

Federal Court



Cour fédérale

Date: 20171018

Docket: T-395-17

Citation: 2017 FC 927

Toronto, Ontario, October 18, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ESTEE LAUDER COSMETICS LTD

Applicant

and

SHARLENE LOVELESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] This Application is an appeal under section 56 of the *Trade-marks Act*, RSC 1985, c T-13 [Act] and Rule 300(d) of the *Federal Courts Rules*, SOR/98-106 from the Registrar of Trade-marks' [Registrar] January 18, 2017 decision [Decision] that Registration No. TMA540,904 for the ENLIGHTEN trademark [Registration] should be expunged from the Trade-marks Register under section 45 of the Act.

[2] The Applicant, Estee Lauder Cosmetics Ltd., seeks an order setting aside the Decision as well as costs in the lump sum of \$10,000. The Respondent, Sharlene Loveless, has not filed a Notice of Appearance and takes no position on this Application. For the reasons that follow, I am allowing this Application with costs to the Applicant in the lump sum of \$3,750.

[3] The Applicant owns the ENLIGHTEN trade-mark in connection with goods described in the Registration as “face makeup”. The Registration was issued on February 7, 2001.

[4] On July 28, 2014, at the Respondent’s request, the Registrar issued a notice to the Applicant under section 45 of the Act requiring the Applicant to show that the ENLIGHTEN trade-mark was “in use in Canada” between July 28, 2011 and July 28, 2014 [Relevant Period].

[5] In response, the Applicant filed the affidavit of Rita Odin, Vice-President and Trade-mark Counsel of the Applicant, sworn February 27, 2015 [Odin Affidavit], in which Ms. Odin deposed that:

- a. the ENLIGHTEN trade-mark had been used on makeup products since at least 2001, but that those products were discontinued in 2009;
- b. the Applicant began plans to reintroduce an ENLIGHTEN product line in early 2013, following which a new ENLIGHTEN product line was developed, including a serum, moisturizer, and skin tone correction cream [the ENLIGHTEN Goods];

- c. the ENLIGHTEN Goods were developed to be sold as part of the Applicant's "Fall 2014 Line" with a "ship to retailer" date of September 2014 and an "on counter" sale date of October 2014;
- d. by October 2013, the Applicant had formalized product and marketing objectives, marketing support material, product samplers, packaging, and pricing;
- e. in April 2014, the Applicant presented the ENLIGHTEN Goods to the Applicant's major Canadian retailers as part of its "Fall 2014 brand product line";
- f. the Applicant thereafter had ongoing discussions with its major Canadian retailers to confirm ship quantities of the ENLIGHTEN Goods, and such confirmation "would have occurred" between April and September 2014; and
- g. in excess of \$450,000 of the ENLIGHTEN Goods were shipped to the Hudson's Bay Company [HBC] in September 2014, intended for counter sale starting in October 2014.

[6] In its written representations to the Registrar, the Applicant submitted that the ENLIGHTEN trade-mark was not "deadwood" because the Applicant had entered into agreements with Canadian retailers during the Relevant Period to ship the ENLIGHTEN Goods, and that the delay between orders taken in April and shipments made in September was attributable to the manufacturing and shipping processes required for a worldwide launch. The Applicant relied upon *ConAgra Foods Inc v Fetherstonhaugh & Co*, 2002 FCT 1257 [*ConAgra*] and *Ridout v Hj Heinz Company Australia Ltd*, 2014 FC 442 [*Heinz*], submitting that its sales of the ENLIGHTEN Goods to its major Canadian retailers during the Relevant Period, followed by

delivery of the ENLIGHTEN Goods shortly after the expiry of the Relevant Period, constituted “use” within the meaning of section 4(1) of the Act.

[7] The Applicant also argued that, to the extent that there was non-use of the ENLIGHTEN trade-mark, there was no doubt it had a serious intention to resume use and the non-use arose only because ENLIGHTEN Goods that had been ordered within the Relevant Period had not yet been delivered.

