

**In the matter of Section 45 proceedings against Registration
No. TMA142,617 for the trade-mark HEALTH CENTRE**

On June 28, 2003, at the request of 928735 Ontario Limited, the Registrar forwarded the notice prescribed by s. 45 of the *Trade-marks Act* R.C.S. 1985 c-13 (the “Act”) to The Spring-Air Company (“Spring Air”) with respect to Registration No. TMA142,617 for the trade-mark HEALTH CENTRE (the “Mark”) registered in association with “bedding and specifically mattresses, box springs, bed springs, pillows, cushions and spring components for bedding.”

Pursuant to the provisions of s. 45, the registered owner must show, with respect to each of the wares and services specified in the registration, whether the trade-mark was in use in Canada at any time during the three-year period immediately preceding the date of the notice, and if not the date on which it was last used and the reason for the absence of use since that date. The relevant period in this case is anytime between June 28, 2000 and June 28, 2003. What qualifies as use of a trade-mark is defined in s. 4 of the Act.

An affidavit of Michael Shepherd, sworn to on January 22, 2004, has been filed in response to the notice. The parties did not file written arguments. No oral hearing has been held.

I note from the outset that Spring Air did not provide any evidence of use of the Mark in Canada in association with “pillows ” and “cushions”, nor any evidence with respect to the date the Mark was last in use in association with these wares and the reason for the absence of use since that date. Accordingly, these wares will be deleted from the registration.

Mr. Shepherd is the Director of Sales & Marketing of Restwell Mattress Company (“Restwell”), a licensee of Spring Air. According to Mr. Shepherd, Restwell has used the Mark in Canada in association with mattresses, box springs, bed springs and spring components for bedding “*during the period from June 8, 2000 through June 8, 2003.*” Mr. Shepherd refers to the aforementioned period throughout his affidavit. Since it does not affect the outcome of the proceedings, I will presume that he meant to refer to the relevant period as June 28, 2000 to June 28, 2003.

Mr. Shepherd deposes that Restwell has manufactured, distributed and sold the wares associated with the Mark to retail stores, which in turn have sold them to the general public during the relevant period. He further deposes that pursuant to the license agreement between Restwell and Spring Air, the later has control over the character and quality of the wares sold by Restwell in association with the Mark. For the purposes of s. 45 proceedings, Mr. Shepherd's assertion that Spring Air has control over the character and quality of the wares associated with the Mark is sufficient for evidencing that Spring Air can invoke the benefit of s. 50(1) of the Act [see *Gowling, Strathy and Henderson v. Samsonite Corp. Samsonite Corp.* (1996), 66 C.P.R. (3d) 560].

Mr. Shepherd declares providing as Exhibit A to his affidavit "*three copies of bed signs that are placed at the foot of the bed when displayed to the general public in retail stores. Each bed sign includes a number of the Spring Air licensed trade-marks, including HEALTH CENTRE.*" He further declares having seen these bed signs displayed, by retail stores, in front of display of mattresses, box springs, bed springs, and spring components for bedding during the relevant period. According to Mr. Shepherd, there are approximately 100 retail locations that "*have used*" the Mark during the relevant period. Mr. Shepherd also provides copies of three invoices (Exhibit B) relating to the sales by Restwell of bedding products stating that these included "*products sold in association and connection with the trade-marks WILLOW, REVELATION, and ADAGIO, each of which in turn are sold in connection with the trade-mark HEALTH CENTRE as demonstrated in Exhibit A.*" His final statements are reproduced hereafter:

"5. [...] (a) Restwell sold mattresses, box springs, bed springs and spring components bearing the trade-marks WILLOW, REVELATION and ADAGIO to retailers in Canada; (b) Restwell provided these retailers with multiple copies of bed signs of the type shown in Exhibit A, each bed sign prominently featuring the trade-mark HEALTH CENTRE; (c) Restwell requested these retailers to display the bed signs in their stores at the foot of displays of the WILLOW, REVELATION and ADAGIO products, as the case may be; and (d) I personally observed these signs being displayed in retailer' stores in this manner."

I note that the bed signs show the Mark as well as other trade-marks, such as FOUR SEASONS, SO NATURALLY COMFORTABLE, WILLOW, ADAGIO and REVELATION. The fact that more than one trade-marks appears on the bed signs is not precluded by the Act. However,

Mr. Shepherd's allegation that the Mark is prominently featured on each bed sign is somewhat misleading because the other trade-marks are much more prominent. Moreover, the Mark appears only in the text describing features of the mattresses, more particularly the coil back supporter spring unit. In addition, the Mark is not distinguished from the text in upper cases, as per the following example: 806 COIL BACK SUPPORTER HEALTH CENTRE SPRING UNIT. The invoices, which have been issued by Restwell during the relevant period, show the quantity of items sold, their code numbers and size followed by abbreviated descriptions and names such as ADAGIO, REVELATION and WILLOW. The Mark is not mentioned anywhere on the invoices.

Although Spring Air is not required to engage in "evidentiary overkill" in order to demonstrate use of the Mark for the purposes of s. 45 proceedings, there must be some evidence upon which it can be concluded that the Mark has been used in association with "bedding and specifically mattresses, box springs, bed springs, pillows, cushions and spring components for bedding."

Based on a fair reading of the affidavit, I am satisfied that the bed signs are so closely associated with the bedding at the time of their sale that displaying the Mark on these bed signs amounts to use within the meaning of s. 4(1). I am also satisfied that the invoices support Mr. Shepherd testimony with respect to Restwell's sales to retailers of mattresses, box springs, bed springs and spring components bearing the trade-marks WILLOW, REVELATION and ADAGIO. According to the evidence, these featured bed springs and spring components for bedding associated with the Mark.

Following my analysis of the evidence, I am satisfied that there is evidence use of the Mark in association with "bedding and specifically bed springs and spring components for bedding" pursuant to s. 4(1) of the Act, within the relevant period, and that the use accrued to Spring Air pursuant to s. 50(1) of the Act. However, I find that the evidence of use of the Mark with respect to "mattresses" and "box springs" amounts to nothing more than a bare assertion of use of the type that was held unacceptable in *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 (F.C.A.). The fact that bed springs and spring components for bedding are in some way related to mattresses and box springs is not sufficient to conclude to use of the Mark in

association with these wares [see *John Labatt Ltd. v. Rainier Brewing Co.*, (1984), 80 C.P.R. (2d) 228 (F.C.A.)].

Having regard to the foregoing, in the absence of an appeal from this decision pursuant to the provisions of s. 56, Registration No. TMA142,617 will be amended by deleting “mattresses, box springs, pillows, cushions” from the statement of wares.

DATED AT BOUCHERVILLE, QUEBEC, THIS 4th DAY OF MAY 2006.

Céline Tremblay
Member
Trade-marks Opposition Board