



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

Reference: 2016 TMOB 132
Date of Decision: 2016-07-27
[UNREVISED ENGLISH
CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Gaétane Ross

Requesting Party

and

**Simon Zakini, also doing business under
the name of Promotions Démo**

Registered Owner

TMA803,955 for Arthri-MED Plus

Registration

[1] This decision relates to a summary expungement procedure brought against registration No. TMA803,955 for the trade-mark Arthri-MED Plus (the Mark) registered in association with: liquid medicine for treating arthritis (the Goods).

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

The Proceeding

[3] On March 19, 2015 at the request of Gaétane Ross (the Requesting Party), the Registrar sent the notice stipulated in section 45 of the *Trade-marks Act*, RSC 1985, c T-13 (the Act) to Simon Zakini, also doing business under the name of Promotions Démo (the Registered Owner), the owner of the registration of the Mark.

[4] Section 45 of the Act requires the Registered Owner to show that he has used the Mark in Canada in connection with each of the Goods at any given time during the three years preceding the date of the notice or, if not, to provide the date on which it was last used and the reason for its absence of use since that date. The relevant period is therefore from March 19, 2012 to March 19, 2015 (the Relevant Period).

[5] The procedure pursuant to section 45 is simple and expeditious, and serves to clear “deadwood” from the register. Accordingly, the threshold to establish use of the Mark, within the meaning of section 4 of the Act, during the Relevant Period is not very high [see *Uvex Toko Canada Ltd v Performance Apparel Corp*, 2004 FC 448, 31 CPR (4th) 270]. The issue is to establish a use of the Mark prima facie [see *1459243 Ontario Inc v Eva Gabor International, Ltd*, 2011 FC 18].

[6] A simple assertion of use of the Mark in association with the Goods is not sufficient to establish its use within the meaning of section 4(1) of the Act. There is no requirement to produce abundant evidence. However, any ambiguity in the evidence will be interpreted against the Registered Owner [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980) 53 CPR (4th) 62 (FCA)].

[7] In response to the Registrar's notice, the Registered Owner filed the statutory declaration of Mr. Melvin Dionne, sworn on March 31, 2015. Attached to this statutory declaration were two invoices of Laboratoire Sol-Labo Inc. (Sol-Labo) dated March 13, 2015 and August 15, 2013.

Preliminary Remarks

[8] On September 14, 2015, the Requesting Party submitted written representations, in which it raises several deficiencies in the evidence provided by the Registered Owner. Thus, on November 16, 2015, the Registered Owner filed two additional affidavits, those of Mr. Mathieu Dionne, sworn on November 16, 2015, and Simon Zakini, sworn on the same date.

[9] By decision rendered on December 17, 2015, the Registrar refused the filing of these affidavits on the record and indicated in his decision that their contents will not be considered

when the Registrar will have to render his final decision under section 45 of the Act. Thus, I will consider only the contents of the above-mentioned statutory declaration of Mr. Melvin Dionne.

[10] The Registered Owner did not file written representations. No hearing was held.

The Evidence

[11] I reproduce the two relevant paragraphs of the statutory declaration of Mr. Melvin Dionne:

[TRANSLATION]

I hereby solemnly declare that the trade-mark Arthri-MED Plus is currently used in Canada regarding the product specified in the registration, namely: 'a liquid medicine for treating arthritis'.

To support this declaration, we attach two invoices of the manufacturer mentioning the trade-mark, the first dated August 15, 2013 and the more recent dated March 13, 2015.

[12] Indeed, attached to this statutory declaration, we find two invoices issued on these dates by Sol-Labo to Promotions Multidemos (Multidemos) with the mention below this of '9253-1979 Québec Inc.'.

Analysis of Evidence

[13] It will not be necessary to rule on all the questions raised by the Requesting Party in its written representations to dispose of this proceeding. I will focus on those that appear to be the most material in my opinion.

[14] However, I must point out that the technical defects of Mr. Dionne's statutory declaration identified by the Requesting Party in its written representations would not have been fatal to the Registered Owner.

[15] First of all, the first paragraph of Mr. Dionne's statutory declaration reproduced above is only a mere claim of use and its contents are insufficient to conclude that the Mark was used within the meaning of section 4(1) of the Act [see *Plough, op. cit.*].

[16] As for the contents of the second paragraph, Mr. Dionne refers to two invoices issued by a third party, identified as the manufacturer of the product, Sol-Labo. The Mark appears alone under the ‘description’ heading of the invoice. Moreover, the goods described in the invoices filed are sold to Multidemos, which seems to be a business name of 9523-1979 Québec Inc. This poses a problem on several levels.

[17] In the first place, nothing indicates that the goods sold by Laboratoire are the Goods. As for the transfer of ownership, these invoices prove a transfer of ownership from Sol-Labo to Multidemos. These two invoices in no way prove a transfer of ownership from the Registered Owner to a third party.

[18] Moreover, Mr. Dionne does not explain the relationship between the Registered Owner and Multidemos. I recall that the Registered Owner is Mr. Simon Zakini, also doing business under the name of Promotions Démos. There is no evidence on record that Multidemos would be a licensee of the Mark under a license agreement with the Registered Owner.

[19] Another important point: Mr. Dionne does not inform us of how the Mark appears on the Goods during the transfer of ownership of the Goods.

[20] Even if I considered Sol-Labo's invoices to be evidence of use of the Mark in association with the Goods, I have no evidence that these invoices accompanied the Goods during their delivery.

[21] Finally, below the name ‘Melvin Dionne’ in the statutory declaration, there is the mention [TRANSLATION] ‘rep for service’. I presume this means ‘Representative for service’ because in the record, Mr. Dionne indeed is identified as the representative for service on behalf of the Registered Owner. However, the fact of being the representative for service does not empower Mr. Dionne to attest to the use of the Mark on behalf of the Registered Owner, except if he has personal knowledge of the facts described in his statutory declaration. There is no assertion in this sense in his statutory declaration.

[22] All these deficiencies and questions, which remain unanswered, are sufficient to conclude that the Registered Owner has not proved that he used the Mark in Canada in association with the Goods during the Relevant Period, within the meaning section 4(1) of the Act. Moreover, the

Registered Owner has not provided evidence of facts that could constitute special circumstances within the meaning of section 45(3) of the Act, justifying the non-use of the Mark during the Relevant Period.

[23] On all these grounds, I conclude that the registration of the Mark must be expunged from the register.

Disposal

[24] In exercising the authority delegated to me pursuant to the provisions of section 63(3) of the Act, registration TMA803,955 will be expunged in compliance with the provisions of section 45 of the Act.

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

Certified true translation
Arnold Bennett

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENT(S) OF RECORD

No agent appointed

FOR THE REGISTERED
OWNER

Robic

FOR THE REQUESTING
PARTY