[8] The Respondent countered, arguing that none of the activities described constituted “use” of the ENLIGHTEN trade-mark within the Relevant Period within the meaning of section 4(1) of the Act because:

- a. it was not possible based on Ms. Odin’s affidavit evidence alone to conclude that any orders were in fact confirmed within the Relevant Period;
- b. Ms. Odin did not depose to whom the marketing materials or product samples were distributed, or whether the ENLIGHTEN trade-mark was on those materials; and
- c. steps taken during the Relevant Period to resume use of the ENLIGHTEN trade-mark did not amount to special circumstances excusing non-use.

II. Decision under Review

[9] The hearing officer on behalf of the Registrar [Hearing Officer] distinguished *Heinz* because there, the goods had been delivered to the shipper within the relevant period, although shipment to the customer occurred after the relevant period. Here, however, the Hearing Officer

found that the Applicant had provided no evidence as to when the ordered ENLIGHTEN Goods were delivered by the Applicant to any shipper. The Hearing Officer noted that the Court in *Heinz* “did not consider whether mere acceptance of the order would have sufficed to meet the requirements of section 45, had the goods not been delivered to the shipper within the relevant period” (Decision at para 16).

[10] The Hearing Officer further found that the evidence furnished by the Applicant did not establish that any orders of ENLIGHTEN Goods had actually been confirmed by its retailers within the Relevant Period. The Hearing Officer noted that Ms. Odin had merely deposed that order quantities “would have been confirmed [...] anytime between April and September 2014” and had not made a clear statement that such confirmations did in fact occur before July 28, 2014, or provided any documents showing order acceptance (Decision at para 17). Accordingly, the Hearing Officer concluded that the Applicant had not demonstrated use of the ENLIGHTEN trade-mark in Canada within the Relevant Period.

[11] The Hearing Officer also considered whether the Applicant had established “special circumstances” capable of excusing non-use. The Hearing Officer noted that the Applicant had neither provided evidence as to why the ENLIGHTEN trade-mark had been out of use after 2009, nor why a product line bearing the ENLIGHTEN trade-mark was re-launched in 2013. As such, the Hearing Officer concluded that non-use of the ENLIGHTEN trade-mark prior to 2013 was a voluntary business decision.

[12] The Hearing Officer also found that he had no evidence from the Applicant explaining why the ENLIGHTEN Goods ordered in April 2014 could not have been shipped to retailers prior to September 2014. The Hearing Officer noted that the Applicant had provided no details of the manufacturing or shipping processes that it argued resulted in this delay. He concluded that the Applicant's launch schedule was voluntarily chosen, and no factors outside of the Applicant's control had contributed to the period of non-use.

[13] In view of these findings on the Applicant's non-use of the ENLIGHTEN Mark in Canada within the Relevant Period, as well as the failure to demonstrate special circumstances excusing that non-use, the disposition of the Hearing Officer on behalf of the Registrar was that the Registration should be expunged under section 45 of the Act.

III. New Evidence on this Application

[14] In support of this Application, the Applicant relies upon the affidavit of Deepa Kshatriya sworn May 16, 2017 [Kshatriya Affidavit]. Ms. Kshatriya has held the position of Operations Executive for the Applicant since 2012. Prior to that, Ms. Kshatriya was a "Replenishment Analyst" for HBC where she was specifically responsible for the Applicant's cosmetics, and thus has unique firsthand insight into the issues at hand from the viewpoints of both the Applicant and one of its major retailers. Ms. Kshatriya deposes that:

- a. it is the Applicant's usual practice to meet seasonally with its major Canadian retailers to present the product line available in the following season. On April 24, 2014, Ms. Kshatriya attended a sales presentation made by the Applicant's sales team to HBC, and also participated in similar presentations

made to other major retailers in April and May 2014, including Holt Renfrew, Sears, and Shoppers Drug Mart. The ENLIGHTEN Goods were sampled during these presentations and shown to the retailers in containers and packaging displaying the ENLIGHTEN trade-mark, and retailers were also shown the Applicant's Fall 2014 national advertising campaign, featuring the ENLIGHTEN trade-mark; and

- b. it is the Applicant's practice to send its major Canadian retailers a quarterly "buyer plan", referred to as an "Order Flow". For instance, the Fall season Order Flow would be sent in April of the same year, and would set out products to be shipped, shipment dates, and suggested retail pricing. The Order Flow is considered to be a commitment to purchase the identified products at the specified net price and an agreement to pay the Applicant following delivery. On April 28, 2014, HBC requested its Fall 2014 Order Flow for the Applicant's products, which was sent by the Applicant to HBC on the same date and included references to the ENLIGHTEN Goods. A revised Fall 2014 Order Flow was sent to HBC on July 8, 2014 with slightly lower quantities for the ENLIGHTEN Goods, but which still exceeded \$750,000 in suggested retail value.

