



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

Citation: 2015 TMOB 112
Date of Decision: 2015-06-18

IN THE MATTER OF A SECTION 45 PROCEEDING

Smart & Biggar

Requesting Party

and

Mercedes Textiles Ltd.

Registered Owner

TMA491,659 for Trade-mark AMBUSH

Registration

[1] On December 4, 2013, at the request of Smart & Biggar (the Requesting Party) the Registrar forwarded a notice under section 45 of the *Trade-marks Act*, RSC 1985, c T -13 (the Act) to Mercedes Textiles Ltd. (the Registrant), the registered owner of the trade-mark AMBUSH (the Mark).

[2] The Mark is registered in association with a single good, namely “Fire hose”.

[3] The notice requires the Registrant to show whether the Mark has been used in Canada in association with the goods 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 use since that date. The relevant period in this case is any time from December 4, 2010 to December 4, 2013 (the Relevant Period).

[4] In response to the notice, the Registrant filed the statutory declaration of Robert Richardson. Only the Requesting Party filed written arguments and no oral hearing was held.

The evidence

[5] Mr. Richardson is the President of Mercedes Textiles Limited. His short statutory declaration included a brief statement which is reproduced below:

The use of the trade mark AMBUSH as evidenced by the enclosed product sheet is currently being used and has been used within the three years immediately preceding the notice date of December 4, 2013.

[6] A two-page product sheet accompanying the statutory declaration provides specifications for an “All synthetic ULC weeping hose.” On the second page, the product is referred to as a “fire hose” in an explanation of its lining. The Mark is displayed prominently on each page. A photograph of a fire hose shows the Mark printed on the hose itself. I note that the two pages appear to be two parts of the same product sheet. I also note that the product sheet contains a 2014 copyright notice on the second page, and that Mr. Richardson does not indicate when the product sheet was produced, or when, to whom and where it has been distributed during the Relevant Period.

The law

[7] Section 45 proceedings are simple, expeditious, and seek to clear the register of “deadwood”; as such, the threshold for establishing use is quite low [see *Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)]. A simple allegation of use of the Mark is not sufficient to evidence its use and any ambiguity in the evidence filed shall be interpreted against the Owner of the Mark [See *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (4th) 62 (FCA)].

Analysis

[8] The Requesting Party argues that the Registrant relies on mere assertions of use rather than providing evidence to show how the Mark was used during the Relevant Period. I disagree as the product sheet shows how the Mark was or is displayed on the goods themselves.

[9] However, the Requesting Party argues and I agree that any use that is shown by the product sheet may not have occurred during the Relevant Period. At best, the 2014 copyright

notice on the product sheet leads me to infer that the product sheet shows how the Mark was displayed after the Relevant Period. The Registrant provided no evidence to clarify when the product sheet was produced and I cannot resolve this ambiguity in the Registrant's favour [see *Plough, supra*].

[10] Even if the product sheet shows how the goods displayed the Mark during the Relevant Period, the Requesting Party argues and I agree that there is still no evidence of the transfer of the goods and thus no use within the meaning of section 4(1) of the Act. Mr. Richardson has not explained the Registrant's normal course of trade in any detail, nor has he provided any evidence whatsoever which would allow me to conclude that the goods were actually sold during the Relevant Period [see *Borden, Ladner Gervais LLP v Honoré Destrempe* (2003), 27 CPR (4th) 563 (TMOB) page 566].

[11] In all, Mr. Richardson's statement reproduced above is tantamount to a mere assertion of use of the Mark as contemplated in *Plough, supra*.

[12] Finally, the Registrant did not allege that there were special circumstances within the meaning of section 45(3) excusing non-use in the present case.

Disposition

[13] In view of the forgoing discussion and pursuant to the authority delegated to me under section 63(3) of the Act and in accordance with section 45 of the Act, the registration shall be expunged.

Jean Carrière
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office

No Hearing Held

Agents of Record

No Agent Appointed

For the Registered Owner

Smart & Biggar

For the Requesting Party