



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

**Citation: 2014 TMOB 275**  
**Date of Decision: 2014-12-12**

**IN THE MATTER OF A SECTION 45  
PROCEEDING requested by Fasken  
Martineau Du Moulin LLP against  
registration No. TMA721,079 for the trade-  
mark MISTER MECHANIC in the name of  
Mister Mechanic Inc.**

The file

[1] On April 11, 2013 at the request of Fasken Martineau Du Moulin LLP (the Requesting Party) the Registrar forwarded a notice (the notice) under section 45 of the *Trade-marks Act*, RSC 1985, c T -13 (the Act) to Mister Mechanic Inc. (the Registrant), concerning registration No. TMA721,079 for the trade-mark MISTER MECHANIC (the Mark).

[2] Registration No. TMA721,079 covers: services of selling new and used motorized vehicles (the Services).

[3] In response to the notice, the Registrant filed the affidavit of Mr. Phillip Rene Le Tendre sworn on July 5, 2013 together with exhibits A to H inclusive.

[4] The parties filed written representations and were represented at the hearing.

[5] For the reasons that follow I conclude that registration TMA721,079 should be maintained on the register.

### The law

[6] The notice requires the Registrant to show whether the Mark had been used in Canada in association with the 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 use since that date. The relevant period in this case is any time from April 11, 2010 to April 11, 2013 (the Relevant Period).

[7] Section 45 proceedings are simple, expeditious and serve the purpose of clearing the register of “deadwood”; as such, the threshold test to establish use is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)].

[8] Section 4(2) of the Act reads as follow:

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] A simple allegation of use of the Mark is not sufficient to evidence its use in association with the Services within the meaning of section 4(2) of the Act. There is no need for evidentiary overkill. However, any ambiguity in the evidence filed shall be interpreted against the owner of the Mark [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (4th) 62 (FCA)].

[10] I therefore must determine if I am satisfied that the evidence to be described afterward enables me to conclude that the Mark had been used by the Registrant in Canada in association with the Services during the Relevant Period.

### The evidence relating to use

[11] Mr. Le Tendre has been the Registrant’s President since its incorporation. He states that the Registrant is an Ontario corporation that sells new and used motorized vehicles, principally lift trucks, and also provides services in connection with rental and repair of new and used motorized vehicles.

[12] I can summarize the relevant portions of Mr. Le Tendre's affidavit in the following terms:

- The Registrant distributed promotional material in the form of key chains, hats, note pads and pens bearing the Mark during the Relevant Period to its customers at the time of the sale of a new or used motorized vehicle, as appears from photographs of these items filed as exhibits A and B to his affidavit;
- The Mark was displayed on the Registrant's website wherein new and used motorized vehicles are listed for purchase on that website. The purpose of the website is to advertise the Registrant's Services. A screenshot of the Registrant's website, as it appeared on May 11, 2012, offering the sale of new and used lift trucks was filed as exhibit D to his affidavit;
- The Registrant delivered during the Relevant Period a Standard Limited Warranty with the sale of each used motorized vehicle. A copy of the Standard Limited Warranty was filed as exhibit E to his affidavit. At the top of the document there is the inscription 'Mister MECHANIC INC.';
- The Registrant completed the sale of new and used motorized vehicles at its shop facilities (the Shop) which prominently features the Mark on its façade. A photographic image of the façade of the Shop taken from the Internet using Google's website was filed as exhibit F to his affidavit and Mr. Le Tendre confirms that the Shop had the same appearance during the Relevant Period;
- The inscription 'Mister MECHANIC Lift Truck Service' appears on all invoices used by the Registrant to document the sale of new or used motorized vehicles. Representative invoices issued during the Relevant Period showing the sale of both new and used motorized vehicles, to customers located in Canada, were filed as exhibit G to his affidavit.

- Finally, Mr. Le Tendre has provided the volume of sales from April 2010 to November 2012 of new and used motorized vehicles and has attached as exhibit H to his affidavit reports of sales for that period.

Analysis of the evidence concerning use of the Mark in association with the Services

[13] The Requesting Party has raised the following issues:

- The photographs filed do not bear a date such that it is impossible to determine if the promotional items existed during the Relevant Period. Moreover it is impossible to link those items to the Registrant. Finally there is nothing to identify the nature of the services promoted by these items;
- The trade-mark appearing on some of the promotional items as well as a screenshot of the website and on the invoices filed is not the Mark but the trade-mark MISTER MECHANIC LIFT TRUCK SERVICE & Design;
- The name of the Registrant does not appear on the invoices filed;
- The sales records filed are incomplete; do not bear the Mark, the Registrant's name and the addresses of those to whom the Services were provided.

[14] One must be careful in not looking at the exhibits filed in a vacuum and ignored the allegations that describe the context in which they have been filed.