[15] Ms. Kshatriya annexed independent documentation (including Order Flows and marketing materials) supporting her affidavit evidence. Her affidavit also addressed some of the gaps identified by the Hearing Officer in the previous Odin Affidavit.

IV. Standard of Review

[16] Decisions under section 45 of the Act attract deference on appeals to this Court, given hearing officers' expertise in trade-mark matters; however, where additional evidence is adduced on appeal that would have materially affected a hearing officer's findings of fact or exercise of discretion, the standard of correctness applies (*Molson Breweries, A Partnership v John Labatt Ltd*, [2000] 3 FC 145 (FCA) at para 51).

[17] Therefore, while the evidence placed before a hearing officer may have resulted in a reasonable decision, that decision may nonetheless be corrected upon this Court's consideration of fresh evidence (see *Bauer Hockey Corp v Easton Hockey Canada, Inc*, 2016 FC 1373 at para 17).

V. Analysis

[18] Section 45 of the Act is a procedure intended to clear the Register of trade-marks that are "deadwood" (*Black & Decker Corp v Method Law Professional Corp*, 2016 FC 1109 at para 12 [*Black & Decker*]). It is meant to be a simple, summary, and expeditious procedure, whereby the trade-mark's owner must establish a *prima facie* case of use in Canada within the relevant period (*Guido Berlucchi & C Srl's v Brouillette Kosie Prince*, 2007 FC 245 at para 15). The burden of proof in doing so is not onerous (*Black & Decker* at para 12).

[19] Section 45(1) of the Act provides as follows:

Registrar may request evidence of user

45 (1) The Registrar may at any time and, at the written request made after three years from the date of the registration of a trade-mark by any person who pays the prescribed fee shall, unless the Registrar sees good reason to the contrary, give notice to the registered owner of the trade-mark requiring the registered owner to furnish within three months an affidavit or a statutory declaration showing, with respect to each of the goods or services specified in the registration, whether the trade-mark was in use in Canada at any time during the three year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since that date.

Le registraire peut exiger une preuve d'emploi

45(1) Le registraire peut, et doit sur demande écrite présentée après trois années à compter de la date de l'enregistrement d'une marque de commerce, par une personne qui verse les droits prescrits, à moins qu'il ne voie une raison valable à l'effet contraire, donner au propriétaire inscrit un avis lui enjoignant de fournir, dans les trois mois, un affidavit ou une déclaration solennelle indiquant, à l'égard de chacun des produits ou de chacun des services que spécifie l'enregistrement, si la marque de commerce a été employée au Canada à un moment quelconque au cours des trois ans précédant la date de l'avis et, dans la négative, la date où elle a été ainsi employée en dernier lieu et la raison de son défaut d'emploi depuis cette date.

[20] "Use" in relation to a trade-mark is defined by section 2 of the Act to mean "use" under section 4(1):

When deemed to be used

4(1) 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

Quand une marque de commerce est réputée employée

4(1) Une marque de commerce est réputée employée en liaison avec des produits si, lors du transfert de la propriété ou de la possession de ces

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.

produits, dans la pratique normale du commerce, elle est apposée sur les produits mêmes ou sur les emballages dans lesquels ces produits sont distribués, ou si elle est, de toute autre manière, liée aux produits à tel point qu'avis de liaison est alors donné à la personne à qui la propriété ou possession est transférée.

[21] The Applicant raises two issues as to how it has properly established “use” within the Relevant Period. In the alternative, the Applicant argues that the Hearing Officer erred by failing to apply section 45 purposively, and by failing to find sufficient circumstances excusing non-use. I will address each of these issues respectively.

