ambiguous. While there is a misstatement as to the Relevant Period, I do not see it as being problematic when the evidence is read as a whole, particularly given that many of the exhibits provided by Ms. Carrier are dated within the Relevant Period.

[20] Turning now to the substantive issues raised by the Requesting Party, I have kept in mind that evidence in a section 45 proceeding must be considered as a whole, and focusing on individual pieces of evidence in isolation is not the proper approach [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB); *Fraser Milner Casgrain LLP v Canadian Distribution Channel Inc* (2009), 78 CPR (4th) 278 (TMOB)]. As well, reasonable inferences can be made from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen*, 2005 FCA 64]. Finally, absent evidence to the contrary, an affiant's statements are to be accepted at face value and must be accorded substantial credibility in a section 45 proceeding [*Oyen Wiggs Green & Mutala LLP v Atari Interactive Inc*, 2018 TMOB 79].

Goods

[21] The relevant definition of use is set out in section 4(1) of the Act as follows:

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.

[22] The Requesting Party submits that Ms. Carrier provides no evidence, beyond bare assertions, to show use of the Mark in Canada in association with the goods listed in the registration (i.e. land motor vehicles namely motor homes and campervans). In particular, the Requesting Party submits that the Owner has not provided any evidence to establish that the Owner made any sales of the goods in Canada in the ordinary course of trade in the Relevant Period.

[23] The evidence of Ms. Carrier is that the Owner “specializes in campervan rentals, sales and maintenance” (at para 6). She goes on to state that the Owner “offers its APOLLO brand campervan rental and sales services through its CanaDream website” (at para 7). She also states that the Mark “has been used and promoted directly via use of its APOLLO branding emblazoned on the front of its campervans, which are either rented or sold throughout Canada” (at para 15). Ms. Carrier describes the photos in Exhibit 9 as being of the Owner’s “campervan fleet which are rented and sold both in Canada and worldwide”. Finally, there are references to “RV Sales” and “Buy a Caravan/RV” on the Owner’s Canadian website as shown in Exhibits 2 and 3.

[24] It is well established that “offering for sale” is not the same as “selling” [see *Michaels & Associates v WL Smith & Associates Ltd* (2006), 51 CPR (4th) 303 (TMOB)] and that advertising alone is insufficient to establish use of a trademark in accordance with section 4(1) of the Act [see *Riches, McKenzie & Herbert LLP v Cleaner’s Supply Inc*, 2012 TMOB 211].

[25] 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)], 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 or 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].

[26] Evidence of a transfer of the goods in the normal course of trade in Canada during the Relevant Period, or indeed at any time, is not present in this case – the Owner has not provided any documentation or information as to sales, either in terms of dollar value or units sold. Further, Ms. Carrier’s statements are ambiguous. As noted above, she states that the Mark “has been used and promoted directly via use of its APOLLO branding emblazoned on the front of its campervans, which are either rented or sold throughout Canada” and she describes the photos in Exhibit 9 as being of the Owner’s “campervan fleet which are rented and sold both in Canada and worldwide” [emphasis added]. These statements fall short of clear sworn statements evidencing a transfer of the goods in the normal course of trade in Canada during the Relevant Period.

[27] In response, the Owner submits that the registration for the goods should be maintained because there is a sworn statement by Ms. Carrier that the goods were sold coupled with photographs of the goods. The Owner relies on the following two cases in support of its submission that nothing more is required: *Digital Attractions Inc v LNW Enterprises Ltd* (2007), 64 CPR (4th) 418 (TMOB) and *Jebsen & Co v Molson Breweries, A Partnership* (1997), 78 CPR (3d) 568. However, I note that in both cases, sales volumes were provided in the evidence – in other words, the evidence contained more than just sworn statements of sales and photographs.

[28] Accordingly, I am not satisfied that the Owner has established use of the Mark in association with the goods specified in the registration, within the meaning of sections 4 and 45 of the Act. As there is no evidence of special circumstances to justify non-use, the registration will be amended accordingly.

Services

[29] The relevant definition of use is set out in section 4(2) of the Act as follows:

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.

[30] The display of a trademark in the advertisement of the services is sufficient to satisfy the requirements of section 4(2) of the Act, provided that the owner of the

trademark is willing and able to perform the services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

[31] The Requesting Party submits that Ms. Carrier does not provide evidence to show that the Owner used the Mark in Canada in association with the services listed in the registration during the Relevant Period.

[32] First, the Requesting Party submits that the mere existence of the archived website is not sufficient to establish that the website was accessed by Canadians during the Relevant Period and that, absent proof that the website was accessed by consumers in Canada, the website does not constitute advertising for the purposes of section 4. In this regard, the Requesting Party relies on *Barrette Legal Inc v 1811350 Alberta Ltd*, 2019 TMOB 80, in which the Registrar held as follows (at paras 28 and 29):

With respect to promotional material posted online, although webpages cannot be physically circulated in the same way as printed advertisements, they must still be "distributed to" or accessed by prospective customers in order to constitute advertising A clear statement to this effect may be sufficient evidence of distribution or, in the alternative, some evidence from which it can reasonably be inferred that customers or prospective customers accessed the webpages may suffice. However, the mere existence of archived webpages is not sufficient to establish that such webpages were accessed by Canadians during the relevant period.

