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Application for judicial review dismissed as abuse of process
Canada - Fasken Martineau DuMoulin LLP

Registration
Court system

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In *Maple Leaf Foods Inc v Consorzio Del Prosciutto Di Parma* (2009 FC 1035, October 15 2009), the Federal Court of Canada has dismissed an application for judicial review of a notice for the adoption and use of an official mark.

The advertisement of a notice for the adoption and use of an official mark in Canada is considered the decision of the registrar. A party has 30 days from the advertisement of such notice to seek judicial review by the Federal Court.

Several years ago, Maple Leaf Foods Inc sought judicial review of a notice requested by Consorzio Del Prosciutto Di Parma pursuant to Subparagraph 9(1)(n)(iii) of the Trademarks Act for the adoption and use of the trademark PARMA (and ducal crown design) as an official mark in Canada. The mark was advertised on February 11 1998. The registrar of trademarks was satisfied that Consorzio was a public authority within the meaning of the act, in that it was a consortium of approximately 210 Italian ham producers from the province of Parma, Italy, known to meet strict quality controls and production standards set by the consortium.

On April 9 1998 Maple Leaf appealed the notice to the Federal Court. It argued that the consortium was not a public authority, and that the notice was of no force and effect. A decision was rendered on November 28 2000 wherein the court held that Maple Leaf did not have standing to appeal the notice, as it was not a party to the proceedings before the registrar. However, the unavailability of an appeal did not serve to bar Maple Leaf from making an application for an extension of time to file a judicial review application or to make a motion to convert its appeal to a judicial review. On December 20 2000 Maple Leaf moved for an order granting it leave to convert its appeal into a judicial review and for an extension of time to file a notice of application. However, on April 25 2002 Maple Leaf discontinued its appeal and never brought its motion to convert back on for hearing.

Ten years after the notice was given, and seven years after the Federal Court's decision, Maple Leaf commenced an application for judicial review. It was during this period of time that the interpretation of the term 'public authority' under Section 9(1)(n)(iii) of the act was altered to read as follows: "A public authority must be under the control of the Canadian government; a party under the control of a foreign government does not qualify as a public authority under Section 9 of the Act" (*Canada Post Corp v United States Postal Services* ((2005) 47 CPR (4th) 117 (FCTD), affirmed (2007) 54 CPR (4th) 121 (FCA)), leave to appeal to the Supreme Court denied). Maple Leaf wrote to the registrar, requesting the withdrawal of the notice. The registrar stated that it did not have authority, after giving public notice of the adoption and use of an official mark by a public authority, to withdraw or reconsider a decision to give public notice of adoption and use of the official mark. Any remedy would be within the Federal Court's jurisdiction. This response prompted the present application for judicial review of the notice.

Maple Leaf argued that the limitations under Section 18(1)(2) of the Federal Courts Act does not apply in cases in which an application for judicial review is sought where an order of mandamus, prohibition or declaratory relief for redress against a state of affairs is continuing and ongoing, and is alleged to be invalid or unlawful. The court disagreed. The notice, and not the registrar s conduct, was the subject of the application for judicial review. Therefore, Maple Leaf had 30 days from the notice of an official mark to seek judicial review. Maple Leaf was obliged to seek an extension of time, which it did not.

Lastly, the court commented on the doctrine of abuse of process. It stated that this "process is applied to preserve the integrity of the court's process and procedure, and to prevent parties from conducting themselves in a manner which would bring the administration of justice into disrepute". Maple Leaf abandoned its appeal by a written request, and abandoned its motion to convert by failing to bring this application on for hearing after being granted an adjournment. Since Maple Leaf chose not to proceed with a motion to convert, the merits of Maple Leaf's claim that the notice was invalid because a public authority under the act had to be Canadian should have been decided, but it was not. As such, the court held the current application for judicial review of the notice was an abuse of process. The application was dismissed with costs.

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