



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

Reference: 2013 TMOB 190
Date of Decision: 2013-11-04
TRANSLATION

**IN THE MATTER OF THE SECTION 45
PROCEEDINGS, undertaken at the request of Pépinières
et Roseraies Georges Delbard, regarding Registration
No. TMA574,571 of the LA TENTATION trade-mark in
the name of Ferme B.M. 1987 Inc. conducting business
under the company name of Cidrerie Verger Bilodeau.**

[1] This decision relates to a summary expungement procedure brought against Registration No. TMA574,571 for the LA TENTATION trade-mark, registered in association with “cider” and “the wholesale distribution of the [sic] cider and apple-derived food products.”

[2] On July 25, 2011, the registrar sent the notice stipulated in Section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Ferme B.M. 1987 Inc. trading under the name of Cidrerie Verger Bilodeau (the Cidrerie), registered owner of the registration. This notice was sent at the request of Pépinières et Roseraies Georges Delbard.

[3] The registrar's notice enjoined the Cidrerie to prove use of its LA TENTATION trade-mark (the Mark) in Canada at any given time between July 25, 2008 and July 25, 2011 in association with each of the wares and each of the services specified in the registration. In the absence of use, the notice enjoined the Cidrerie to show the date when the Mark had last been used and the reason for its absence of use since this date.

[4] 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 clearing the register of “deadwood.” Although

the criterion for establishing use is not very demanding and an overabundance of evidence is not necessary, sufficient facts must be presented to enable the registrar to conclude that the trade-mark has been used in association with each ware or service mentioned in the registration during the Relevant Period [see *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 CPR (4th) 270 (CF)]. Mere claims of use are insufficient to show the use of the mark [see *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 CPR (2d) 62 (FCA)].

[5] In reply to the registrar's notice, the Cidrerie submitted an affidavit from its initial shareholder, Claude Bilodeau. Mr. Bilodeau states in his affidavit that he handles daily management of the Cidrerie, including the marketing of ciders and other products.

[6] The Cidrerie alone submitted written representations. A hearing was not held.

Use of the Mark in association with the wares specified in the registration

[7] I subscribe to the Cidrerie's representations to the effect that it has provided sufficient elements of proof to enable me to conclude use of the Mark in Canada in association with the "cider" during the Relevant Period within the meaning of subsection 4(1) of the Act, applicable in this case. This subsection defines the use of a trade-mark in association with the wares.

[8] On this point, Mr. Bilodeau states that the Cidrerie had used the Mark since September 1, 1998 in association with the cider and the wholesale distribution of cider and apple-derived food products. Again, according to Mr. Bilodeau's statements, the ciders were sold in bulk, among others, to restaurateurs and various corporations and organizations. The ciders were also sold at the retail level, specifically at markets and food fairs, and at the Cidrerie, which, in addition to its production activities, operated a product tasting and dining room.

[9] In support of his statements, Mr. Bilodeau submitted a list of sales for July 2010 and copies of invoices issued by the Cidrerie during the Relevant Period [Exhibit B-2]. He also submitted a copy of the label used on the bottles of cider [Exhibit B-3]. The Mark appears on this label.

[10] Accordingly, I conclude that the evidence shows use of the Mark in Canada in association with the "cider" wares within the meaning of sections 4(1) and 45 of the Act.

Use of the Mark in association with the services specified in the registration

[11] The Cidrerie’s representations did not convince me that its evidence was sufficient to conclude use of the Mark in Canada in association with “the wholesale distribution of the [sic] cider and apple-derived food products” during the Relevant Period, within the meaning of subsection 4(2) of the Act. This subsection stipulates that a mark is used in association with services if it is shown in the execution or advertising of services.

[12] In support of its claims concerning use of the Mark in association with the services specified in the registration, the Cidrerie refers to exhibits B-4 to B-6 of Mr. Bilodeau affidavit, namely:

- A data sheet for products offered by the Cidrerie [Exhibit B-4];
- Copies of pages from the Cidrerie’s website [Exhibit B-5]; and
- A corporate brochure “promoting the Cidrerie” [Exhibit B-6].

[13] There is no statement in Mr. Bilodeau’s affidavit to the effect that exhibits B4 to B6 cover the Relevant Period or are representative of the material distributed or used by the Cidrerie during the Relevant Period. However, considering Mr. Bilodeau’s affidavit as a whole, I am prepared to infer that such is the case. This said, for the following reasons, I believe that, at most, these exhibits show the use of “Cidrerie Verger Bilodeau” in association with the services specified in the registration, whether as a trade-mark or a trade name.

[14] I acknowledge that the exhibits referred to the cider associated with the Mark. However, the logo produced below as logo A is prominent on the data sheet and corporate brochure, and that produced below as logo B is prominent at the top of each page on the Cidrerie’s website.



(logo A)



(logo B)

[15] More specifically, the data sheet describes, besides the cider associated with the Mark, ciders apparently associated with other marks of the Cidrerie, including LE PETIT BONHEUR,

FASCINATION and SYMPHONIE. The data sheet also describes other food products, such as apple jellies and apple syrup, and processed products, such as apple butter and mustard. Similarly, the images contained in the corporate brochure do not show only the cider associated with the Mark. They show ciders associated with other marks of the Cidrierie, as well as some of its other food products. The same observation applies to the website pages.

[16] I would add that logo A also appears in the upper left corner of all of the invoices submitted as Exhibit B2. In my opinion, this fact supports my conclusion that the evidence shows the use of “Cidrierie Verger Bilodeau,” whether as a trade-mark or a trade name, in association with the Cidrierie’s wholesale services. The fact that these invoices refer to the Mark in the description of certain products does not in itself mean use of the Mark in association with the Cidrierie’s wholesale services. In effect, the reference to the Mark in the description of the products would, at most, constitute a use in association with the cider if the evidence showed that the invoices accompanied the ciders at the time of their transfer of property or ownership.

[17] In summary, further to my analysis of Mr. Bilodeau’s affidavit as a whole, I deem it reasonable to conclude that the Cidrierie executed and advertised cider and apple-derived food products wholesale services during the Relevant Period, but that these services were not executed or advertised in association with the Mark.

[18] Accordingly, I conclude that the evidence does not establish use of the Mark in Canada in association with “the wholesale distribution of the [sic] cider and apple-derived food products” within the meaning of sections 4(2) and 45 of the Act. Furthermore, the Cidrierie presented no evidence of special circumstances justifying the absence of use of the Mark in association with these services during the Relevant Period.

Disposal

[19] Given the above, in exercising the authority delegated to me pursuant to subsection 63(3) of the Act, the Registration No. TMA574,571 will be amended to expunge the services in compliance with the provisions of Section 45 of the Act.

Céline Tremblay
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Traduction certifiée conforme
Alan Vickers