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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADEMARKS

Citation: 2020 TMOB 52

Date of Decision: 2020-03-31

IN THE MATTER OF A SECTION 45 PROCEEDING

The Coca-Cola Company	**Requesting Party**
and	
Bedessee Imports Ltd.	**Registered Owner**
TMA381,146 for LIMCA	**Registration**

[1] This is a decision involving a summary expungement proceeding under section 45 of the *Trademarks Act*, RSC 1985, c T-13 (the Act) with respect to registration No. TMA381,146 for the trademark LIMCA (the Mark), owned by Bedessee Imports Ltd. (the Owner).

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

Soft drinks, juices, nectars, peas, beans, noodles.

[3] For the reasons that follow, I conclude that the registration ought to be maintained with respect to "Soft drinks, juices".

INTRODUCTION

[4] At the request of The Coca-Cola Company (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on May 26, 2017, to the Owner. The notice required the Owner to show whether the trademark 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 May 26, 2014 to May 26, 2017.

[5] The relevant definition of use for 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.

[6] It is well established that 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)]. However, 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 specified in the registration during the relevant period [*John Labatt Ltd v Rainier Brewing Co* (1984), 80 CPR (2d) 228 (FCA)].

[7] In response to the Registrar's notice, the Owner furnished the affidavit of Rayman Bedessee, sworn on December 21, 2017. Only the Owner filed written representations. Both parties were represented at an oral hearing.

THE OWNER'S EVIDENCE

[8] Mr. Bedessee states that he has been the vice-president of the Owner since about 1985. He describes the Owner as a Toronto-based company that sells goods in association with the Mark to retailers such as specialty food stores, grocery stores, supermarkets, restaurants and restaurant dealers in the normal course of trade in Canada. He attaches the following exhibits to his affidavit:

- a 210ml bottle of lemonade soft drink whose label displays the Mark (Exhibit A), and invoices (Exhibit F) and sales reports (Exhibit H and I) showing sales by the Owner

in Canada during the relevant period of "LEMONADE SODA", which Mr. Bedessee attests is the same product as the aforementioned bottle;

- a 675ml bottle of lemon seasoning whose label displays the Mark and indicates that one of the product's only ingredients is lemon juice (Exhibit B), along with invoices (Exhibit G) and sales reports (Exhibit J) showing sales by the Owner in Canada during the relevant period of "LEMON JUICE SEASONING", which Mr. Bedessee attests is the same product as the aforementioned bottle;
- invoices (Exhibit G) and sales reports (Exhibit K) showing sales by the Owner in Canada during the relevant period of "LEMON JUICE PURE". Mr. Bedessee explains that these materials reflect sales of a pure lemon juice product which "uses the [Mark]", but that the Owner had been out of stock of this product since September 2017 and was not scheduled to receive new stock until March 2018. He further explains that this product "has more lemon concentrate than the lemon seasoning which is also a lemon juice".

[9] Mr. Bedessee concludes by stating that the above-noted evidence shows use of the Mark in association with soft drinks and juices.

ANALYSIS

[10] At the outset, I note that in its written representations, the Owner refers to the motivations of the Requesting Party and submits that it has made "improper use" of section 45 of the Act by initiating these proceedings. However, the sole issue to be determined in a section 45 proceeding is whether a trademark has been used within the meaning of the Act; as such, the motivation of the Requesting Party is generally not a consideration [see *Consorzio del Prosciutto di Parma v Maple Leaf Foods Inc*, 2010 TMOB 52 at para 20; *Norton Rose Fulbright Canada v VSL Canada Ltd*, 2016 TMOB 68 at para 30].

[11] At the hearing, the Owner conceded that it had not used the Mark in association with the registered goods "nectars, peas, beans, noodles." As no special circumstances were put forward to excuse non-use, these goods will be expunged from the registration.

