



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2019 TMOB 123
Date of Decision: 2019-11-18

IN THE MATTER OF A SECTION 45 PROCEEDING

BCF S.E.N.C.R.L./BCF LLP

Requesting Party

and

Trexima Limited

Registered Owner

TMA640,732 for THE WATER DROP

Registration

[1] At the request of BCF S.E.N.C.R.L./BCF LLP (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) on October 30, 2017 to Trexima Limited (the Owner), the registered owner of registration No. TMA640,732 for the trademark THE WATER DROP (the Mark).

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

Purified drinking water, water coolers, water softeners, water filtration units.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with each of the goods specified in the registration, at any time between October 30, 2014 and October 30, 2017. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definitions of “use” in association with goods is set out in section 4 of the Act as follows:

4(1) A trademark 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 mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FC)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FC)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FC)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trademark in association with each of the goods and services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FC)].

[6] In response to the Registrar's notice, the Owner furnished the affidavit of Mr. Kronfli, sworn on January 18, 2018. The Requesting Party then filed its written representations on May 18, 2018. On May 24, 2018, a letter was issued by the Registrar inviting the Owner to file written representations or notify the Registrar that no written representations would be filed. On June 4, 2019, the Registrar received a letter from the Owner, objecting that the language of correspondence between the Registrar and the Requesting Party, including the Requesting Party's written representations, is in French. In its letter, the Owner submitted that it should receive all communications in this proceeding in English, its preferred language of correspondence, and requested that the Registrar's "affiliated third parties" be informed accordingly. Per the Registrar's letter to the Owner dated July 3, 2018, while each party to a section 45 proceeding may communicate with the Registrar in the official language of its choice, there is no legislative or regulatory requirement for a party corresponding with the Registrar to send the other party a translated copy of its correspondence. Following the Registrar's letter, the Owner did not file written representations. Neither party requested an oral hearing.

THE OWNER'S EVIDENCE

[7] In his brief affidavit, Mr. Kronfli states the following:

I, Sami Kronfli of Vaughan, Ontario solemnly swear and affirm that The Water Drop name is being used on stickers and labels on water treatment and water purification equipment sold to the public through a retail store (The Water Store) for the past 7 years. The Water Store's main brand of water treatment products is The Water Drop brand name now widely known and recognized among their customers. Among the systems carrying the brand name are Reverse Osmosis drinking systems, Water Softeners and Iron & Chlorine filters.

ANALYSIS

[8] At the outset, as noted by the Requesting Party, Mr. Kronfli does not explain his relationship with the Owner and how he has personal knowledge of the facts set out in his affidavit. At the very least, however, as Mr. Kronfli includes his name together with the name of the Owner when signing his affidavit, I could infer that he is an employee of the Owner, authorized to provide such evidence. In any event, this matter is irrelevant as the Owner's evidence fails to establish the requisite use of the Mark for the reasons detailed below.

[9] As noted by the Requesting Party, Mr. Kronfli's affidavit does not reference any good that corresponds to the registered good "Purified drinking water". Consequently, the Owner failed to provide evidence of use with respect to this good. As special circumstances have not been advanced to excuse such non-use, "Purified drinking water" will be deleted from the registration.

[10] With respect to the remaining registered goods, the Requesting Party submits, and I agree, that it is not clear which remaining registered goods are identified in Mr. Kronfli's affidavit, as he only refers to "water treatment" and "water purification equipment". In any event, it is not necessary for me to draw a conclusion on this issue as there is no evidence of use of the Mark with respect to any of the goods referenced in Mr. Kronfli's affidavit.

[11] Indeed, Mr. Kronfli merely asserts that "The Water Drop name is being used on stickers and labels on water treatment and water purification equipment". The Owner fails to *show* how the Mark as registered was presented on, or in association with such goods by providing exhibits

in support of Mr. Kronfli's assertion, such as representative photographs of the Mark displayed on the goods and/or their packaging.

[12] Additionally, the Owner does not provide evidence of sales or transfers during the relevant period in Canada of the referenced "water treatment and water purification equipment". Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FC)], some evidence of transfers in the normal course of trade in Canada is necessary [*John Labatt*]. Such evidence can be in the form of documentation like invoices, sales reports, but can also be through clear sworn statements such as volumes of sales, dollar value of sales, or equivalent factual particulars [see, for example, *1471706 Ontario Inc v Momo Design srl*, 2014 TMOB 79, CarswellNat 2439].

[13] However, in the case at bar, Mr. Kronfli does not provide any clear statement or any document showing any transfers in Canada during the relevant period. Indeed, Mr. Kronfli statement that water treatment and water purification equipment "were sold for the past 7 years" is a mere assertion also ambiguous as it doesn't necessarily correspond to the relevant period. Furthermore, I note that Mr. Kronfli does not even indicate that the sales were not made in Canada nor does he make any statement regarding his normal course of trade.

[14] In the absence of additional details and supporting documents, Mr. Kronfli's statements amount to a mere assertion of use only, rather than statements of fact showing use of the Mark. As such, Mr. Kronfli's statements are insufficient to establish use of the Mark within the meaning of section 4 and 45 of the Act.

[15] In view of all the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of section 4 and 45 of the Act. Furthermore, there is no evidence before me of special circumstances excusing the absence of such use.

DISPOSITION

[16] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

Jean Carrière
Member
Trademarks Opposition Board
Canadian Intellectual Property Office

**TRADEMARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

No Hearing Held

AGENTS OF RECORD

No Agent Appointed

For the Registered Owner

BCF S.E.N.C.R.L./BCF LLP

For the Requesting Party