Unlike, for example, a highway billboard, a website does not presumptively receive traffic from the public. Thus a website is more analogous to a brochure that was printed but perhaps never circulated or to an old newspaper clipping. The mere ability of a third party to locate such brochures or clippings is not in itself evidence of advertising; there must also be some evidence that the brochure or newspaper in question was actively distributed to Canadians during the relevant period

[33] The Registrar went on to conclude at para 30:

In the present case, although I accept that the Owner's website appears to be targeted to Canadians, there is no evidence that Canadians ever accessed the webpages attached to the Chen affidavit. As well, there is no evidence that anyone actually availed themselves of any of the Owner's services during the relevant period. Nor is there any other information on the Owner's business activities or on how the Owner actually performed the registered services after acquiring the Mark, from which inferences favourable to the Owner might be drawn. For example, had sales or delivery volumes or details with respect to the Owner's members during the relevant period been furnished, it might have been reasonable to infer that the Owner's website enjoyed at least some traffic from club members during that time. Yet it is not even made clear in Mr. Chen's affidavit whether the club had any active members during the relevant period. [emphasis added]

[34] The present situation differs from the situation in *Barrette*. While there is nothing to show if Canadians accessed the webpages in question, we have information as to the Owner's business activities. In particular, we have the statement of Ms. Carrier that the Owner "specializes in campervan rentals, sales and maintenance ... with 7 branches located across Canada" (at para 6) and the statement that the Owner "offers its APOLLO brand campervan rental and sales services through its CanaDream website" which links customers to the seven physical RV Rental pick-up and drop-off locations (at para 7). The locations of the Owner's physical locations are identified on the website (pages 17 and 19) and on the stationary (Exhibit 10) – the letterhead also refers to RV Rentals and Sales. Finally, we have the statement that the Mark "has been used and promoted directly via use of its APOLLO branding emblazoned on the front of its campervans, which are either rented or sold throughout Canada" (at para 15 and Exhibit 9) – see also the display of the Mark on the side of the vehicle featured on the Facebook page (Exhibit 5).

[35] Reading the evidence as a whole, I am satisfied that the Owner was in a position to perform the services at its seven physical locations across Canada. From that, it is reasonable to infer that the Owner's website would have enjoyed at least some traffic within the Relevant Period from consumers interested in finding out more about the Owner's rental or sales business or to book a service appointment.

[36] Secondly, the Requesting Party submits that the Mark is not displayed in such a way that associates the Mark with the offered services since the Mark appears only in the lower right hand corner and is given no prominence. At the hearing, the Requesting Party submitted that the average consumer would not perceive the Mark as indicating the source of the services being offered because the dominant trademark on the webpages is CANADREAM.

[37] I do not accept the Requesting Party's submission for two reasons:

- (a) First, there is nothing in the Act that precludes a trademark owner from using more than one trademark at the same time [*AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD)].

(b) Secondly, the Requesting Party's contention that the consumer would not perceive the Mark as indicating source is tied to the issue of distinctiveness, which is not an issue in section 45 proceedings [see *United Grain Growers Ltd v Lang Michener*, 2001 FCA 66]. What is to be determined is whether or not sufficient facts have been provided to permit me to arrive at a conclusion of use of the Mark by the Owner, within the meaning of section 4(2) of the Act, in association with the services during the Relevant Period.

[38] The Requesting Party also notes that the evidence refers on one webpage to CanaDream Corporation and, on the stationary, to "a subsidiary of Apollo". However, Ms. Carrier clearly states that the Owner offers its "APOLLO brand campervan rental and sales services" through its website at *canadream.com* which links the Owner's customer base to the Owner's seven physical "RV Rental pick-up and drop-off locations across Canada" (para 7) and I accept her sworn statements at face value.

[39] Finally, the Requesting Party submits that, to the extent that Ms. Carrier makes statements about the services offered in Canada, she uses the present tense and does not speak to the Relevant Period. While the language used by Ms. Carrier could have been more precise, the webpages relied upon by Ms. Carrier are all dated within the Relevant Period. Read in context, nothing in the evidence is inconsistent with the interpretation that her present tense statements are with respect to the offering of services generally, including during the Relevant Period.

[40] Based on the evidence, I am satisfied that the Mark was used in the advertising and promotion of the services listed in the registration and that the Owner was willing and able to perform the services at its locations in Canada during the Relevant Period.

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

DISPOSITION

[42] 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 goods listed in the registration, namely:

CI 12 Land motor vehicles namely motor homes and campervans.

[43] The registration will be maintained with respect to the services, namely:

CI 35 Wholesaling and retailing services relating to the sale of ex-rental motor vehicles including motor homes and campervans;

CI 37 Maintenance, servicing and repair of motor vehicles, including motor homes and campervans;

CI 39 Vehicle leasing and rental services.

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

Appearances and Agents of Record

HEARING DATE: 2023-04-06

APPEARANCES

For the Requesting Party: John Simpson

For the Registered Owner: Marta Tandori Cheng

AGENTS OF RECORD

For the Requesting Party: Shift Law Professional Corporation

For the Registered Owner: Riches, McKenzie & Herbert LLP