



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 88

Date of Decision: 2020-07-31

IN THE MATTER OF A SECTION 45 PROCEEDING

Jeunesse Global Holdings, LLC

Requesting Party

and

**LaFontaine Source De Jeunesse
Corporation**

Registered Owner

TMA403,697 for JEUNESSE

Registration

INTRODUCTION

[1] At the request of Jeunesse Global Holdings, LLC (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 November 6, 2017 to LaFontaine Source De Jeunesse Corporation (the Owner), the registered owner of registration No. TMA403,697 for the trademark JEUNESSE (the Mark). The Mark is registered in association with the services “Operation of a skin care spa.”

[2] The notice required the Owner to furnish evidence, either by way of affidavit or statutory declaration, showing that it had used the Mark in Canada, at any time between November 6, 2014 and November 6, 2017 (the Relevant Period), in association with the services specified in the registration. If the Mark had not been so used, the Owner was required to furnish evidence

providing the date when the Mark was last in use and the reasons for the absence of use since that date.

[3] The Owner was not represented by a lawyer or trademark agent in its dealings with the Registrar on this matter. Instead, the Owner's evidence and written representations were submitted by an individual named Arthur Froom, identified variously in his correspondence to the Registrar as the Managing Director of "LaFontaine Source De Jeunesse Corporation" [per letters to the Registrar dated May 31, 2019 and September 21, 2018], the Director/Shareholder/Vice President of "LaFontaine Source De Jeuneses Corporation" [per letter to the Registrar dated September 21, 2018], the Director/President of "LaFontaine Source De Jeunesse" [per letter to the Registrar dated May 31, 2019], and the Director of "2186704 ONTARIO INC. T/A Lafontaine Source de Jeunesse Corporation and LaFontaine Source De Jeunesse, Inc." [per letters to the Registrar dated May 11, 2018 and December 18, 2017].

[4] In response to the Registrar's notice, the Owner submitted a document identified as the "AFFIDAVIT OF ARTHUR FROOM AS PROOF OF USE OF MARKS DURING THE THREE (3) YEARS PRIOR TO THE S. 45 NOVEMBER 6, 2017 NOTICE DATE (SWORN SEPTEMBER 20, 2018)" (the Froom Affidavit). As will be discussed below, the Froom Affidavit includes over 200 pages of exhibits. Among those exhibits are two documents which are themselves identified as affidavits, namely, the "AFFIDAVIT EVIDENCE OF JESSICA GUNAWARDANA" dated September 18, 2018 (the Gunawardana Affidavit) and the "AFFIDAVIT EVIDENCE OF LIA LAANEMETS AS EVIDENCE OF USE [...]" dated September 7, 2018 (the Laanemets Affidavit).

[5] Both the Requesting Party and the Owner submitted written representations. A hearing was not requested.

SUMMARY OF RELEVANT LAW

[6] Section 45(1) of the Act requires the owner of a registered trademark to furnish its evidence in the form of "an affidavit or statutory declaration". The technical requirements to constitute an affidavit are not specified in the Act, but are generally governed in Canada by the various provincial rules of civil procedure, the *Federal Courts Rules*, and the *Canada Evidence*

Act. For affidavits sworn outside of Canada, the Registrar generally accepts such affidavits provided that they were sworn in compliance with the requirements of the jurisdiction in which they were sworn [*Dubuc v Montana* (1991), 38 CPR (3d) 88 (TMOB)]. The form and requirements of a statutory declaration are set out in section 41 of the *Canada Evidence Act*.

[7] Section 45 proceedings are intended to be summary in nature; their purpose being to remove “deadwood” from the trademarks register. Consequently, mere technical deficiencies in an owner’s evidence should not be a bar to a successful response to a section 45 notice [*Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)], and it has been held that the “technical requirements” of section 45 should not become “a trap for the unwary” [*George Weston Ltd. v. Sterling & Affiliates* (1984), 3 CPR (3d) 527 (Fed TD)]. For example, the Registrar has held that it need not strictly adhere to the rules of practice of the Federal Court with respect to evidence from a registered owner [*Maximilian Fur Co v Maximillian for Men's Apparel Ltd* (1983), 82 CPR (2d) 146 (TMOB) at para 9]. In certain cases, un-notarized or incorrectly notarized exhibits to an affidavit have been admitted as evidence when no timely objection was raised by the requesting party [*Adams v Société des Produits Nestlé SA* (1996), 72 CPR (3d) 100 (TMOB) at paras 13-14]. In other cases, the Registrar has held that exhibits to an affidavit need not be notarized provided the exhibits are properly identified in the body of the affidavit [*Smith, Lyons, Torrance, Stevenson & Mayer v Pharmaglobe Laboratories Ltd* (1996), 75 CPR (3d) 85 (TMOB) at para 7].