Issue 1: ENLIGHTEN Goods purchased during but delivered after the Relevant Period

[22] The Applicant submits that the Hearing Officer erred in concluding that the Applicant did not demonstrate use of the ENLIGHTEN trade-mark in association with the ENLIGHTEN Goods within the Relevant Period. It argues that an agreement by a Canadian retailer within the Relevant Period to purchase the ENLIGHTEN Goods at a specified price to be delivered by a specified date, in the context of an existing commercial relationship, constitutes a transfer of property in the ENLIGHTEN Goods and “use” of the ENLIGHTEN trade-mark.

[23] The Applicant begins with the proposition that use is established by evidence of a commercial transaction involving the purchase of goods bearing the trade-mark, which are subsequently delivered. The Applicant then argues — relying on *ConAgra* — that “use” can also

be established by a large purchase order made within the relevant period, even if the goods are delivered shortly after the expiry of the relevant period, so long as the goods are indeed delivered. As such, the Applicant submits that sales agreements entered into between it and major Canadian retailers for ENLIGHTEN Goods within the Relevant Period constitute “use” under section 4(1), because the ENLIGHTEN Goods were subsequently delivered to retailers, even if delivery was shortly after the expiry of the Relevant Period.

[24] The Applicant argues that its new evidence makes clear that purchases of the ENLIGHTEN Goods took place within the Relevant Period, as documented by Order Flows sent to HBC, and that ENLIGHTEN Goods were delivered to HBC shortly after the Relevant Period, all of which is “use” within the meaning of section 4(1) for the purposes of section 45.

[25] I disagree. First, in my view, the Hearing Officer reasonably concluded, based on the Odin Affidavit, that the Applicant had not demonstrated whether any orders of ENLIGHTEN Goods were in fact confirmed during the Relevant Period. I am satisfied on this Application, given the new evidence contained in the Kshatriya Affidavit, that the 2014 Order Flows between the Applicant and HBC constituted agreements to purchase the ENLIGHTEN Goods, and that the HBC order was both substantial and confirmed within the Relevant Period. However, those facts still do not constitute “use” within the meaning of section 4(1) for the purposes of section 45 because, as I will explain, there is no evidence that property in the ENLIGHTEN Goods was in fact transferred within the Relevant Period.

[26] On this Application, the Applicant relies upon *ConAgra* for the proposition that a large order made within, but delivered shortly after, the Relevant Period constitutes “use” for the purposes of sections 4(1) and 45. In *ConAgra*, an order for goods was placed a few days before the expiry of the relevant period, and those goods (valued at \$60,000) were shipped that same day to Canada; the goods did not clear customs in Canada until two days after the expiry of the relevant period. Justice McKay held that “acceptance of that order before the date of the s. 45 notice constitutes use of [trade-mark] product associated with the wares within s. 4 of the Act within the purposes of s. 45” (*ConAgra* at para 16).

[27] However, as mentioned above, the Applicant also relied upon *Heinz* before the Hearing Officer, a much more recent decision of this Court, which clarified the holding in *ConAgra*. In that case, an order had been placed with Heinz in June 2010. The Heinz shipment left Australia in July, arriving in the port of Vancouver about a month later, three days after the expiry of the relevant period.

[28] In subsequent section 45 proceedings (*Ridout & Maybee LLP v HJ Heinz Co Australia Ltd*, 2013 TMOB 49 at paras 21-22), the Registrar applied *ConAgra* to find that the respondent had demonstrated “use in Canada” within the relevant period for the purposes of section 45.

[29] On appeal to this Court, the applicant submitted that Justice McKay’s decision in *ConAgra* should not have been followed by the Registrar. It argued that the word “use” had to have the same meaning for all cases decided under the Act, and that a broad reading of “use” for

the purposes of section 45 was inconsistent with other cases of this Court deciding the issue of “use”.

[30] Justice Annis, at paragraph 33 of *Heinz*, found that Justice McKay had correctly adopted a purposive interpretation of “use” for section 45. To resolve the submission that section 4(1) had been inconsistently applied, Justice Annis drew a distinction between the words “in use” and “in Canada”, the latter of which appear only in section 45 and not in section 4(1).

