



Canadian Intellectual Property Office

THE REGISTRAR OF TRADEMARKS

Citation: 2023 TMOB 002

Date of Decision: 2023-01-11

[TRADUCTION RÉVISÉE]

IN THE MATTER OF A SECTION 45 PROCEEDING

Requesting Party: Astell Caza De Sua

Registered Owner: 7525443 Canada Inc.

Registration: TMA734,932 for NOWA & Design

INTRODUCTION

[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. TMA734,932 for the trademark NOWA & Design (the Mark), shown below.



[2] The registration includes a colour claim which states that the letters «N» and «O», words «the», «leak», «detector» and the cercle are black; the point inside the letter «O», letters «W» and «A», both points between letters «N and O» and «W and A» and the word «water» are blue.

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

(1) Water leak detection system comprised a water closing valve installed on the main power supply of the building in which the water leak detection system is installed

(2) Water leak detection system comprised a water closing valves installed near equipment, namely water heaters, dishwashers and washing machines and washers

(the Goods)

[4] For the reasons that follow, I conclude that the registration ought to be maintained.

THE PROCEEDING

[5] At the request of Astell Caza De Sua (the Requesting Party), the Registrar of Trademarks issued a notice under section 45 of the Act on April 26, 2021, to 7525443 Canada Inc. (the Owner), the registered owner of the Mark.

[6] The notice required the Owner to show the Mark was used in Canada in association with the Goods listed in the registration within the three-year period immediately preceding the date of the notice indicate or the date when the Mark was last in use providing reasons for the absence of use since that date. In this case, the relevant period for showing use is between April 26, 2018 and April 26, 2021 (the Relevant Period).

[7] The applicable definition of use in the present case is as set out in section 4(1) of the Act:

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.

[8] In response to the Registrar's notice, the Owner submitted the affidavit of Jean-Hugues LaBrèque, Chief Executive Officer for the Owner, sworn and signed on July 23, 2021 in Montréal, together with Exhibits JHL1 to 4 signed by the Commissioner of Oaths.

[9] Only the Requesting Party submitted written representations and no oral hearing was held.

THE OWNER'S EVIDENCE

[10] Mr. LaBrèque explains that he is the Chief Executive Officer of the Owner, doing business as NO WA [para 1]. The Owner provides electrical installations intended to protect buildings and infrastructure from damages caused by water [para 4].

[11] In support, Mr. LaBrèque attached the following relevant exhibits to his statement:

- Copies of four invoices from the company "NO WA" located in Montreal to Canadian customers during the Relevant Period [exhibit JHL-1]. The invoices include two products in various formats: "Ensemble NOWA 360 WiFi 5 détecteurs" [Traduction : "NOWA 360 WiFi 5 detectors set"] and "Détecteur sans fil NOWA 360" [Traduction : "NOWA 360 wireless detector"]
- Photographs of product and shipping boxes displaying the following designs [Exhibit JHL-2]:





Mr. LaBrèque states that the photos were taken during the Relevant Period in the Owner's warehouse and that they are representative of the components and packaging of the Goods as sold during the Relevant Period [paras 10 and 11].

- Photograph of products bearing the following designs [Exhibit JHL-3]:



Mr. LaBrèque asserts that the items in these photos are components (electric valve, control panel, electronic component, valve controller) of the Goods as sold during the Relevant Period [paras 12 and 13].

- Installation and user guides (quick and complete) for the "NOWA360" which features the following design [Exhibit JHL-4]:



Mr. LaBrèque states that this guide is provided to customers at the time of purchase [para 14].

ANALYSIS

Inadmissibility of Evidence Submitted in Written Arguments

[12] As a preliminary matter, I note that in its written representations, the Requesting Party makes reference to facts not in evidence. These submissions will be disregarded [*Ridout & Maybee LLP v Encore Marketing International Inc* (2009), 72 CPR (4th) 204 (TMOB)]. In addition, in a section 45 proceeding, the Registrar may only receive evidence tendered by or on behalf of *the registered owner* [see *Meredith & Finlayson v Canada (Registrar of Trademarks)* (1991), 40 CPR (3d) 409 (FCA)].

Sworn statements given substantial credibility

[13] The Requesting Party alleges that Mr. LaBrèque cannot represent the Owner because he is not its President and CEO. This is contradictory to what Mr. LaBrèque states in paragraph 1 of his affidavit.