[8] An owner is permitted to file multiple affidavits in response to a section 45 notice, including affidavits from third parties [*Baume & Mercier SA v Brown Carrying On Business As Circle Import* (1985), 4 CPR (3d) 96 (FCTD)].

[9] However, the evidence filed by a registered owner must still constitute “an affidavit or statutory declaration” in order to comply with section 45(1) of the Act. If it does not, then such evidence has been held inadmissible [*Indian Motorcycle International, LLC v 680187 Ontario*, 2006 CarswellNat 4928 (TMOB) at paras 6-9; see also *Riches, McKenzie & Herbert LLP v Sena Marketing Inc*, 2014 TMOB 255, 130 CPR (4th) 189].

[10] Assuming that an owner’s evidence is admissible, it is well established that mere assertions of use in an affidavit 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 (FCA)]. Although the threshold for establishing use in these proceedings is low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], 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 services specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[11] With respect to services, the display of a trademark on advertising is sufficient to meet the requirements of section 4(2) when the trademark owner is offering and prepared to perform those services in Canada [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (TMOB)].

ANALYSIS

[12] In the present case, I am conscious of the fact that the Owner was not represented by counsel or a registered trademark agent in these proceedings, and that technical deficiencies ought not preclude a successful response to a section 45 notice. Nevertheless, in my view, the deficiencies in the Owner's evidence in this case are so fundamental and numerous that they amount to more than mere technicalities, and instead render the Owner's evidence inadmissible. As a consequence, I find that the Owner has not filed evidence in compliance with section 45(1) of the Act and its registration should be expunged.

[13] As noted above, the Owner included the Gunawardana Affidavit and the Laanemets Affidavit as exhibits to the Froom Affidavit. In my analysis of the evidence, I have considered the merits of these three documents as though the Owner filed three separate affidavits (though as will be discussed below there is some ambiguity as to whether certain exhibits were intended as exhibits to the Froom Affidavit or Gunawardana Affidavit). Ultimately, in my view, nothing turns on this somewhat unusual way in which the Gunawardana Affidavit and the Laanemets Affidavit were filed in this case.

[14] First, I will canvass the deficiencies common to all three of the "AFFIDAVITS" and then I will address issues specific to each document.

Deficiencies common to all three “AFFIDAVITS”

[15] There are two deficiencies common to each of the Froom Affidavit, Gunawardana Affidavit and the Laanemets Affidavit.

[16] First, none of the three documents contain an indication that the content is provided under oath or solemn declaration. While each of these documents contains a jurat at the end signed by a notary or commissioner, it has been held that the presence of a jurat is not necessarily sufficient to correct for the absence of an indication that the facts were provided under oath or solemn declaration. In this regard, the following analysis in *Dr Ing hcF Porsche AG v Procycle Inc* (1992), 45 CPR (3d) 432 (TMOB) at paragraphs 9-10, relied on by the Requesting Party, is instructive:

To be affidavits, the documents would have to have been sworn. As pointed out by the opponent, the decision in *Dobrinsky v. Kubara* (1949), [1950] 1 W.W.R. 65 (Man. K.B.) is authority for the proposition that the failure of an affiant to specify that the statements contained in the affidavit were made under oath renders the affidavit inadmissible. Further, in the *Dobrinsky* case., Mr. Justice Kelly refers to *Newton, Re* (1860), 2 De G.F. & J. 3, 45 E.R. 522 (Eng. Ch. Div.), where it was held “that the omission of the material words ‘make oath’ is not cured by the jurat stating: ‘Sworn by the said deponents’.” Further, were the documents intended to be considered as statutory declarations, then each is contrary to Section 41 of the Canada Evidence Act which stipulates the form to be used in the case of a statutory declaration.