[31] Justice Annis went on to confirm that the “critical point in time” for the analysis of trademark use is “the time at which a transfer occurs, either of property or of possession”, writing that “the *required* elements of use must all be present at this time” (*Heinz* at para 42, emphasis in original, citing *Syntex Inc v Apotex Inc*, [1984] FCJ No 191 at 151 (FCA), 1984 CarswellNat 653 (WL Can) at para 11). Justice Annis found that the transfer in property associated with the wares occurred when they were placed in the custody of the shippers for transportation to Canada (*Heinz* at paras 43 and 48). Therefore, all the requirements of deemed “use” under section 4(1) were fulfilled at the time the wares were delivered to the shipper in Australia. A purposive reading of section 45 allowed the Court greater latitude in holding that such delivery to a shipper in Australia constituted use “in Canada”, with the underlying required elements of “use” remaining consistent across the Act.

[32] On this Application, the Applicant urges me to distinguish *Heinz* and apply *ConAgra* to find that the Order Flows, which were sent to HBC before the expiry of the Relevant Period,

were in and of themselves “use” at the relevant time because they were eventually followed by delivery of the ENLIGHTEN Goods in September 2014.

[33] I cannot accept the Applicant’s argument with the principles enunciated in the case law above in mind. These principles are succinctly summarized in a leading text: “[e]ntering into an agreement or placing an order for wares is not considered use; use will not occur until the wares have had a transfer of possession” (*Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed loose-leaf Toronto: Carswell, 2002, at 3-56 [Fox on Trade-marks]).

[34] There was no transfer of possession of the ENLIGHTEN Goods within the Relevant Period; the ENLIGHTEN Goods first reached the Applicant’s retailers in September 2014. As there is still no evidence before this Court on when the ENLIGHTEN Goods were delivered to any shipper, the Applicant has not shown that the *Heinz* analysis enables it to demonstrate “use” based on the transfer of property within the Relevant Period.

[35] That said, given its new evidence presented to this Court, the Applicant has succeeded in proving “use” based on the second issue it raises, namely the distribution of samples.

Issue 2: Distribution of samples within the Relevant Period

[36] The Applicant submits that samples of the ENLIGHTEN Goods featuring the ENLIGHTEN trade-mark (in packaging also featuring the ENLIGHTEN trade-mark) were provided to Canadian retailers during the Relevant Period for the specific purpose of generating sales. The Applicant submits that providing such samples to its retailers during the Relevant

Period was a transfer of possession for the purpose of trying the products and constituted “use” of the ENLIGHTEN trade-mark during the Relevant Period within the meaning of section 4(1) of the Act for the purposes of section 45.

[37] There was minimal evidence placed before the Hearing Officer that the Applicant had formalized “product samplers” by October 2013. However, the Applicant has now furnished further evidence before this Court on the sampling of the ENLIGHTEN Goods in April 2014. As explained above, this evidence is admissible on these proceedings even though it was not placed before the Hearing Officer. I also find that the new evidence is material and relevant and therefore I will consider the Applicant’s arguments on this second issue regarding the delivery of samples.

[38] First, with regard to marketing materials, “token” sales, including the free delivery of samples bearing a trade-mark, do not meet the requirements of section 4(1) (*JC Penney Co v Gaberdine Clothing Co*, 2001 FCT 1333 at para 92); in this section, the phrase “in the normal course of trade” requires that the transfer of property be for the purpose of acquiring goodwill and profits (*Distrimedic Inc v Dispill Inc*, 2013 FC 1043 at para 302 [*Distrimedic*]). In *Distrimedic*, for instance, special sheets for a pill-dispensing system bearing a trade-marked colour scheme had been distributed free of charge to pharmacies for testing and feedback purposes, following which the sheets were destroyed and never sold by the pharmacies to their clients (*Distrimedic* at para 303). This Court held that the free distribution of samples without any subsequent sales of the same product on the market did not satisfy the requirements of use “in the normal course of trade” (*Distrimedic* at paras 302-303).

