



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

Citation: 2015 TMOB 140
Date of Decision: 2015-08-24

IN THE MATTER OF A SECTION 45 PROCEEDING

Miller Thomson LLP	Requesting Party
and	
Rhoing (1975) Limited	Registered Owner
TMA261,092 for NOVA	Registration

[1] At the request of Miller Thomson LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on November 4, 2013 to Rhoing (1975) Limited (the Owner), the registered owner of registration No. TMA261,092 for the trade-mark NOVA (the Mark).

[2] The Mark is registered in association with the following goods:

- (1) Surgical and dental instruments.
- (2) Medical examination gloves, medical finger cots.
- (3) Vinyl gloves.
- (4) Blood pressure units.
- (5) Stethoscopes.
- (6) Scalpel blades.
- (7) Stainless steel utensils, namely bed pans, kidney trays, catheter and instrument trays, surgical aluminum boxes, dressing jars, dressing drums, sponge bowls, iodine cups, thermometer and forceps jars and solution bowls-wash basins.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been 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 between November 4, 2010 and November 4, 2013.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) of the Act:

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.

[5] 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 and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Owner filed the affidavit of Leslie Levi, President of the Owner, sworn on January 29, 2014 in Montreal. Both parties filed written representations; an oral hearing was not requested.

The Owner’s Evidence

[7] In his affidavit, Mr. Levi states that the Owner is an importer and wholesale distributor of medical, surgical, laboratory, dental and veterinarian equipment and supplies, carrying on business under the trade-mark ALMEDIC. He states that the Owner has been selling “dental instruments” in association with the Mark since 1981 as well as “blood pressure units” and “stethoscopes” since 1994.

[8] With respect to the remaining registered goods, in its written representations, the Owner concedes that the Mark was not used in association with such goods and that no special circumstances excusing such non-use existed. The registration will be amended accordingly.

[9] With respect to dental instruments, Mr. Levi includes evidence with respect to various types of dental instruments, including scalers, dams and forceps. He attests that the Owner's dental instruments were sold and delivered to its distributors in boxes which had labels bearing the Mark. Attached as Exhibits 2 and 4 are samples of such boxes. I note that the Mark appears on labels on the outside of each box and, with respect to Exhibit 2, on a bag inside the box.

[10] Furthermore, attached as Exhibit 6 to Mr. Levi's affidavit is a copy of a catalogue entitled "Nova Dental Instruments". Mr. Levi attests that this catalogue has been in continuous use since 1982 and that copies of the catalogue have been sent by the Owner to its distributors in Canada for their use in ordering NOVA branded dental instruments. The catalogue shows that NOVA branded instruments use product codes starting with the letters "NV". Mr. Levi notes that, as depicted in the catalogue, the Mark is embossed on the side of the instruments. He specifically references two dental scalers on pages 40 and 41 of the catalogue, both of which show the Mark on the instrument handle.

[11] As evidence of transfers of NOVA dental instruments, attached as Exhibits 3, 5, 7, 8 and 10 to Mr. Levi's affidavit are invoices from "Almedic A Division of Rhoing (1975) Limited" to various customers in Canada, all dated within the relevant period. The invoices show sales of various types of dental instruments identified by Mr. Levi. I note, for example, that one of the Exhibit 3 invoices shows a sale of a "dental scaler", with catalogue numbers corresponding with those identified by Mr. Levi and appearing in the Exhibit 6 catalogue.

[12] With respect to "blood pressure units", Mr. Levi identifies several models sold by the Owner during the relevant period, along with associated catalogue numbers. He states that the Owner's blood pressure units were packaged and delivered to its distributors in containers and boxes bearing the Mark. Attached as Exhibits 14, 16 and 17 to his affidavit are samples of such containers and boxes. The Mark is clearly displayed on the packaging.

[13] As evidence of transfers, Mr. Ash attaches representative invoices to his affidavit at Exhibits 15, 18 and 20. The invoices show sales of different types of NOVA blood pressure units to Canadian addresses during the relevant period.

[14] With respect to “stethoscopes”, Mr. Levi attests that the Owner’s NOVA stethoscopes were packaged and delivered to its distributors in boxes bearing the Mark. Attached as Exhibits 11 and 12 to his affidavit are sample boxes, clearly displaying the Mark as registered.

[15] As evidence of transfers, attached as Exhibit 13 to his affidavit are seven invoices showing sales of NOVA stethoscopes in Canada during the relevant period. For example, one of the invoices shows a sale of ten “NOVA DOUBLE HEAD STETH BLACK” to a company in Quebec in 2012.

Requesting Party Representations

[16] In its written representations, the Requesting Party submits that the evidence at best shows use of the Mark by an entity named ALMEDIC, rather than the Owner. As such, it submits that the evidence fails to show use of the Mark enuring to the benefit of the Owner, as i) the evidence does not clearly indicate the relationship between ALMEDIC and the Owner, ii) there is no evidence of a licensing agreement and iii) there is no evidence of control, as required by section 50 of the Act.

[17] However, as noted above, the invoices refer to “Almedic A Division of Rhoing (1975 Limited)”. This is consistent with Mr. Levi’s statement in his affidavit that the Owner’s business is carried on in association with the trade-mark ALMEDIC. It is also consistent with his references to the exhibited boxes and invoices as having belonged to or issued from the Owner. Nothing in the evidence indicates that ALMEDIC is a separate legal entity. As such, I agree with the Owner that ALMEDIC is simply a trade name of the Owner, and that references to “ALMEDIC” in the exhibits are references to the Owner itself. Accordingly, section 50 of the Act is not relevant in this case.

[18] The Requesting Party also submits that some of the dental instruments appear to be identified in the catalogue by trade-marks other than NOVA. For example, it notes that, both in the invoices and in Mr. Levi’s affidavit, products are described as “Darby-Perry Scaler”, “Jaquette Dental Scaler”, “Rubberdam Punch” and “Rubberdam Clamp Forceps”.

[19] In its written representations, the Owner explains that these descriptions are actually the generic terms for such specialized instruments, and do not constitute use of other trade-marks in association with such products. Indeed, this is discernible from the catalogue's table of contents, where instruments with clearly descriptive names are listed in the same manner as instruments with names that may not appear to be generic to a layperson.

[20] In any event, the evidence shows that the Mark appeared on the instruments themselves and was displayed on the boxes in which they were distributed during the relevant period in Canada.

[21] Similarly, the Requesting Party notes that, with respect to "dental instruments", the Mark does not appear on the associated invoices. However, the Owner acknowledges that such invoices were not filed in order to establish use of the Mark in Canada on their own. Rather, such invoices were furnished to establish that the Owner's NOVA dental instruments were transferred in Canada during the relevant period. Indeed, the codes appearing on the invoices correspond with the catalogue codes for NOVA instruments.

[22] Again, as the evidence shows that the Mark appeared on the goods themselves or the packages in which they were transferred, the fact that the Mark did not appear on the invoices is irrelevant.

[23] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods "dental instruments", "blood pressure units" and "stethoscopes" within the meaning of sections 4 and 45 of the Act.

Disposition

[24] Accordingly, 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 goods (2), (3), (6), (7) and “surgical and...” from goods (1).

[25] The amended statement of goods will be as follows:

- (1) Dental instruments.
- (2) Blood pressure units.
- (3) Stethoscopes.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

Hearing Date: No Hearing Held

Agents of Record

Robinson Sheppard Shapiro S.E.N.C.R.L./L.L.P.

For the Registered Owner

Miller Thomson LLP

For the Requesting Party