Despite being alerted to the alleged defects in the four documents by the opponent's written argument, the applicant elected to proceed on the basis that the documents were admissible as evidence. While the Opposition Board is prepared to overlook technical deficiencies in the jurat of an affidavit or similar technical objections to evidence, and particularly so when the objections are raised for the first time at an oral hearing, I consider that the defects in the four documents to be more than mere technical deficiencies or minor irregularities which ought to be overlooked. I have therefore concluded that the four documents are inadmissible as evidence in this proceeding.

[17] In this case, none of the three “AFFIDAVITS” submitted by the Owner make reference to the facts being provided under oath, and none meet the requirements of a statutory declaration under section 41 of the *Canada Evidence Act*.

[18] Further, the Owner was put on notice by the Requesting Party's written representations that the Requesting Party was contesting the admissibility of the Owner's evidence on the basis that it was not provided under oath or solemn declaration, and the Owner took no steps to try to

correct the alleged issue (for example, by requesting a retroactive extension of time to file a corrected affidavit or statutory declaration).

[19] Second, I note that neither of the Froom Affidavit, the Gunawardana Affidavit or the Laanemets Affidavit contain any of the customary personal identification information about the affiant (such as, for example, the affiant's city and/or county of residence) that demonstrate to a reader that the commissioner or notary was able to confirm the affiant's identity before the document was sworn. While seemingly a minor point, taken together with the other irregularities in these documents, it further leaves me in doubt as to their reliability.

[20] In its written representations, the Owner argues that because the Froom Affidavit (which from its perspective includes the Gunawardana Affidavit and Laanemets Affidavit) was sworn in Florida, it was sworn in accordance with the requirements of that jurisdiction, which the Owner submits does not involve the notarization of exhibits, and that it should therefore be admissible in its entirety before the Registrar. However, in my view, this argument bypasses the threshold issue of whether the Froom Affidavit, the Gunawardana Affidavit and the Laanemets Affidavit constitute affidavits at all for the purposes of section 45(1) of the Act, given the absence of foundational elements such as an indication that the facts in the documents were provided under oath, and basic information to demonstrate confirmation of the affiants' identity. Given these deficiencies, in my view, I must conclude that the Froom Affidavit, the Gunawardana Affidavit and the Laanemets Affidavit do not constitute affidavits or statutory declarations for the purpose of section 45(1) of the Act, and are thus inadmissible. However, if I am wrong on this point, I note that there are additional issues with each of these documents, discussed below, that lead me to conclude that the Owner has failed to demonstrate use of the Mark during the Relevant Period.

The Froom Affidavit

[21] Mr. Froom identifies himself in paragraph 1 as a "Corporate Board Member / Director, Major Shareholder, Legal Director and Officer of LaFontaine Source De Jeunesse (hereinafter "LSDJ") (located at 890 A Young [*sic*] Street, Toronto, Ontario M4W 3P4 [...]). Mr. Froom does not indicate where he resides; however, at paragraph 14 he states that "I am currently in Florida" and the jurat on page 19 of the Froom Affidavit indicates that the document was signed in the City of Hallandale Beach in the State of Florida.

[22] The body of the Froom Affidavit is nineteen (19) pages and the exhibits are in excess of two hundred (200) pages. In many ways, the body of the Froom Affidavit reads more like a party's written representations than a fact affidavit. It contains numerous legal arguments, citation of case law, and pages of irrelevant allegations regarding the business of the Requesting Party. Consequently, while I have reviewed the Froom Affidavit in its entirety, I will limit my discussion of its contents to those elements that I consider relevant to resolving this proceeding.

