



THE REGISTRAR OF TRADE-MARKS  
LE REGISTRAIRE DES MARQUES DE COMMERCE

**Citation: 2015 TMOB 47**  
**Date of Decision: 17/03/2015**

**TRANSLATION**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Hugo Berthiaume against registration  
No. TMA728,083 for the trade-mark MUZO in the name  
of Linda Zago.**

The record

[1] On April 11, 2013, at the request of Hugo Berthiaume (the Applicant), the Registrar sent the notice stipulated in section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Linda Zago (hereafter occasionally referred to as the Registrant), registered owner of registration No. TMA728,082 for the trade-mark MUZO (the Mark).

[2] This notice enjoined the Registrant to show that its Mark had been used in Canada, at any given time between April 11, 2010 and April 11, 2013 (the Relevant Period), in association with each of the services specified in the registration, i.e.

Pet food and accessories, namely tote bags for pet accessories, pet transport bags, collars, leashes, tags, clothing for pets.

Pet boarding, pet sitting, hotel services, pet grooming and restaurant services; sale of pet food and accessories; pet health care and wellness services; restaurant services.

And, in the absence of use, the date when the Mark had last been used and the reason for its absence of use since this date.

[3] In response to the Registrar's notice, the Registrant filed an affidavit submitted by herself on July 10, 2013.

[4] Each party has filed written representations.

[5] Along with the filing of said written representations, the Registrant has submitted an application to amend the registration have all the products removed from the registration, except for those described as "pet food." Accordingly, these products have been removed from the registration and there is no need to discuss, in relation to this case, the issue of whether the evidence produced by the Registrant shows use of the Mark during the relevant period in relation to these products.

[6] No hearing was requested.

#### Analysis

[7] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing "deadwood" from the register; this is why the applicable test is not very stringent. As stated by Judge Russell in *Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC), on p. 282:

[TRANSLATION]

We know that the purpose of s. 45 proceedings is to clean up the "deadwood" on the register. We know that the mere assertion by the owner that his trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade mark owner's business and merchandising practices.

[8] In the present case, section 4 of the Act defines use in connection with products and services as follows:

- (1) A trade-mark is deemed to be used in association with products if, at the time of the transfer of the property or possession of the products, in the normal course of trade, it is marked on the products themselves or on the packages in which they are distributed or it is in any other manner so associated with the products that notice of the

association is then given to the person to whom the property or possession is transferred.

- (2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

[9] This brings me to review the evidence filed by the Registrant in light of the parties' representations.

[10] Ms. Zago begins her affidavit by stating that she is the majority shareholder and president of Gestion Zago Inc. (Gestion Zago), a company that she founded on October 30, 2006 [paragraph 4, Exhibit LZ-1].

[11] Gestion Zago is the majority shareholder of Muzo Inc., a company founded on April 26, 2006 of which Ms. Zago is also president [paragraph 5, Exhibit LZ-2].

[12] Ms. Zago explained that since July 1<sup>st</sup> 2007 Muzo Inc. has been operating a pet resort for cats and dogs under the Mark. Ms. Zago referred to the pet resort as "Complexe MUZO" and I will do the same [paragraph 6].

[13] Ms. Zago stated that Complexe MUZO uses the Mark with her authorization and under her direct control. Ms. Zago personally manages, controls and supervises all of Muzo Inc.'s activities along with those of Complexe MUZO. In this regard, Ms. Zago explained that she is present on the premises of Complexe MUZO during the greater part of the business hours in order to serve customers and ensure the quality of the services provided by employees and the products sold on site. She also makes sure to personally review and approve the advertising for Complexe MUZO and exposure of the Mark related to the latter. In fact, she is the only person who decides how the Mark is to be used by Muzo Inc. [paragraphs 7-9]. It should be noted at this stage of my analysis that such control by the Registrant regarding the characteristics and quality of the products and services provided under the Mark meet the requirements under section 50(1) of the Act on licensed use.

[14] Ms. Zago then described in about 30 paragraphs, including supporting documentation, the activities of Complexe MUZO under the Mark. Complexe MUZO essentially offers pet boarding, pet sitting, hotel services, pet grooming and restaurant services (for cats and dogs),

along with ancillary products and services (such as the sale of pet food and pet health care and wellness services).

[15] The Applicant is basically arguing the following in its written representations:

- i) The evidence does not show use of the Mark but rather use of the Muzo Inc. company name;
- ii) The evidence does not show use of the Mark with the “[p]et food” products and the following services: “[...] pet restaurant services,” “sale of pet food and accessories,” and “restaurant services”; and
- iii) The evidence shows that the Mark does not belong to the Registrant but rather to Muzo Inc.

