



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

Citation: 2010 TMOB 141
Date of Decision: 2010-08-30

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by MBM & Co. against registration No. TMA
545,209 for the trade-mark KICK ‘N’ GO in the name of
Manuel Radbord, trading as Belize Bicycle Canada
Reg’d.**

[1] At the request of MBM & Co. (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s.45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on May 9, 2008 to Manuel Radbord (the Registrant), the registered owner of registration No. TMA545,209 for the trade-mark KICK ‘N’ GO (the Mark). The Mark is registered for use in association with sidewalk scooters (the registered wares).

[2] Section 45 of the Act requires the registered owner of a trade-mark to show whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years 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 time period for showing use is between May 9, 2005 and May 9, 2008 (the Relevant Period).

[3] “Use” in association with wares is set out in s. 4(1) and 4(3) of the Act:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the transfer of the property in or possession of the wares, in the normal course of trade, it is marked on the wares themselves or on the packages in which they are distributed or it is in any other manner so

associated with the wares that notice of the association is then given to the person to whom the property or possession is transferred.

[...]

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

[4] In response to the section 45 notice, the Registrant furnished the statutory declaration of Mr. Manuel Radbord, declared on June 1, 2008. Mr. Radbord's statutory declaration consists of the following statement: "Within the last three years I have used the trade mark, KICK "N" GO", for the special model of scooter I sell". Attached to the statutory declaration of Mr. Manuel Radbord are copies of two invoices for the sale of KICK 'N' GO scooters dated within the Relevant Period as well as promotional materials including an undated photo of a sidewalk scooter displaying the Mark. However, these documents are neither mentioned in Mr. Radbord's statutory declaration nor identified or notarized as exhibits thereto.

[5] Neither party filed a written argument in this case nor was a hearing held.

[6] It has been well established that technical shortcomings or technical deficiencies should not bar a successful response to a s. 45 notice where there is sufficient evidence for the Registrar to conclude the mark was in use [see *Baume & Mercier S.A. v. Brown* (1985), 4 C.P.R. (3d) 96 (F.C.T.D.), *Beiersdorf AG v. Future International Diversified Inc.* (2002), 23 C.P.R. (4th) 555 (T.M.O.B) and *Maximilian Fur Co., Inc. v. Maximilian for Men's Apparel Ltd.* (1983) 82 C.P.R. (2d) 146 (T.M.O.B.)]. In this regard, exhibits that are not properly notarized or identified as exhibits may nonetheless be considered acceptable on the basis that they were properly referenced or identified in the affidavit (*Borden & Eilliot v. Raphaël Inc.* (2001) 16 C.P.R. (4th) 96 (T.M.O.B.)). However, the fact that the documents attached to the statutory declaration in this case are neither referred to by the declarant nor identified as exhibits is more than a technical deficiency (*Bereskin & Parr v. Teletronic Communications Ltd.* 78 C.P.R. (3d) 406 (T.M.O.B.)). Accordingly, none of the documents attached to the statutory declaration of Mr. Radbord are admissible as evidence in this case.

[7] Although the threshold for establishing use in s. 45 proceedings is quite low [*Woods Canada Ltd. v. Lang Michener* (1996), 71 C.P.R. (3d) 477 (F.C.T.D). at 480] without any admissible evidence demonstrating use, the statutory declaration represents a mere assertion of use which is insufficient evidence to maintain this registration [*Plough (Canada) Ltd v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (2d) 62 (F.C.A.)]. Accordingly, as the evidence filed fails to show use of the words KICK ‘N’ GO as a trade-mark during the Relevant Period I conclude that the Mark ought to be expunged from the register.

Disposition

[8] Thus, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be expunged in compliance with the provisions of s. 45 of the Act.

Darlene H. Carreau
Chairperson
Trade-marks Opposition Board
Canadian Intellectual Property Office