



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

Citation: 2013 TMOB 52
Date of Decision: 2013-03-28

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Cameron IP against registration
No. TMA557,427 for the trade-mark CLIFFHANGER in
the name of Gary A. Jones**

[1] At the request of Cameron IP (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 August 2, 2011 to Gary A. Jones (the Registrant), the registered owner of registration No. TMA557,427 for the trade-mark CLIFFHANGER.

[2] The section 45 notice required the Registrant to furnish evidence showing that he had used the Mark in Canada in association with each of the wares and services specified in the registration within the time period between August 2, 2008 and August 2, 2011.

[3] The wares and services specified in the registration are as follows:

Wares:

- (1) Board game.
- (2) Games and equipment for playing games, namely playing board, mood die, rules of play, story introduction cards, card boxes, and player tokens.
- (3) Clothing, namely hats, socks, shoes, dresses, suits, skirts, pants, shirts, jackets; silk screen and flock-imprinted T-shirts, sports shirts, sweaters and fleece-lined shirts, sweaters and pants; T-shirts, tank tops, T-dresses, jogging suits, polo pyjamas, short sets, underwear, knit tops and hats, caps, toques, headbands and sweatbands.

- (4) Video games and components, namely all necessary software for video game systems namely game cartridges, control panels and attract panels.
- (5) Wall calendars, loose leaf desk calendars, date books, memo pads holders, pencil caddies, blank books, diaries, address books, engagement books, desk pads, note pads, note pad portfolios, memo pads, waste paper baskets, clip boards, letter openers, stickers, sticker stationery, post cards, greeting cards, photo albums, autograph books, message pads, telephone pads and notice and message boards, scrap books and bookmarks.
- (6) 14K-gold electroplated metal playing pieces, jewellery, watches, and clocks.
- (7) Jigsaw and inlaid picture puzzles.
- (8) Paper plates and party napkins.
- (9) Books, namely cartoon humour books, comic books, brochures and posters.
- (10) Coffee mugs, key chains, coasters, serving trays, souvenir spoons, fridge magnets, bottle openers, glasses, beer mugs, shot glasses and ice buckets and pottery.
- (11) Beach towels and sports bags.

Services:

- (1) Entertainment services in the nature of television game show programs.
- (2) Entertainment services in the form of a television game show.
- (3) Entertainment services in the nature of radio game show programs.
- (4) Entertainment services in the form of a radio game show.

[4] The relevant definitions of “use” are set out in sections 4(1) and 4(2) of the Act. With respect to the Wares, the Registrant must demonstrate that the Mark was associated with the Wares at the time of transfer in the normal course of trade. With respect to the Services, the Registrant must demonstrate that the Mark was displayed in the advertisement or performance of the Services.

[5] However, in this case, the primary issue is whether the material furnished by the Registrant is admissible as proper evidence in this proceeding.

Registrant’s “Affidavit”

[6] In response to the Registrar’s notice, the Registrant initially furnished two letters dated August 29, 2011 – a covering letter addressed to the Registrar, and a two-page letter addressed to the Requesting Party. Although both letters included the subject line “Re – Affidavit regarding use of the Trade-mark “CLIFFHANGER” © ®”, neither letter was in the form of an affidavit or statutory declaration.

[7] Accordingly, by way of letter dated September 13, 2011, the Registrar informed the Registrant that his correspondence of August 29, 2011 could not be accepted as evidence in response to the notice issued, because evidence in a section 45 proceeding must be filed in the form of an affidavit or statutory declaration. In particular, it was noted that the statements in the August 29, 2011 letter did not appear to have been sworn before an individual authorized to administer oaths, such as a notary public or Commissioner of Oaths.