[23] By way of introduction, at paragraph 6 of the Froom Affidavit, Mr. Froom states as follows:

[...] **LSDJ** is a full service cosmetic surgery and skin care spa provides, promotes, markets and sells beauty, medical, surgical, traditional spa, medi spa and medical spa services in association with the mark Jeunesse and Source De Jeunesse (including during the years 2014, 2015, 2016 and up to and including November 6, 2017 (the relevant times). The mark was used by the corporations. LSDJ (and its predecessor corporations) have/has used the **“Jeunesse” mark** in **Association** with spa services / medi spa services, cosmetic surgery & plastic surgery services (which is part of spa services/medi-spa / medical spa services) for the three years prior to November 6, 2017. [Emphasis in original]

[24] The exhibits to the Froom Affidavit include various invoices, price lists, website printouts and photographs relating to the above-described business purporting to demonstrate use of the Mark during the Relevant Period.

[25] None of the exhibits to the Froom Affidavit are tabbed or notarized. Instead, the exhibits have individual page numbers, and these page numbers are referenced in the body of the document. However, the page number references within the body of the Froom Affidavit are not consistent. For example, in paragraph 12 Mr. Froom states that “The Exhibits are annexed to this my affidavit as pages 1 to 121”. Later in paragraph 12, Mr. Froom describes various exhibits on pages numbering from 1 to 232. In paragraph 13, Mr. Froom states “[...] exhibits are at page 1 to 110 [...]”.

[26] Some of the exhibit page numbers have been applied using a stamp, while others have been applied by hand. For those page numbers applied by hand, many have been crossed-out and subsequently re-numbered by hand with different page numbers, in some cases multiple times (for example, see exhibit pages with the final numbering 17.1 to 17.23 and 110).

[27] As discussed above, the failure to have exhibits notarized is not necessarily fatal to the admissibility of exhibits in the context of a section 45 proceeding. However, in this case, the absence of notarized exhibits, combined with the frequently revised, hand-annotated exhibit page numbering, and inconsistent page references within the body of the document, leaves me in doubt as to which exhibits to the Froom Affidavit, if any, were actually present with Mr. Froom and the notary when the document was signed, or whether the exhibits were compiled and added later. Since this is not clear, I find that the exhibits to the Froom Affidavit are inadmissible.

[28] For the reasons discussed in the previous section of this decision, in my view, the entirety of the Froom Affidavit is inadmissible. However, even if I were to accept the body of the Froom Affidavit as admissible, I would not have found the exhibits admissible for the reasons set out directly above. As the exhibits are the only aspect of the Froom Affidavit that could be considered to demonstrate use of the Mark, the Owner has not demonstrated any use of the Mark during the Relevant Period.

[29] The above is sufficient to dispose of the issue of whether the Froom Affidavit demonstrates use of the Mark within the Relevant Period. However, I note that even if I had accepted the Froom Affidavit in its entirety as admissible (including the exhibits), in my view, there remains a lack of clarity as to which legal entity may have used the Mark, and if that entity was different from the Owner, whether any such use enured to the benefit of the Owner pursuant to section 50 of the Act. As noted above, the Owner identified in the subject registration is “LaFontaine Source De Jeunesse Corporation”. However, the Froom Affidavit suggests this is merely the trading name (and it would appear one of multiple trading names identified in the Owner’s evidence) adopted by a corporate entity named 2186704 Ontario Inc. which Mr. Froom identifies at paragraphs 19 and 27 as the owner of the registration, despite 2186704 Ontario Inc. not being identified in the registration itself. An affiliated corporation purported to have used the Mark, LaFontaine Jeunesse Corporation, is also identified at paragraphs 12, 18 and 54, but it is not clear which use of the Mark may have been by that entity. I will refrain from assessing the merits of these issues as it is not necessary to resolve the proceeding in view of my findings above; however, I note that in my view the Froom Affidavit lacks clarity on these issues.

The Gunawardana Affidavit

[30] As noted above, Ms. Gunawardana does not identify where she resides; however, the jurat on page 3 indicates that the document was signed in Toronto, Ontario on September 18, 2020. I note that the lawyer who commissioned the Gunawardana Affidavit has clearly identified herself, her law society number and has initialed, numbered, and affixed a notary stamp to each of the three pages of the body of the Gunawardana Affidavit.