[15] As for the copies of the photographs of the promotional items bearing the Mark, Mr. Le Tendre states in paragraph 9 of his affidavit that the Registrant distributed promotional materials bearing the Mark in the performance of the Services in Canada during the Relevant Period, namely upon the sale of a new or used motorized vehicle, in the form of a free key chain bearing the Mark with the delivery of the keys to the customer. Mr. Le Tendre affirms that the photograph illustrates the key chains bearing the Mark, which were distributed by the Registrant during the Relevant Period. Consequently, contrary to what is argued by the Requesting Party,

there is no need to identify the date when the photograph was taken. Mr. Le Tendre clearly states that the photograph represents an illustration of the key chain given with the delivery of the keys to the Registrant's customers upon the sale of a new or used motorized vehicle during the Relevant Period.

[16] The Requesting Party argues that there is no reference to the Registrant on the key chain and thus there is no association between the Registrant and the key chain. This association existed at the time of the delivery of the motorized vehicle purchased by the customers as the key chain is given to the customers with the keys of the motorized vehicle purchased.

[17] The Requesting Party also pleads that there is no association between the Mark and the Services as there is no reference to any services on the key chain. Again, one must look at the circumstances surrounding the giving away of these key chains. They were handed over at the time the customer took possession of the motorized vehicle purchased.

[18] The Requesting Party argues that what appears on some of the exhibits filed is not the Mark but either the Registrant's corporate name or trade name (Mister MECHANIC Lift Truck Service) or a different trade-mark than the Mark, namely MISTER MECHANIC LIFT TRUCK SERVICE & Design as illustrated below:



(the design Mark)

[19] I will deal first with the issue of use of a trade name as opposed to trade-mark use. The leading case on the use of a trade-mark as part of a corporate name is *Road Runner Trailer Manufacturing Ltd v Road Runner Trailer Co* (1984), 1 CPR (3d) 443 (FCTD). In that case, the Court held that there is a rebuttable presumption that a company name is a trade name rather than a trade-mark. The Court went on to hold that the presumption had in fact been rebutted in that case because the trade-mark appeared in greater prominence [see also *Bereskin & Parr v 1082205 Ontario Ltd* (2001), 19 CPR (4th) 103 (TMOB)].

[20] In our case, in most of the exhibits filed, the trade-mark appears in the same format as illustrated above. I consider that such illustration is a representation of the Mark. In fact on the coloured exhibit (see exhibit D to Mr. Le Tendre's affidavit) 'Mister MECHANIC' is written in larger orange letters than 'Lift truck Service' written in smaller blue letters. On some of the black and white representation of the design Mark, the portion 'Mister MECHANIC' appears in a shade of grey as opposed to black for the portion 'Lift Truck Service' (see note pad as part of the promotional materials illustrated on the photographs filed as exhibit B to Mr. Le Tendre's affidavit).

[21] The Requesting Party argues that the photograph of the Shop, filed as exhibit F to Mr. Le Tendre's affidavit, where the Services are provided, does not illustrate use of the Mark but rather shows use of the Registrant's trade name Mister Mechanic. Moreover since the reproduction of that photograph appears to have been made at the same time the affidavit was executed, namely on July 5, 2013, it should not be considered.

[22] Again the photograph must be viewed in the context of the allegation made by Mr. Le Tendre about it. He states in paragraph 15 of his affidavit that the Services are provided from the Shop. He alleges that the Shop prominently features the Mark on its façade. He states that the photograph is an illustration consistent with the Shop's appearance as it was during the Relevant Period. The Services are provided at the Shop. Therefore the Mark appearing on the Shop's façade is being used in association with the Services when the Registrant performed the Services at the Shop [see *Stikeman Elliott v Boulangerie Au Pain Doré Ltée*, (2008), 64 CPR (4th) 374 (TMOB)].

[23] The evidence described above is sufficient to maintain the registration on the register as the Registrant has demonstrated use of the Mark in Canada in association with the Services during the Relevant Period. However, I have not referred to some of the other exhibits filed by Mr. Le Tendre to substantiate the Registrant's claim that the Mark has been used during the Relevant Period simply because I do not consider them to be evidence of use of the Mark in association with the Services for the following reasons.

[24] Exhibit C to Mr. Le Tendre's affidavit includes a document entitled 'Lease agreement and delivery receipt'. I do not have to determine if the trade-mark appearing on that document is

the Mark as 'leasing of forklift' is not part of the services covered by the registration. The same reasoning applies to the warranty document filed as part of Exhibit C as it covers the repair services performed by the Registrant. Those services are not covered by the registration.

[25] Finally I wish to point out that the invoices filed (Exhibit G) to prove the sale of forklifts during the Relevant Period, bear the design Mark reproduced above except that the word portion 'Mister MECHANIC Lift Truck Service' is written on one line, in the same colour, and followed underneath by the Registrant's address. As I already ruled that there is enough evidence in the record to substantiate use of the Mark by the Registrant in association with the Services during the Relevant Period, I do not need to determine if such invoices could be considered as evidence of use of the Mark in association with the Services.

#### Disposition

[26] 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, registration No TMA721,079 will be maintained on the register.

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Jean Carrière  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office