



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

Citation: 2017 TMOB 6
Date of Decision: 2017-01-19
[UNREVISED ENGLISH
CERTIFIED TRANSLATION]

IN THE MATTER OF A SECTION 45 PROCEEDING

Altex Décoration Ltée

Requesting Party

and

Vaillancourt Inc.

Registered Owner

TMA697,839 for Harmonia

Registration

The record

[1] On July 14, 2015, at the request of Altex Décoration Ltée (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 R. Vaillancourt & Fils Ltée, whose name then appeared as registered owner of registration No. TMA697,839 for the Harmonia trade-mark (the Mark). As explained hereinafter, the name of this company was changed to Vaillancourt Inc. on October 3, 2011, and this name has now been registered on the record. Consequently, I will refer to Vaillancourt Inc. as the Registered Owner.

[2] This notice enjoined the Registered Owner to prove that its Mark was used in Canada at any time between July 14, 2012 and July 14, 2015 (the relevant period), in association with the goods specified in the registration, namely "hybrid windows, aluminum PVC" and, in the

negative, the date when the Mark was used for the last time and the reason for its failure to use it since that date.

[3] In response to the Registrar's notice, the Registered Owner filed an affidavit submitted by its co-owner, Carl Vaillancourt , on September 18, 2015.

[4] Neither of the parties filed written representations. Only the Requesting Party requested and participated in a hearing.

Analysis

[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; this is why the applicable test is not very stringent. As stated by Judge Russell in *Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC), at p. 282:

We know that the purpose of s. 45 proceedings is to clean up the "deadwood" on the register. We know that the mere assertion by the owner that his trade-mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owner's business and merchandising practices.

[6] In the present case, section 4(1) of the Act defines use in association with goods as follows:

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.

[7] This leads me to review the evidence filed by the Registered Owner.

[8] Mr. Vaillancourt affirms in a brief affidavit that [TRANSLATION] "the [Mark] has always been used by [the Registered Owner] since October 3, 2007" and he attached in support

of such assertion [TRANSLATION] a "copy of bid made to a customer by way of evidence", dated September 17, 2015.

[9] Mr. Vaillancourt affirms he is personally aware of all the facts alleged in his affidavit, and that all these facts are true.

[10] Mr. Vaillancourt ends his affidavit by notifying the Registrar of the above-mentioned name change and attaching a copy of an excerpt from the Québec Enterprise Register attesting to this change.

[11] At the hearing, the Requesting Party argued that the evidence filed by the Registered Owner does not meet the criteria stated above to establish the use of the Mark during the relevant period for obvious reasons.

[12] I agree.

[13] Although Mr. Vaillancourt affirms that the Mark has always been used by the Registered Owner since October 3, 2007, the only exhibit provided to corroborate this general assertion of use consists of the above-mentioned bid. However, this bid poses a problem for the following reasons:

- It is dated subsequent to the relevant period. In fact, as mentioned by the Requesting Party, it precedes the signing date of Mr. Vaillancourt's affidavit by only one day.
- It does not constitute evidence per se of a sale or commercial transaction involving the goods covered by the registration. It is simply an offer of goods for which no evidence exists of any acceptance by the customer. In other words, this bid does not prove any transfer of the goods described therein in the normal course of business.
- Moreover, although this bid refers to the Mark, it seems to concern [TRANSLATION] "hybrid structural shutter" instead of "windows", although the Requesting Party concedes that the illustration included in the bid and the other information contained therein seem to indicate it concerns a shutter for a window.

[14] I agree with the Requesting Party that the first two reasons stated above are fatal for the Registered Owner in the case at bar. It is thereby useless to describe at greater length the question of the description of the goods found in the bid.

[15] By way of a parallel, it is sufficient to recall the following decisions in a matter of a section 45 notice:

- *Smart & Biggar v Boussad (Collection Bagus Inc)*, 2008 CanLII 88448 (TMOB), in which the Registrar concluded the absence of evidence that a commercial transaction proving that a transfer of ownership of the goods displaying the trade-mark in question had occurred during the relevant period. The evidence consisted of photographs of some of the goods in question and a copy of a purchase order dated subsequent to the relevant period.
- *Canadian Council of Professional Engineers v Labon Inc.*, 2006 CanLII 80400 (TMOB), in which the Registrar concluded the absence of proof of payment or any exchange of the goods displaying the trade-mark in question had occurred during the relevant period. The computer statement filed as evidence was considered to be an internal document not proving per se the sale of the products covered by the registration in question during the relevant period. Moreover, the evidence did not prove how the mark had been affixed to the goods or their packaging at the time of their sale during the relevant period.

[16] In view of the foregoing, I find that the Registered Owner has not discharged the burden that was incumbent on it under the terms of section 45 of the act to prove the use of the Mark in association with the goods described in the registration during the relevant period. The contents of Mr. Vaillancourt's affidavit are akin to a mere assertion of use of the Mark. He does not prove how the Mark was used by the Registered Owner within the meaning of section 4(1) of the Act, such that notice of association was given during the relevant period. Moreover, the Registered Owner did not provide any evidence of special circumstances justifying the non-use of the Mark during the relevant period.

Disposal

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

Annie Robitaille
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

Certified translation
Arnold Bennett

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

HEARING DATE: 2017-01-12

APPEARANCES

No appearance

FOR THE REGISTERED
OWNER

Catherine Bergeron

FOR THE REQUESTING
PARTY

AGENT(S) OF RECORD

No agent

FOR THE REGISTERED
OWNER

Robic, S.E.N.C.R.L.

FOR THE REQUESTING
PARTY