[14] In addition, the Requesting Party alleges that there is no material evidence attesting to the date on which the photos of exhibits JHL-2 and JHL-3 were taken. However, in his Affidavit, Mr. LaBrèque clearly states that the photos provided in Exhibit JHL-2 were "taken during the Relevant Period" [para 10] and that the ones in Exhibit JHL-3 "are representative" of the Goods sold in Canada during the Relevant Period [paras 12 and 13].

[15] In a section 45 proceeding, an affiant's statements are to be accepted at face value and must be accorded substantial credibility [*Oyen Wiggs Green & Mutala LLP v Atari Interactive, Inc*, 2018 TMOB 79]. Therefore, I accept Mr. LaBrèque sworn statements that he is the President and CEO of the Owner and that the photos in Exhibits JHL-2 and JHL-3 were taken, or are representative of the Goods sold in Canada, during the Relevant Period.

Technical deficiencies in an affidavit

[16] The Requesting Party also alleges that the evidence is insufficient to show use of the Mark given that the exhibits are not signed by the affiant, which makes them inadmissible as evidence.

[17] In the context of section 45 proceedings – which are intended to be summary and expeditious – the Registrar has frequently considered certain deficiencies in affidavits to be mere technicalities [see, for example, *Brouillette, Kosie v Luxo Laboratories Ltd* (1997), 80 CPR (3d) 312 (TMOB); and *88766 Canada Inc v Tootsie Roll Industries Inc* (2006), 56 CPR (4th) 76 (TMOB)]. If there is any requirement that exhibits to an affidavit be signed by an affiant, in addition to the Commissioner of Oaths, in this case, I would consider such deficiency a mere technicality as the affiant makes clear reference to the Exhibits in his duly signed and sworn affidavit. The Exhibits joined to the Affidavit are therefore accepted as evidence.

[18] Technical deficiencies in an affidavit or a statutory declaration should not stop a party from successfully responding to a section 45 notice where there is sufficient evidence to conclude the trademark was in use [*Baume & Mercier SA v Brown* (1985), 4 CPR (3d) 96 (FCTD)].

Deviation of the Mark

[19] The Requesting Party alleges that the Owner's evidence does not demonstrate use of the Mark as registered given deviation in the colours of the Mark as used as well as differences in the words associated with the design element of the Mark.

[20] In considering whether the display of a trademark constitutes display of the trademark as registered, the question to be asked is whether the trademark was displayed in such a way that it did not lose its identity and remained recognizable, in spite of the differences between the form in which it was registered and the form in which it was used [*Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA)]. In deciding this issue, one must look to see whether the dominant features of the registered trademark

have been preserved [*Promafil Canada Ltée v Munsingwear Inc*, 1992 CanLII 12831, 44 CPR (3d) 59 (FCA); *Pizzaiolo Restaurants Inc v Les Restaurants La Pizzaiolle Inc*, 2016 FCA 265]. This is a question of fact to be determined on a case-by-case basis.

[21] As shown above, some evidence displays a slightly modified version of the Mark. Nevertheless, I consider that the dominant characteristics, namely the combination of the coined term "NO WA" as well as the circle and the three dots which connect "NO" and "WA", having been preserved, I conclude that the trademark has not lost its identity and remains recognizable, such that the slightly modified display of the trademark constitutes a display of the Mark as registered [per *Promafil*].

Use of the Mark

[22] 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. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448] and “evidentiary overkill” is not required [see *Union Electric Supply Co v Canada (Registrar of Trademarks)* (1982), 63 CPR (2d) 56 (FCTD)]. Nevertheless, sufficient facts must still be provided to allow the Registrar to conclude that the mark was used in association with the Goods.

[23] In this case, the Owner has demonstrated that it sold the Goods in Canada in the normal course of business during the Relevant Period [Exhibit JHL-1]. In addition, the Mark appeared on the Goods and its shipping boxes [Exhibits JHL-2 et JHL-3]. I am therefore satisfied that the Owner has demonstrated use of the Mark in Canada within the meaning of sections 4 and 45 of the Act.

DISPOSITION

[24] In view of the above, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

Martin Béliveau
Chairperson
Trademarks Opposition Board
Canadian Intellectual Property Office

Translation reviewed by the author

Appearances and Agents of Record

HEARING DATE: No hearing held

AGENTS OF RECORD

For the Requesting Party: N/A

For the Registered Owner: Brouillette Legal Inc.