[39] However, in *ConAgra*, this Court held that the distribution of samples for testing and developing the Canadian market could be a step within the regular course of trade. In that case, the applicant tested the market with samples and focus groups and met with representatives of grocery chain stores to arrange for the introduction of its product in Canada:

16 [...] Moreover, the distribution of samples, for testing in the Canadian market in 1998, a step within the regular course of trade in the industry where the owner of the trade-mark wares seeks to develop a market, also constitutes use of the trade-mark. There is no doubt that property in the sample products was transferred to the Canadian merchants testing the product, and no question arises about the process of sampling as market testing in the normal course of trade. Thus that process also meets the specific requirements of s. 4.

[Emphasis added]

[40] Fox on Trade-marks also states that: "...samples that are sent can be seen as use in the normal course of trade only as long as there are subsequent sales of the items" (at 3-46).

[41] In this case, the Applicant met with and distributed samples of the ENLIGHTEN Goods bearing the ENLIGHTEN trade-mark to its major retailers for testing and market development purposes, following which agreements (Order Flows) for substantial orders of the ENLIGHTEN Goods were confirmed. This all occurred during the Relevant Period. The new evidence corroborating the distribution of samples, and subsequent customer orders based on the delivery of those samples, is contained in the Kshatriya Affidavit and its various exhibits.

[42] The distribution of sample ENLIGHTEN Goods in the context of this case was thus for the purpose of securing orders of those ENLIGHTEN Goods. The Applicant ultimately secured such orders. The required elements of "use" crystallized at that time. In short, due to the

distribution of samples within the Relevant Period, there was indeed (i) a “transfer of property or possession” (the ENLIGHTEN Goods sampled by the Applicant’s major retailers), (ii) “in the normal course of trade” (to secure agreements to purchase, which were subsequently secured). The shipping and receipt date of the ENLIGHTEN Goods ordered is not relevant for this analysis. As Justice Pinard stated in *Argenti Inc v Exode Importations Inc* (1984), 8 CPR (3d) 174 (FC) at paragraph 45:

Although the first clothes sent by the applicant to the respondent were samples, they bore the above-mentioned trade marks, marked on by the applicant, and consisted in clothing which the respondent, through its own salesmen, used to solicit orders from various retailers in Canada. The respondent thus used these samples, in the normal course of business and trade, for marketing purposes, prior to the critical date of June 30, 1983. That is sufficient to find that the applicant used its trade marks ARGENTI and PAT ARGENTI & DESIGN in Canada within the meaning of section 4(1) of the Act, even though the clothing the respondent wished to sell had not yet reached the consumer.

[Emphasis added]

[43] I find that the Applicant has, through its distribution of samples for the purposes of securing orders (which were indeed secured), demonstrated “use” of the ENLIGHTEN trade-mark within the Relevant Period under section 4(1) for the purposes of section 45 of the Act.

Issue 3: Purpose of section 45 of the Act and “special circumstances” excusing non-use

[44] Because the Applicant’s distribution of samples bearing the ENLIGHTEN trade-mark constituted “use” within the Relevant Period for the purposes of sections 4(1) and 45 of the Act, that issue disposes of this Application and I need not address the Applicant’s third issue

regarding the purpose of section 45 and whether “special circumstances” existed excusing any non-use of the ENLIGHTEN trade-mark.

VI. Costs

[45] Having considered the Applicant’s submissions on costs, including its draft Bill of Costs, and taken into account all of the circumstances of this Application, I am awarding costs to the Applicant in the lump sum of \$3,750, payable by the Respondent forthwith.

VII. Conclusion

[46] The Application is granted and the Decision is set aside, with costs to the Applicant of \$3,750.

JUDGMENT in T-395-17

THIS COURT'S JUDGMENT is that this application is granted and the Registrar of Trade-marks' January 18, 2017 Decision in the matter of Registration No. TMA540,904 is set aside. Costs are awarded in the amount of \$3,750 to the Applicant.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-395-17

STYLE OF CAUSE: ESTEE LAUDER COSMETICS LTD v SHARLENE
LOVELESS

PLACE OF HEARING: TORONTO, ONTARIO

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APPEARANCES:

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