

SECTION 45 PROCEEDINGS
TRADE-MARK: BLUE CROSS
REGISTRATION NO.: TMA 211,982

On August 2, 1996, at the request of the Canadian Association of Blue Cross Plans, the Registrar forwarded a Section 45 notice to American White Cross Laboratories, Inc., the registered owner of the above-reference trade-mark registration.

The trade-mark BLUE CROSS is registered for use in association with the following wares:

Bandages, absorbent cotton, surgical adhesive tape, corn pads, callous pads, bunion pads, combined gauze and adhesive strip bandages and styptic pencils.

In response to the Registrar's notice, the affidavit of Mr. Andrew Jarzyna, a partner in the firm of Moffat & Co., trade-mark agents for the registrant, was furnished. Each party filed a written submission. An oral hearing has not been requested in this case.

In his affidavit Mr. Jarzyna explains that the registrant company no longer exists and that on February 3, 1997 a certificate of ownership and merger was filed with the Registrar to be recorded against this registration. He states that the current owner is American White Cross, Inc.

He then states that he has been informed and verily believes that American White Cross, Inc. did not use the trade-mark in Canada in view of the corporate reorganization and that as of the date of the Notice the new owner intended to use the mark as quickly as possible in Canada, and that he has been informed and believes that the current owner has taken steps towards using the trade-mark since acquiring the trade-mark.

The requesting party argues that as Mr. Jarzyna does not have personal knowledge of the circumstances surrounding use of this mark, the evidence filed should be rejected as hearsay and the trade-mark registration should be expunged for failure of the registrant to furnish evidence of use or reasons for non-use excusing the absence of use.

Concerning the merger of the registrant company, from the copy of the certificate of ownership and merger which is of record on the trade-mark file, it seems the merger took place on February 22, 1994. Consequently I am prepared to accept that American White Cross, Inc. is the registrant's successor-in-title.

However, concerning the other statements in the affidavit, I totally agree with the requesting party, that the Jarzyna affidavit consists of "heresay evidence".

In *Labatt Brewing Co. v. Molson Breweries, a Partnership*, 68 C.P.R. (3d) 216, it was held that statements made in an affidavit based on information and belief are prima facie inadmissible hearsay evidence unless they satisfy the criteria of necessity and reliability. Therefore to determine the weight to be given to Mr. Jarzyna's statements, it is necessary to apply these criteria.

Concerning the first criterion, as we are not informed the reason an affidavit from an officer of the current owner could not be obtained, I cannot conclude that the Jarzyna affidavit was filed out of necessity. Therefore I conclude that it is inadmissible in this proceeding.

As no other evidence has been furnished, I conclude that in view of the registrant's failure to furnish admissible evidence in this case, the trade-mark registration ought to be expunged.

Even had I found Mr. Jarzyna's statements concerning the non-use of the trade-mark to be admissible, I still would have found the evidence insufficient to maintain the trade-mark on the register since the affidavit fails to provide the details concerning any steps that may have been taken by the new owner to commence use of the trade-mark since the date of the merger (i.e. February 1994). Further, there is no clear showing of an intention to commence use of the trade-mark shortly (see *Lander co. Canada Ltd. v. Alex E. MacRae & Co.*, 46 C.P.R. (3d) 417).

Consequently, registration No. TMA 211,982 will be expunged in compliance with the requirements of Section 45(5) of the Trade-marks Act.

DATED AT HULL, QUEBEC THIS 7th DAY OF July, 1998.

D. Savard
Senior Hearing Officer
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