[16] I will examine each of these arguments in turn.

i) The evidence does not show use of the Mark but rather use of the Muzo Inc. company name

[17] This argument by the Applicant is based on the invoices produced under exhibits LZ-11 through LZ-15 identifying Muzo Inc. (immediately followed by the company’s address) as the entity that invoiced the products and services described on the bill. Note in this regard that Muzo Inc. is acting as a licensee of the Mark which is duly authorized and controlled by the Registrant under section 50(1) of the Act.

[18] I agree with the Registrant that this argument by the Applicant is based on an analysis that is outside the context of the bills of sale that have been produced and does not take into account the evidence as a whole.

[19] As recalled by the Registrant, the bills of sale were submitted to back Ms. Zago’s affidavit in support of certain evidence showing use of the Mark in accordance with the provisions of section 4 of the Act. These bills of sale do not constitute the entire evidence submitted by the Registrant.

[20] Under section 4 of the Act, for there to be “use” in connection with products, a transfer of the property or possession is required. In fact, the purpose of the bills of sale that were produced was to show transfer of property. The other evidence (such as photographs and sworn statements) show that the Mark is affixed to the containers in which the products covered by this registration are sold by Muzo Inc., as more amply discussed below under point ii).

[21] For there to be “use” in connection with the services under section 4, the Mark must be used or displayed in the performance or advertising of the services. In this case, the invoices clearly show that the services described therein have been provided. The other evidence (such as photographs, rates cards and promotional flyers) show that the Mark was displayed in the performance and advertising of the services concerned by this registration, as more amply discussed below under point ii).

ii) The evidence does not show use of the Mark with the “[p]et food” products and the following services: “[...] pet restaurant services,” “sale of pet food and accessories,” and “restaurant services”

[22] It should first be noted that use as such of the Mark in connection with the remaining services covered by the registration involved, namely:

Boarding, pet sitting, hotel services, grooming services [...] for pets; [...] pet health care and wellness services; [...]

does not seem to be contested by the Applicant other than as generally argued in points i) and iii). Furthermore, I have no problem concluding as to the use of the Mark in association with such services. The rates cards as Exhibits LZ-4 through LZ-6, the sample membership card as Exhibit LZ-7, and the promotional flyers as Exhibit LZ-8, all handed out during the relevant period, clearly show how the Mark is used in the advertising of the services. The photographs in paragraphs 13, 19 and 21 clearly show that the Mark is displayed at the location where the Services are provided, and Invoices LZ-11 through LZ-14 show that said services were not only in fact available, but were duly provided.

### Contested products

[23] Coming back to the contested products, the Applicant is submitting that the Registrant is claiming to make liver muffins based on its own recipe and of selling them. The Applicant is submitting that said muffins cannot be found anywhere in the evidence. Only a photograph of the box bearing the Mark has been filed as evidence in paragraph 43 of Ms. Zago's affidavit. The Applicant is submitting that it is not possible to determine that these boxes contain muffins. The Applicant is further submitting that the words "treats/muffins" on invoice LZ-15 do not allow a determination to be made of whether treats or muffins are being sold. The Applicant is also submitting that the indication "homemade snack, including our famous liver muffins" appearing in one of the promotional flyers under Exhibit LZ-8 is not clear as to whether treats or snacks are involved.

[24] I agree with the Registrant that this argument on the Applicant's part seems to be based on an incorrect assessment of the concept of burden of proof applicable in the case at bar. The recognized requirement for proof to be acceptable as part of proceedings under section 45 is not that of proof "beyond a reasonable doubt," but rather "unambiguous" proof.

[25] In this instance, the assertions made by Ms. Zago in paragraphs 41 through 44 of her affidavit based on which:

[TRANSLATION]

41. Since Complexe Muzo first began operation, it has been making, based on my own recipe, liver muffins, which dogs love.

42. During the Relevant Period, the muffins were, and still are, regularly given to dogs as snacks during their short or long stay, as part of the pet sitting or boarding services provided at Complexe MUZO, and are also sold at the store.

