



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

Citation: 2011 TMOB 185
Date of Decision: 2011-10-04

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Dan-Foam APS against registration No.
TMA349,094 for the trade-mark SYMPHONY in the
name of Simmons Canada Inc.**

[1] On November 17, 2009 at the request of Dan-Foam APS (the Requesting Party), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* R.C.S. 1985, c. T-13 (the Act) to Simmons Canada Inc. (the Registrant), the registered owner of the trade-mark SYMPHONY, registration No. TMA349, 094 (the Mark).

[2] The Mark is registered for use in association with the following wares: mattresses, box springs, and mattress foundations.

[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 wares and/or services listed on 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 use since that date. Thus, the relevant period in which use must be shown is between November 17, 2006 and November 17, 2009 (the Relevant Period).

[4] The relevant definition of “use” is set out in s. 4 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.

[5] In response to the s. 45 notice, the Registrant furnished the affidavit of Tony LaMantia, Director of National Accounts of the Registrant. Only the Registrant filed written submissions; an oral hearing was not requested.

[6] In his affidavit, Mr. LaMantia states that as the Director of National Accounts he is familiar with trade-mark and marketing matters of the Registrant. He also states that the Registrant is a leading Canadian bedding manufacturer that sells mattresses, box springs and mattress foundations to authorized retailers across Canada.

[7] Mr. LaMantia states that the Registrant supplies to 1,400 authorized retailers in Canada in many major cities. The retailers include stores such as The Bay, Sears, Sleep Country, and The Brick Mattress Store. Mr. LaMantia has provided a copy of the label (Exhibit A) that was affixed to mattresses sold by the Registrant in 2007. A copy of a similar label (Exhibit B) that was affixed to mattresses sold by the Registrant in 2008 is also provided. I note that the Mark is prominently displayed on both labels. Mr. LaMantia states that the sales of mattresses bearing the Mark in Canada during 2007 and 2008 were approximately \$15,000.

[8] Although Mr. LaMantia has not provided any invoice as proof of sales in Canada, an affidavit that does not attach an invoice is not presumptively useless [see *Lewis Thomson & Sons Ltd. v. Rogers, Bereskin & Parr* (1988), 21 C.P.R. (3d) 483 (F.C.T.D.)]. In these circumstances, Mr. LaMantia has provided a clear statement regarding the normal course of trade and sales figures and has also provided labels for mattresses that clearly show the Mark. Based on the information provided, I am satisfied that the Registrant's normal course of trade is the sale of mattresses to retail stores and that during the sale of these mattresses the Mark was displayed on labels affixed to the mattresses.

[9] I note that Mr. LaMantia does not mention any use of the Mark in association with box springs and mattress foundations during the Relevant Period and has not provided any documentary evidence regarding such use.

[10] Based on the evidence provided, I am satisfied that the Registrant has shown evidence of use of the Mark in association with “mattresses” as required by s. 4 of the Act during the Relevant Period. Use of the Mark has not been shown in association with box springs and mattress foundations and no special circumstances were advanced to excuse the absence of use. Accordingly, these wares will be deleted from the registration.

[11] Pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be maintained with respect to “mattresses” and amended to delete the following wares: “box springs and mattress foundations”, in compliance with the provisions of s. 45 of the Act.

P. Heidi Sprung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office