

Federal Court



Cour fédérale

Date: 20250218

Docket: T-831-23

Citation: 2025 FC 312

Ottawa, Ontario, February 18, 2025

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MICHAL CHWAJA

Applicants

and

0710674 BC LTD. DBA COTTONMOUTH

Respondent

JUDGMENT AND REASONS

[1] Michal Chwaja appeals a decision of the Trade-marks Opposition Board [TMOB] of the Canadian Intellectual Property Office [CIPO] on behalf of the Registrar of Trade-marks [Registrar]. The TMOB declared Mr. Chwaja's trademark application to be abandoned pursuant to s 38(11) of the *Trade-marks Act*, RSC 1985, c T-13 [Act].

[2] On March 31, 2017, Mr. Chwaja filed a trademark application with the CIPO for the word mark “Cotton Mouth” (application No 1830571). The application was advertised on July 27, 2022.

[3] On October 3, 2022, the TMOB sent Mr. Chwaja a letter stating that 0710674 BC Ltd DBA CottonMouth [Respondent] opposed the application. This letter triggered Mr. Chwaja’s obligation to file and serve a counter statement by December 3, 2022.

[4] On January 5, 2023, the TMOB sent Mr. Chwaja a letter stating:

The deadline for filing and serving the applicant’s counter statement has expired on December 03, 2022. Consequently, the above-referenced trademark application will be treated as abandoned pursuant to section 38(11) of the *Trademarks Act*.

[5] On February 16, 2023, the TMOB sent another letter to Mr. Chwaja stating:

Further to the Office letter of January 05, 2023, please be advised that the above-referenced trademark application is deemed to have been abandoned pursuant to section 38(11) of the *Trademarks Act*.

[6] On February 27, 2023, Mr. Chwaja sent a letter to the TMOB stating that he believed his mail had been stolen. He asked that his application be reinstated. By letter dated March 8, 2023, the TMOB informed Mr. Chwaja that it did not have jurisdiction to revive the application after it was deemed abandoned on February 16, 2023, even if the reinstatement request included a retroactive extension of time.

[7] Where an appeal under s 56(1) of the Act concerns a question of law, the appropriate standard of review is correctness (*Clorox Company of Canada, Ltd v Chloretec SEC*, 2020 FCA 76 at para 23).

[8] Mr. Chwaja argues that s 47(2) of the Act permitted the TMOB to grant a retroactive extension of time and revive his application. The Respondent replies that the TMOB was *functus officio* after deeming the application abandoned. As a general rule, the doctrine of *functus officio* holds that a decision maker, having reached a final decision in respect of a matter, cannot revisit that decision, subject to only limited exceptions (*Chandler v Alberta Association of Architects*, [1989] 2 SCR 848 at 861; *Rogers Communications Partnership v Society of Composers, Authors and Music Publishers of Canada* (SOCAN), 2016 FCA 28 at para 70).

[9] Mr. Chwaja's amended notice of application is not directed towards the TMOB's decision of March 8, 2023 regarding its lack of jurisdiction, but rather the decision of February 16, 2023 deeming the application to be abandoned. Accordingly, the TMOB's decision regarding its jurisdiction falls outside scope of this appeal.

[10] Section 38(11) of the Act states:

Deemed abandonment of application

(11) The application is deemed to have been abandoned if the applicant does not file and serve a counter statement within the

Abandon de la demande

(11) Si le requérant omet de produire et de signifier une contre-déclaration dans le délai visé au paragraphe (7) ou si, dans les circonstances

time referred to in subsection (7) or if, in the prescribed circumstances, the applicant does not submit and serve either evidence under subsection (8) or a statement that the applicant does not wish to submit evidence.

prescrites, il omet de soumettre et de signifier la preuve visée au paragraphe (8) ou une déclaration énonçant son désir de ne pas soumettre de preuve, la demande est réputée abandonnée.

[11] There is no dispute that Mr. Chwaja failed to file and serve a counter statement in the prescribed time. Accordingly, the TMOB did not err in finding that the application was deemed abandoned under s 38(11).

[12] Even if the TMOB's decision respecting its jurisdiction were properly before the Court, the jurisprudence is clear that trademark applications, once refused, cannot be revisited by the decision maker after a final decision has been made. In *Vegee Group (Canada) Ltd v Woolworth Canada Inc*, 1999 CanLII 9013 (FC), Justice Denis Pelletier held that (at para 16):

[...] common sense suggests that one cannot amend that which has already been adjudicated. It was possible to amend the application for registration before it was the object of deliberation by the Registrar either before or after advertisement. But once the Registrar ruled upon the application before him, he was *functus officio* and could not consider an amendment to the application.

[13] The Respondent acknowledges that Associate Chief Justice James Jerome's decision in *Liquid Glass Industries of Canada Ltd v Canada (Registrar of Trade Marks)*, [1994] 54 CPR (3d) 541 may provide some authority for the power of the Registrar to revive a trade-mark application after it has been deemed abandoned. However, in that case the Registrar did not deem the application to be abandoned until after it had refused an extension of time (at para 5).

This was the focus of the Court's analysis, not the Registrar's jurisdiction to grant an extension of time after an application has been deemed abandoned.

[14] The preponderance of this Court's jurisprudence is to the effect that a retroactive extension of time under the Act cannot be considered once the Registrar is *functus officio*: *Gagatek v Gowlings WLG (Canada) LLP*, 2019 FC 634 at para 20 and cases cited therein.

[15] The appeal is dismissed.

[16] The parties have each submitted draft Bills of Costs. This appeal was of no more than average complexity. Costs are therefore awarded to the Respondent at the mid-range of Column III of Tariff B.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The appeal is dismissed.
2. Costs are awarded to the Respondent at the mid-range of Column III of Tariff B.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: T-831-23

STYLE OF CAUSE: MICHAL CHWAJA v 0710674 BC LTD. DBA
COTTONMOUTH

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA AND BY
VIDEOCONFERENCE

DATE OF HEARING: JANUARY 9, 2025

JUDGMENT AND REASONS: FOTHERGILL J.

DATED: FEBRUARY 18, 2025

APPEARANCES:

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(on his own behalf)

FOR THE APPLICANT

Michele Ballagh

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT