

SECTION 45 PROCEEDINGS
REGISTRATION NO. 215,608
TRADE-MARK: PROVIMI

On June 13, 1989, at the request of Robic, Robic & Associates on behalf of 88766 Canada Inc., the Registrar issued a Section 45 notice to central Soya of Canada Ltd., the registered owner of the above-mentioned trade-mark registration.

The trade-mark PROVIMI was registered on August 27, 1976 in association with the wares "animal foodstuffs, namely, feeds".

In response to the section 45 notice, the registrant submitted an affidavit by Richard Downen, Vice-President of Premix Operations of the registrant.

Each party submitted a written submission and no oral hearing was requested.

In paragraph 7 of the affidavit, Mr. Downen states that prior to 1986, the major products produced and distributed by his company under the PROVIMI trade-mark included complete animal feeds, premixes and concentrates and milk replacers. He adds that these products would have been distributed directly to local farmers from the registrant's company and throughout Canada through his company's distributors consisting of approximately 80 feed mill companies. He mentions that the PROVIMI trade-mark would have been prominently displayed on feed bags, interior and exterior signage, brochures, and PROVIMI product manuals at his company's main plant and by his company's distributors. At paragraph 8, he states that since 1986 to the date of the affidavit, his company has continued to use the PROVIMI trade-mark in a like manner in association with premixes, concentrates and milk replacers and, to a lesser extent, with complete feeds.

In my view, the evidence does not show use of the trade-mark PROVIMI pursuant to s. 4(1) of the Act by the registered owner at or slightly prior to the date of the notice in association with the registered wares.

Exhibits A to H do not show use of the trade-mark PROVIMI pursuant to s. 4(1) of the Act as there is no association shown of the trade-mark with the wares at the time of transfer of the wares. with respect to the price list for PROVIMI products, the location of the price list allegedly posted in the interior of the distributor's business premises is not specified; nor is it specified whether it is posted for the customers' benefit or for the employees' benefit, nor whether it was still in use at the date of the notice, and therefore without more information I cannot determine whether it was so closely associated with the wares at the time of transfer of the wares as to meet the provisions of s. 4(1) of the Act (see Union Electric Supply Co. Ltd. v. Registrar of Trade-mark, 63 C.P.R. (2d) 179). Even had I found that such price list showed the association of the mark with the wares at the time of sale of the wares, I would have concluded, in view of Exhibit K attached to the affidavit, that such use did not accrue to the registered owner.

At paragraph 19 of the affidavit, Mr. Downen states that the photograph attached as Exhibit K shows the feed bag, which is no longer in use, but which has been used by his company for many years. A close examination of such bag shows the name "Canadian Provimi Limited" printed thereon. Such company is not the registered owner but a predecessor in title of the present registered owner. In view of such evidence, even the invoices bearing dates in 1989, which were issued by the registrant's distributor and on which there is no indication of the source of origin of the wares apart from the name of the distributor which appears at the top of the invoices, cannot be seen as showing use of the trade-mark by the registered owner. From the evidence

filed, I can only infer, in view of Exhibit K, that the name Canadian Provimi Limited appeared on the feed bags sold by the distributor and therefore the invoices would show sales of wares emanating from Canadian Provimi Limited not the registered owner (see Herman Lindy v. The Registrar of Trade-marks, 57 C.P.R. (2d) 127).

Mr. Downen informs us that new labels were printed in July 1989, subsequent to the date of the notice. He attaches as Exhibits L and M the new labels which he states are currently in use. However, as such labels seem to have been used subsequent to the date of the notice, although such use has not been shown, those labels are irrelevant in determining whether the trade-mark was in use by the registered owner in association with the wares at or prior to the date of the notice.

In view of the above, I conclude that any use of the trade-mark in association with the registered wares at or prior to the date of the notice is not use by the registered owner and there are no special circumstances excusing the absence of use by the registered owner.

Accordingly, Registration No. 215,608 will be expunged pursuant to the provisions of s. 45(5) of the Trade-Marks Act.

DATED AT HULL, QUEBEC, THIS 21ST DAY OF AUGUST 1991.

(Mrs.) Denise Savard
Member
Trade-marks Opposition Board