[12] Similarly, the Requesting Party advised that it accepted that the Owner's evidence, including the invoices and sales reports, established that sales had taken place during the relevant period of products of some kind. Further, the Requesting Party accepted that the Owner's evidence showed use of the Mark in association with the registered goods "Soft drinks". I concur. In view of the totality of the Owner's evidence, including a lemonade soft drink bottle

displaying the Mark and invoices and sales reports establishing that said beverage was sold in the normal course of trade during the relevant period, I am satisfied that the Owner has established use of the Mark in association with the registered goods "Soft drinks" within the meaning of sections 4(1) and 45 of the Act.

[13] As such, the issue to be determined is whether the Owner has established use of the Mark in association with the registered goods "juice". In this respect, the Owner submits that it has established use of the Mark in association with two products which fall within the category of "juice": the Exhibit B bottle of lemon seasoning, and the pure lemon juice product which is not depicted in evidence but referred to in Mr. Bedessee's affidavit. Both of these products are shown in the invoices as having been sold in Canada in the normal course of trade during the relevant period. Further, the Mark can be clearly seen on the label for the lemon seasoning. However, I note that Mr. Bedessee stated only that the pure lemon juice product "uses the [Mark]", but provided no clear statement as to how the Mark was displayed on this product.

[14] At the oral hearing, the Requesting Party argued that the lemon seasoning is not a juice, and submitted that a reading of the registration as a whole would suggest that "juice" indicates a beverage rather than a seasoning, that customers would perceive the product as a seasoning rather than as a juice, and the fact that the product contains juice does not mean it is a juice.

[15] In my view, however, the lemon seasoning can be considered to be juice for the purposes of this proceeding. The product is listed in the invoices and sales reports as "LEMON JUICE SEASONING", and Mr. Bedessee describes it as lemon juice in his affidavit. In addition, the product's label indicates that lemon juice is the main or principal ingredient [for similar conclusions, see *Gowling Lafleur Henderson LLP v Liwayway Marketing Corp*, 2015 TMOB 196 at para 17; *Wilson Lue LLP v InovoBiologic Inc*, 2019 TMOB 115 at para 12].

[16] Furthermore, the fact that the product is used as a seasoning, rather than as a beverage, does not preclude it from being "juice". In this respect, I note that there is nothing in the registration that would suggest that the Owner intended to restrict its "juice" registration to beverages. As noted by the Owner, the Federal Court held in *Aird & Berlis LLP v Levi Strauss & Co*, 2006 FC 654, that "one is not to be astutely meticulous when dealing with language used in a statement of wares" [para 17]. The Requesting Party sought to distinguish that case on the

grounds that it involved a fact pattern where the language used to describe the goods in question had changed over time; however, the principle that goods in a registration are to be interpreted broadly has been applied in numerous other cases where linguistic evolution was not at issue [see, for example, *Brouillette Kosie Prince v Orange Cove-Sanger Citrus Assn*, 2007 FC 1229 at para 7; *Canadian Council of Professional Engineers v ING LORO PIANA & C SPA*, 2009 FC 1095 at paras 25-30; *Gowling Lafleur Henderson LLP v Ferring BV*, 2015 TMOB 18 at para 35], and it applies equally here. As such, I find that use of the Mark in association with sales of the lemon seasoning in Canada in the normal course of trade is sufficient to maintain the registered goods "juice".

[17] In view of the above, I am satisfied that the Owner has shown use of the Mark in association with the registered good "juice" within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[18] In view of all of the foregoing, 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 "nectars, peas, beans, noodles" from the registered goods.

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

Soft drinks, juices.

G.M. Melchin
Hearing Officer
Trademarks Opposition Board
Canadian Intellectual Property Office

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

HEARING DATE 2020-01-30

APPEARANCES

Dale Schlosser	For the Registered Owner
Robert MacDonald	For the Requesting Party

AGENTS OF RECORD

Sprigings Intellectual Property Law	For the Registered Owner
Gowling WLG (Canada) LLP	For the Requesting Party