



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2024 TMOB 008

Date of Decision: 2024-01-18

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Smart & Biggar LP

Registered Owner: Service Routier Americain Inc. / American Road Service
Inc.

Registration: TMA1,066,277 for FRUEHAUF

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. TMA1,066,277 for the trademark FRUEHAUF (the Mark).

[2] The statement of goods is reproduced below, together with the associated Nice classes (CI):

CI 12 (1) Vehicle cargo trailers and semi-trailers and bodies for cargo trailers, cargo semi-trailers and trucks

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

PROCEEDING

[4] At the request of Smart & Biggar LP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on December 13, 2022, to Service Routier Americain Inc. / American Road Service Inc. (the Owner), the registered owner of the Mark.

[5] The notice required the Owner to show whether the Mark was used in Canada in association with each of the goods 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 December 13, 2019 to December 13, 2022.

[6] The relevant definition of “use” in the present case is 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 does not show “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 Cary Emard, sworn March 8, 2023, together with Exhibits 1 to 12.

[9] Both parties submitted written representations and were represented at an oral hearing.

PRELIMINARY REMARK: THE OWNER’S CONCESSIONS

[10] At the hearing, the Owner conceded that it only claims use in association with “bodies for trucks” and that it does not claim special circumstances excusing the absence of use of the Mark in association with the remaining goods.

[11] Given that the evidence is silent as to the use of the Mark in association with the remaining goods, and as the Owner has not provided any evidence of special circumstances excusing the absence of use of the Mark in association with them, the registration will be amended to delete “vehicle cargo trailers and semi-trailers and bodies for cargo trailers, cargo semi-trailers”.

EVIDENCE AND ANALYSIS

[12] Mr. Emard has been the Owner’s Director and President since 1995. He states that the Owner manufactures and sells standard or customized trailers or truck bodies [paras 1-5].

[13] Mr. Emard states that the Owner has been promoting, offering for sale and selling its goods in association with the Mark through the website *www.fruehauf.ca* (the Website) [para 11]. In support, he provides printouts of the Website [Exhibit 4], which he states are representative of how it appeared during the relevant period [para 12]. The printouts show several headings related to the registered goods, among which the “Custom Trailers and Truck Bodies” heading, which is followed by a photograph of a truck body displaying the Mark on its bottom rear side.

[14] Mr. Emard explains the sales process within the Owner’s normal course of trade. In this regard, he states that on May 2021, Globocam (Montreal) Inc. (Globocam) placed an order with the Owner for the purchase of a truck body. The Owner accepted such offer and issued an invoice to Globocam. Mr. Emard states that the truck body was subsequently manufactured and delivered, and that Globocam issued a cheque to the Owner in full payment of the invoice. He asserts that the Mark was affixed to the truck body upon delivery in the same manner illustrated on the Website [paras 14-17]. In support, Mr. Emard provides copies of the purchase order, dated May 6, 2021, and the invoice issued by the Owner on July 10, 2021 to Globocam in Quebec [Exhibits 5 and 6]. The invoice details an [TRANSLATION] “isolated body” for over \$80,000. The Mark appears on the invoice’s top along with the Owner’s corporate information. I note that the due date indicated in the invoice is October 22, 2021. Mr. Emard also provides a

copy of a cheque issued by Globocam to the Owner on October 25, 2021 in full payment of the invoice [Exhibit 7].

[15] In its written representations, the Requesting Party submits that the evidence does not support the conclusion that the Owner delivered the truck body to Globocam during the relevant period. In particular, it notes that Mr. Emard omits to indicate when the truck body was actually delivered or that the cheque was issued upon or after delivery. At the hearing, the Requesting Party also noted that Mr. Emard did not provide any information concerning the delivery standards for the products the Owner manufactures. The Requesting Party therefore submits that the absence of an express reference to the date of delivery should lead to the negative inference that delivery did not occur during the relevant period.

[16] In response, the Owner submits that the invoice sufficiently demonstrates sale of the truck body within the meaning of section 4(1) of the Act. It also submits that Globocam would not have issued a cheque for over \$80,000 if the truck body had not been delivered by the Owner.

[17] 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. The evidence in a section 45 proceeding need not be perfect; indeed, a registered 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 [per *Diamant Elinor Inc v 88766 Canada Inc*, 2010 FC 1184 at para 9].

[18] In the present case, I agree with the Requesting Party that Mr. Emard does not specify the Owner’s estimated delivery time or the date of delivery. Further, I note that the sole invoice in evidence does not include any delivery date. All that being said, bearing in mind that drawing an inference is a matter of reasonably probable, logical deductions from the evidence [*Sim & McBurney v En Vogue Sculptured Nail Systems Inc*, 2021 FC 172 at para 15], I can infer from the documented evidence that the truck body sold to Globocam was delivered during the relevant period.

[19] First, the invoice clearly establishes a due date of around three months after its issuance. In view of this due date, I find it reasonable to conclude that the truck body was to be delivered before or concomitantly with the date on which the invoice was expected to be paid. The fact that the cheque is for the full amount of the invoice reinforces this conclusion. In this respect, I agree with the Owner that Globocam would likely not have paid the total amount due if the truck body had not been delivered. Thus, the cheque date and amount support the conclusion that the delivery took place during the relevant period.

[20] The Requesting Party relies on *Deeth Williams Wall LLP v Wutzke*, 2010 TMOB 91, at para 8 and on *Rogers Media Inc v La Cornue*, 2019 TMOB 63 at para 57 for the proposition that it is not possible to infer the delivery from the payment of the invoice. However, in my view, the above cases are distinguishable from the present case in that neither affiant in those cases stated that the goods were delivered and paid for. Moreover, in the *Rogers Media* case, there was no indication on the invoice as to when the payment was due, and nothing in the evidence supported a finding of transfer before the end of the relevant period. In this case, the evidence includes not only statements that the truck body was delivered and paid, but also a copy of the cheque dated more than a year before the end of the relevant period.

[21] Given that the Mark was affixed to the truck body upon delivery to Globocam, and given my finding that such delivery took place during the relevant period, I am satisfied that the Owner has shown use of the Mark in association with “bodies for trucks” pursuant to sections 4(1) and 45 of the Act.

DISPOSITION

[22] In view of all the above, 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:

- CI 12 (1) Vehicle cargo trailers and semi-trailers and [...] cargo trailers, cargo semi-trailers

[23] The amended statement of goods will read as follow:

CI 12 (1) Bodies for trucks

Maria Ledezma
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

Appearances and Agents of Record

HEARING DATE: 2023-12-07

APPEARANCES

For the Requesting Party: Philip Lapin

For the Registered Owner: Richard Uditsky

AGENTS OF RECORD

For the Requesting Party: Smart & Biggar LP

For the Registered Owner: Robinson Sheppard Shapiro S.E.N.C.R.L./L.L.P.