43. The muffins sold in the store are found in packaging with the mark MUZO, as shown in the photograph below.

44. I am including in my affidavit as Exhibit LZ-15 a typical bill of sale for half a dozen MUZO-brand muffins during the Relevant Period.

are clear and backed by supporting documents that are properly explained. The fact that the Mark is affixed to the box rather than the muffins themselves meets the requirements in section 4,

without there being the need to also produce a photograph of the actual muffins. Similarly, the fact that bill of sale LZ-15 shows the sale of “treats/muffins” rather than only “muffins” is inconsequential since Ms. Zago mentions that this is a typical sales receipt for the sale of a half-dozen muffins.

### Contested services

#### Restaurant services

[26] Regarding the contested restaurant services, the Applicant is noting that the Registrant makes a distinction between its restaurant services provided “as part of its boarding service” and those provided “at all times and as needed.”

[27] It should be mentioned in this regard that Complexe MUZO customers can leave their dog or cat to the care of Complexe MUZO employees for a few hours (pet sitting) or for a longer period of time ranging from one night to a week and more. If the customer would like Complexe MUZO to feed its pet during the pet’s stay, this constitutes pet boarding services. If the customer does not wish Complexe MUZO to feed its pet during the pet’s stay (such as when the customer brings its own food), then this constitutes pet hotel services.

[28] With regard to the restaurant services provided as part of the boarding services, the Applicant submits that restaurant services mean providing a meal and necessarily imply that the meal is prepared on site. However, the Applicant submits that the Registrant is not asserting anywhere that it is preparing meals for the pets, nor has it submitted any photographs of the kitchen where such meals are prepared. The Applicant submits that the Registrant instead appears to only provide already-prepared food, and only when the pet owners do not provide any pet food themselves. Hence, the Registrant is not providing actual “restaurant services” as meant in a literal sense, namely, “preparing and serving meals.”

[29] With regard to the restaurant services provided on an as-needed basis, the Applicant submits that the Registrant’s evidence is ambiguous in that the Registrant seems to be selling snacks or treats for pets rather than providing restaurant services.

[30] For its part, the Registrant submits that restaurant services do not necessarily require a kitchen on site nor is there an authority suggesting that evidence of the existence of restaurant services requires a photograph of the kitchen. The Registrant submits that there are various types of restaurants where food is prepared ahead of time outside of the restaurant and served on site to customers. Furthermore, the Registrant submits that with regard to pet restaurant services, the fact of serving a bowl of food or a snack prepared ahead of time in fact constitutes restaurant services (in the same way as a person being served a bowl of cereal in a restaurant for humans). In other words, the Registrant is submitting that pet restaurant services do not have to be as depicted in the classic film *Lady and the Tramp* where two dogs are eating spaghetti seated at a table while being serenaded by a violin in order to constitute pet restaurant services.

[31] The Registrant is also stating that restaurant services are advertised on the rates cards for the services provided at Complexe MUZO on which the Mark is clearly displayed. For instance, about half-way down the rates card under Exhibit LZ-4, we can read:

A day at Club MUZO includes exercise, entertainment and rest, a snack and a meal.

[32] Similarly, mid-way down the rates card under Exhibit LZ-6, there is the heading “A LA CARTE SERVICES AND ACTIVITIES”:

Nutrition	Healthy snack	\$2
	Peanut butter KONG	\$3

[33] Moreover, I have noticed that on one of the advertising flyers under Exhibit LZ-8 describing the many available packages, such as “RELAXATION PACKAGE,” “ACTIVITY PACKAGE,” “FITNESS AND BEAUTY PACKAGE,” etc., it is explicitly stated that each package includes a “homemade snack, including our famous liver muffins.”

[34] The Registrant submits that the Registrant’s restaurant services were not only available during the relevant period but were also provided as evidenced by bill of sale 14010 filed under exhibit LZ-11 which shows a “meal” billed in the amount of \$5 plus tax.

[35] I agree with the Registrant that the evidence shows use of the Mark in connection with restaurant services for pets. Evidently, the pets brought to Complexe MUZO can be fed based on various plans. In this regard, it would be useful reproduce paragraph 32 of Ms. Zago’s affidavit:



[TRANSLATION]

In addition to providing restaurant services as part of pet boarding, Complexe MUZO also provides restaurant services for pets at all times as needed; these services are in fact advertised under “Nutrition” in Exhibit LZ-6. For instance, a customer may be walking his dog along Lachine Canal and stops in to buy a snack or treat for his pet.

