



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

Reference: 2015 TMOB 35  
Date of Decision: 2015-02-26

### TRANSLATION

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by 88766 Canada Inc. against registration  
No. TMA703,812 for the trade-mark ECO-CONFORT in  
the name of Beaudin Le Prohon Inc.**

[1] This decision relates to a summary expungement procedure brought against registration No. TMA703,812 for the trade-mark ECO-CONFORT.

[2] The goods and services covered by the registration are:

Goods: [TRANSLATION] Split-unit air conditioner or heat pump, without conduit, for wall installation, including a dehumidifier, for residential or commercial applications, electronically controlled with remote-control joystick.

Services: [TRANSLATION] Installation, start-up, verification and after-sale service for air conditioner and heat pump.

[3] For the following reasons, I conclude that the registration must be expunged.

#### The proceeding

[4] On October 25, 2013, the Registrar addressed a notice under section 45 of the *Trade-Marks Act*, RSC (1985), c T-13 (the Act) to Beaudin Le Prohon Inc., registered owner of registration No. TMA703,812 for the trade-mark ECO-CONFORT (the Mark). This notice was addressed at the request of 88766 Canada Inc. (the Requesting Party).

[5] The Registrar's notice enjoined Beaudin Le Prohon Inc. (the Owner) to prove the use of the Mark in Canada, at some time between October 25, 2010 and October 25, 2013, in association with each of the goods and each of the services specified in the registration. In the absence of use, the Registrar's notice enjoined the Owner to prove the date when the Mark was used for the last time and the reason for its absence of use since that date.

[6] It is well established that the purpose and the scope of section 45 of the Act are to provide for a simple, summary and expeditious procedure for removing "deadwood" from the register. The criterion for establishing use is not demanding and an overabundance of evidence is unnecessary. However, sufficient facts must be presented to allow the Registrar to conclude that the trade-mark was used in association with each of the goods or services mentioned in the registration during the relevant period [see *Uvex Toko Canada Ltd. v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)]. Bare allegations of use are insufficient to prove the use of the Mark [see *Plough (Canada) Ltd. v Aerosol Fillers Inc.* (1980), 53 CPR (2d) 62 (FCA)].

[7] Section 4 of the Act defines the use of a trade-mark in association with goods and services, as follows:

4. (1) A trade-mark 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.

(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.

(3) A trade-mark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

[8] In response to the Registrar's notice, the Owner filed, under cover of a letter from its trade-mark agent, invoices and a solemn declaration by Guillaume LeProhon, Vice-President, Strategic Development of La Cie Leprohon, Maître ès Celsius.

[9] Neither party filed written representations. The two parties were represented at the hearing, where Mr. LeProhon, who represented the Owner, indicated that the Owner and La Cie Leprohon, Maître ès Celsius are one and the same entity.

The evidence

[10] I reproduce Mr. LeProhon's solemn declaration below:

DÉCLARATION SOLENNELLE

Je soussigné Guillaume LeProhon, vice-président Développement stratégique de la Cie Leprohon , Maître ès Celsius dont le siège social est situé au 6171 Boul. Bourque à Sherbrooke, Québec déclare ce qui suit :

La Cie leprohon emploie toujours la marque de commerce ECO-CONFORT et que à l'avenir, nous continuerons a l'utiliser

Je fais cette déclaration solennelle la croyant en toute conscience vraie et qu'elle a la même force et le même effet que si elle était faite sous serment.

Déclaré à Sherbrooke, le        Novembre 2013.



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Guillaume LeProhon



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[11] There is no reference in the solemn declaration to the four invoices filed concurrently with the declaration. These invoices were presented in the covering letter as invoices for sales or repairs concerning the equipment sold under the Mark. I note that the invoices were issued in 2013 by "leprohon (sic) Maître ès Celsius".

### Representations of the Parties

[12] During the hearing, the Requesting Party's agent submitted, first and foremost, that Mr. LeProhon's solemn declaration is inadmissible as evidence. Apart from the fact that the signing date is incomplete, the Requesting Party's agent noted the absence of a "jurat".

[13] In the event the solemn declaration would be ruled admissible, the Requesting Party's agent made subsidiary representations, which I summarize as follows:

- i) the solemn declaration, which contains only a bare affirmation of use of the Mark, is insufficient to establish use pursuant to section 45 of the Act;
- ii) there is no evidence proving that the Owner and La Cie Leprohon, Maître ès Celsius are one and the same business; and
- iii) in the absence of reference to the invoices in the declaration, they are inadmissible as evidence. Subsidiarily, the invoices do not prove the use of the Mark in association with goods, within the meaning of section 4 of the Act, and even less in association with each of the goods specified in the registration. Nor do they prove the use of the Mark in association with each of the services, as worded in the registration.

[14] Mr. LeProhon responded to the Requesting Party's representations concerning the inadmissibility of the evidence, submitting that he had signed his solemn declaration in the presence of a witness, and attested to the veracity of its contents. Concerning the Requesting Party's subsidiary representations, it is sufficient to say that Mr. LeProhon responded to them by invoking facts that are neither alleged nor explained in his solemn declaration.

### Examination of the questions in the case at bar

[15] The first question to examine is the admissibility of Mr. LeProhon's solemn declaration. This question may be conclusive, because if I conclude the solemn declaration is inadmissible, I will have to conclude that the Owner did not file evidence in response to the Registrar's notice.

[16] As mentioned by my colleague Jean Carrière (acting on behalf of the Registrar) in *Gowling Lafleur Henderson LLP v 81392 Canada Ltd.* 2008 CarswellNat 3659 (TMOB) at paragraph 13:

Although the procedure in section 45 is simple, the evidence must nonetheless be adduced by way of statutory declaration or affidavit in order to ensure that its contents are true especially since the applicant cannot cross examine the deponent.

[17] To determine whether Mr. LeProhon's solemn declaration is a real solemn declaration, I refer to section 41 of the *Evidence Act*, RSC (1985) c C-5. This section stipulates the following:

41. Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

I, ..... , solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.

Declared before me at ..... , this ..... date of ..... 19 .....

[18] Even if I agree that Mr. LeProhon affirms that he declares, rather than *solemnly* declares the contents of his declaration, the last paragraph clearly constitutes the formula required to attest to the veracity of the contents of a solemn declaration.

[19] However, as the Requesting Party correctly argued, the requirement that a solemn declaration be made before a person authorized to receive it in application of section 41 of the *Evidence Act* is not a purely formalistic requirement that I may set aside. In the absence of an oath or a solemn affirmation regularly subscribed, there is no affidavit or solemn declaration. It is impossible for me, in the case at bar, to conclude that the "witness" was a person authorized to receive Mr. LeProhon's solemn declaration.

[20] I therefore conclude that Mr. LeProhon's solemn declaration is not a real solemn declaration and thus is not admissible in the case at bar.

[21] Since the Owner, by not filing its evidence in the form of an affidavit or a solemn declaration, did not comply with the requirements of section 45 of the Act, I conclude that it did not furnish the required evidence. It is therefore appropriate to expunge the registration.

[22] I will add that, if I had ruled Mr. LeProhon's declaration admissible, I would have concluded that the Owner had not discharged its burden of proof. Let it suffice to say that I essentially would have subscribed to the Requesting Party's subsidiary representations to conclude that the evidence was insufficient to prove the use of the Mark in Canada, within the meaning of sections 4 and 45 of the Act, in association with each of the goods and services specified in the registration.

### Decision

[23] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, registration TMA703,812 will be expunged in compliance with the provisions of section 45 of the Act.

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

Arnold Bennett  
Certified true translation