[31] Ms. Gunawardana states at paragraph 2 that she has “been a client of Lafontaine Source De Jeunesse during the past 4 years and for the three years prior to November 6th, 2017.” She further indicates in paragraph 3 that “[d]uring that time I have had various spa, medi spa / skin care services/treatments” and she provides a list of thirteen such treatments received between the dates of December 3, 2014 and November 3, 2017.

[32] At paragraph 10 of the Gunawardana Affidavit, she states “I have attached copies of my invoices for the services rendered to me on the dates listed”. The next fourteen pages appear to be invoices to Ms. Gunawardana from the LaFontaine Source De Jeunesse Cosmetic Surgery Centre; however, these pages have not been notarized as exhibits to the Gunawardana Affidavit. In particular, these pages have no exhibit cover pages, and were not notarized, numbered or initialed in any way by the lawyer that commissioned the body of the Gunawardana Affidavit. I am therefore left in doubt as to whether these additional fourteen pages were in fact with Ms. Gunawardana when she signed the Gunawardana Affidavit, or were added afterwards. The fact that these fourteen pages that follow the Gunawardana Affidavit were not notarized, numbered or initialed by the commissioning lawyer in the same manner as was the body of the Gunawardana Affidavit, suggests to me that the invoices were likely not present when the document was signed. As a consequence, I do not consider these invoices admissible as exhibits to the Gunawardana Affidavit.

[33] To the extent these invoices were intended to be exhibits to the Froom Affidavit (they are also referenced on page 3 of the body of the Froom Affidavit), I similarly find them inadmissible for the reasons set out above in the discussion of the Froom Affidavit.

[34] Taking the above into consideration, in my view, the Gunawardana Affidavit does not demonstrate any use of the Mark by the Owner during the Relevant Period.

The Laanemets Affidavit

[35] Ms. Laanemets does not identify where she resides, but the jurat on page 4 of the Laanemets Affidavit indicates that the document was signed in Toronto, Ontario on September 7, 2018. The lawyer that commissioned the document included the following annotation with the jurat: “*NO LEGAL ADVICE SOUGHT OR GIVEN*”.

[36] Ms. Laanemets identifies herself at paragraph 4 as a customer of “Lafontaine Source De Jeunesse” and that she has been a customer for the last eight years including the three years prior to November 6, 2017. She states as follows at paragraphs 5 and 6 of the Laanemets Affidavit:

LaFontaine Source De Jeunesse is a skin care spa, a cosmetic and plastic surgery centre where cosmetic procedures are performed, spa services are performed, and skin care product line known as Jeunesse, Source De Jeunesse and LaFontaine Source De Jeunesse are sold, used, promoted and advertised. I know this because I am a customer and use the products and have them used on me as well.

I associate the words and name/names “Jeunesse” and “Source De Jeunesse” with the Lafontaine Source De Jeunesse cosmetic and skin care line.

[37] The Laanemets Affidavit contains no exhibits, notarized or otherwise. Thus, the Laanemets Affidavit is effectively comprised solely of bald allegations of the use of the Mark, without actually demonstrating use of the Mark by the Owner or any other entity.

[38] I also note that the Laanemets Affidavit contains multiple allegations relating to the activities of the Requesting Party and the issue of confusion that are irrelevant to the question in this proceeding of whether or not the Owner has used the Mark during the Relevant Period.

[39] In sum, the Laanemets Affidavit does not demonstrate any use of the Mark by the Owner during the Relevant Period.

Conclusions regarding the Owner’s evidence

[40] To summarize, I find that the Froom Affidavit, Gunawardana Affidavit, and Laanemets Affidavit are each inadmissible in their entirety as the documents do not constitute affidavits or

statutory declarations for the purposes of section 45(1) of the Act. As a consequence, the Owner has filed no admissible evidence in response to the section 45 notice.

[41] In addition, even if I were to have found the bodies of the Froom Affidavit, Gunawardana Affidavit and Laanemets Affidavit admissible, I would not have found the exhibits admissible, and thus for that reason the Owner failed to demonstrate use of the Mark during the Relevant Period.

DISPOSITION

[42] As there is no evidence before me of special circumstances excusing the absence of use, in view of the above, 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 expunged.

Timothy Stevenson
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

Bereskin & Parr LLP/S.E.N.C.R.L., s.r.l.

For the Requesting Party