[36] This having been said, the wording of the services covered by the present registration encompasses both “boarding, pet sitting, hotel services, grooming and restaurant services for pets” along with “restaurant services.” The latter services are separated from the other categories of services by a semi-colon such that the context does not allow the restaurant services in question to be associated with pets. Ms. Zago’s affidavit does not show what this other category of services consists of nor the extent to which exceptional circumstances could justify non-use of the Mark in association with such services. Accordingly, I consider it appropriate to expunge the latter category of services from the registration.

#### Sale of pet food and accessories

[37] The Applicant submits that the Registrant’s evidence does not make it possible to conclude to use of the Mark in connection with “the sale of pet food and accessories.” I disagree.

[38] As explained by Ms. Zago in paragraph 37 of her affidavit, Complexe MUZO includes a store that sells a wide array of pet accessories including toys, pet carry bags, collars, leashes, clothing for pets, as well as pet food, including treats and “regular” pet food, namely, of the type sold in large bags. A typical photograph of the store since its opening to the present is reproduced in the affidavit. The store is also advertised in particular through Complexe Muzo’s website [see Exhibit LZ-9. Ms. Zago mentions in this respect that the web page printouts submitted basically conform to the version of the website as it has been available online since at least the winter of 2010].

[39] The bills of sale produced as exhibits LZ-11 to LZ-14 in fact clearly show the sale of various pet accessories. Mentioning Exhibit LZ-13 as an example, Ms. Zago notes that the latter exhibit consists of eight typical bills of sale for various pet accessories (such as leashes, toys, cushions, etc.) sold at the Complexe MUZO store during the relevant period. Similarly, Exhibit LZ-14 shows four typical bills of sale for bags of pet food.

[40] Without going into detail regarding the Applicant's representations, it should be mentioned here that the services involving the sale of these various products should not be confused with the products themselves. The products being sold do not need to bear the Mark within the meaning of section 4(1) of the Act. What is in question here is the retail sale of similar products in connection with the Mark, which Ms. Zago's affidavit clearly establishes.

iii) The evidence appears to show that the Mark does not belong to the Registrant but rather to Muzo Inc.

[41] The Applicant is arguing that in paragraph 25 of her affidavit, Ms. Zago asserts submitting as Exhibit LZ-9 a representation of the website *www.hotelmuzo.com* advertising Complexe MUZO. However, the Applicant states that the following appears on all the pages submitted:

MUZO is a trademark of MUZO Inc.

[42] The Applicant argues that through this indication, the Registrant is clearly indicating that the Mark belongs to Muzo Inc.

[43] The Applicant recognizes that in cases where a mark is listed in the register as being owned by an individual, and that it has been shown that said individual wholly owns or holds various functions within the company using the mark that allows the required control to be determined, it must be inferred that said individual exercises the control required under Section 50 of the Act. However, the Applicant submits that in such a case, the company is not clearly identified as being the proprietor of the mark.

[44] In this instance, the Applicant submits that Muzo Inc.'s licensee status cannot be put into question since it has been clearly identified as the proprietor of the mark.

[45] The Applicant adds that the conclusion must be drawn that the Registrant itself considers that the Mark belongs to Muzo Inc. and not to itself, otherwise the Registrant would not have made this indication on its website.

[46] The Registrant, for its part, submits that the Applicant's assertion that "[t]hrough this indication, [the Registrant] clearly indicates that the Mark belongs to Muzo Inc." is incorrect. The Registrant is not the one making this assertion but rather its licensee on its website. The Registrant is submitting that this is obviously an error made by the company that designed the website (as the statement is not mentioned on any other promotional material) and that this error on the part of a third party, which unfortunately escaped the Registrant's checks, should not cause the Registrant to lose its rights in relation to the Mark or its registration. The Registrant submits that in any event, for the consuming public, this indication in no way changes how it views the issue since Muzo Inc. is the company that is operating a business under the Mark, all under the Registrant's ongoing control.

[47] I agree with the Registrant that the mere mention on Muzo Inc.'s website that the Mark belongs to Muzo Inc. rather than the Registrant could not be a determining factor and sufficient on its own to conclude that such is the case in the present matter.

[48] This isolated indication is explicitly contradicted by Ms. Zago's detailed assertions. As indicated earlier in paragraph 13 of my decision, the Mark is used by Muzo Inc. under license. Under the terms of said license, the Registrant exercises direct control over the characteristics and quality of the products and services offered under the Mark. Such control meets the requirements under Section 50(1) of the Act.

Disposal

[49] Accordingly, in exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, the registration will therefore be amended so that the last category of services described as “restaurant services” is expunged from the registration.

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Annie Robitaille  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

Certified true translation  
Carole Biondic