



LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2015 TMOB 28
Date of Decision: 2015-02-18

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by 88766 Canada Inc. against registration
No. TMA194,681 for the trade-mark AQUATIK in the
name of Burton's Importing Inc./Importations Burton
Inc.**

[1] At the request of 88766 Canada Inc. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on October 28, 2013 to Burton's Importing Inc./Importations Burton Inc. (the Registrant), the registered owner of registration No. TMA194,681 for the trade-mark AQUATIK (the Mark).

[2] The Mark is registered for use in association with the following goods:

- (1) Bathing caps.
- (2) Swim suits, but excluding specifically garments, such as waterproof outerwear and personal floating devices, namely hip length floating suits or coveralls, or floating wares similar thereto.
- (3) Nose plugs, ear plugs, swim goggles, goggle stands, parapharmaceutical products comprising the following specific wares namely bulb syringes, invalid rings, surgical gloves, household gloves, pessary, rectal syringes, rubber tubing, hot water bottles, fountain syringes, nasal aspirators, ear syringes, breast pumps, hot water bottles and ice caps, footwear namely plastic or rubber thongs, sandals, loafers, tied shoes and slip-on shoes for beach, swimming and boating.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the goods specified in the registration at any time within the three year period immediately preceding the date of the notice and, if not, the date when it was last in use and the reason for the absence of such use since that

date. In this case, the relevant period for showing use is between October 28, 2010 and October 29, 2013.

[4] The relevant definition of “use” with respect to goods is set out in section 4(1) of the Act:

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 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.

[5] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Registrant filed the affidavit of Geneviève Bosquet, President of the Registrant, sworn on December 16, 2013 in Montreal, Quebec. Only the Registrant filed written representations; no oral hearing was held.

[7] In her affidavit, Ms. Bosquet asserts that the Registrant used the Mark in association with “bathing caps, nose plugs, ear plugs and swim goggles” during the relevant period in Canada. In this respect, she attests that the Registrant offered for sale and in fact sold such goods bearing the Mark. Based on the invoices attached to her affidavit, it would appear that the Registrant sold its goods primarily to retail pharmacies in Quebec.

[8] With respect to the manner of display of the Mark, Ms. Bosquet attaches representative photographs of each of the four goods, at Exhibits GB-1 to GB-4. The Mark is prominently displayed on the packaging of each of the goods. I further note that a unique code is displayed on the packaging for each item. For example, “#5000” is displayed on the packaging of the swim goggles shown in Exhibit GB-4.

[9] With respect to evidence of sales in the normal course of trade, Ms. Bosquet attaches seven invoices to her affidavit at Exhibit GB-5. The invoices show sales of various goods in various quantities to retailers in Quebec, such as Pharmacie Jean Coutu. Ms. Bosquet attests that the invoices are sample invoices showing sales of AQUATIK bathing caps, nose plugs, ear plugs

and swim goggles. Indeed, I note that some of the item codes appearing on the invoices correspond to the codes appearing on the AQUATIK goods packaging shown in the exhibited photographs.

[10] In view of the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark within the meaning of sections 4 and 45 of the Act with respect to “bathing caps” from goods (1) and “Nose plugs, ear plugs, swim goggles” from goods (3).

[11] With respect to the remaining goods, the Registrant concedes in Ms. Bosquet’s affidavit and in its written representations that the registration should be amended to delete such goods. As the Registrant furnished no evidence of use with respect to the remaining goods and no special circumstances excusing non-use of the Mark in association with such goods is before me, the registration will be amended accordingly.

Disposition

[12] Pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registration will be amended to delete the entirety of goods (2) and the following from goods (3):

...goggle stands, parapharmaceutical products comprising the following specific wares namely bulb syringes, invalid rings, surgical gloves, household gloves, pessary, rectal syringes, rubber tubing, hot water bottles, fountain syringes, nasal aspirators, ear syringes, breast pumps, hot water bottles and ice caps, footwear namely plastic or rubber thongs, sandals, loafers, tied shoes and slip-on shoes for beach, swimming and boating.

[13] The amended statement of goods will be as follows:

- (1) Bathing Caps.
- (2) Nose plugs, ear plugs, swim goggles.

Andrew Bene
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office