[8] On September 27, 2011, the Registrant responded by furnishing essentially the same two letters again. However, with respect to the two-page letter addressed to the Requesting Party, the second page displays the seal, stamp and signature of Yasmin Nakhuda, a notary public. I would note that in lieu of a jurat, next to Ms. Nakhuda's stamp and signature is the following statement:

NO ADVICE SOUGHT OR PROVIDED
COMMISSIONER AS TO OATH ONLY
Declarant was strongly advised to obtain
legal advice prior to making the declaration
herein and is aware that a false
declaration is a criminal offence.

[9] Nonetheless, on October 5, 2011, the Registrant's correspondence of September 27, 2011 was made of record and, in response, the Requesting Party provided written representations dated February 6, 2012.

Requesting Party's Submissions

[10] In its written representations, the Requesting Party submits that the September 27, 2011 letters furnished by the Registrant do not comply with the legal requirements of an Affidavit and therefore cannot be accepted as such [citing in part the *Ontario Rules of Civil Procedure*, RRO 1990 and the *Federal Courts Rules* SOR/98-106]. In particular, the Requesting Party notes that, among other deficiencies, the Registrant's letters do not contain any language that would establish that the Registrant swears the statements in his letters to be true. Furthermore, the jurat is missing in its entirety, including any indication that the "affidavit" was sworn before the notary public, Ms. Nakhuda.

[11] In short, the Requesting Party submits that the use of the term “affidavit” in the subject line does not transform a letter into a proper affidavit meeting the requirements of section 45.

Analysis With Respect to Admissibility

[12] I would first note that the Act and the *Trade-marks Regulations* are silent as to the form of affidavits and statutory declarations to be filed in an opposition or section 45 proceeding before the Registrar. As the Registrar has noted before, while it may be desirable for evidence to conform to the *Federal Court Rules*, it is not an obligation [see *Tension 10 Inc v Tension Clothing Inc* (2004), 45 CPR (4th) 136 (TMOB)]. Furthermore, especially in the context of section 45 proceedings – which are intended to be summary and expeditious – the Registrar has frequently considered certain deficiencies in affidavits and statutory declarations to be mere technicalities [see, for example, *88766 Canada Inc v Tootsie Roll Industries Inc* (2006), 56 CPR (4th) 76 (TMOB)].

[13] In this case, however, I agree with the Requesting Party that the deficiencies in the Registrant’s evidence are well beyond mere technicalities. In particular, there is no jurat whatsoever and no statement by the notary public as to whether the Registrant’s declaration was made in the notary’s presence. The fact that the notary signed the letter does not in and of itself demonstrate that any statements in the letter were sworn or solemnly affirmed before her [see *88766 Canada Inc v 167407 Canada Inc* (2010), 89 CPR (4th) 293 (TMOB) for similar treatment of such deficiencies].

[14] In the absence of submissions from the Registrant, it is clear that the “affidavit” in this case is not, in fact, an affidavit or statutory declaration. Indeed, the “affidavit” concludes with an offer to the Requesting Party that both parties share the Mark, so long as the Requesting Party is not using it “for a similar product”.

[15] In view of the foregoing, I find that the letters filed by the Registrant are inadmissible as evidence in this proceeding and, consequently, that the Registrant has failed to demonstrate that the Mark was used in association with the Wares and Services within the meaning of sections 4 and 45 of the Act.

Analysis With Respect to the Wares and Services

[16] Even if I were to accept the statements in the Registrant's letters as proper evidence, I would consider them insufficient to demonstrate use of the Mark during the Relevant Period. First, I would note that the Registrant only references "board games" in his letters, and makes no reference to any of the remaining Wares or Services.

[17] In his letter addressed to the Requesting Party, he states that "this Affidavit confirms we are using the Trade-mark "CLIFFHANGER" © ® and have done so continuously since 1998." Specifically, he claims such use is "evidenced" by the following:

- the "large amount of physical board games" in the Registrant's inventory;
- the "existence" of the Registrant's website, *www.cliffhangerthegame.com*;
- the "fact" that the game is "currently" stocked by a Toronto retail store;
- the "fact" that the game was sold at markets and garage sales "within last 3 years"; and
- the "fact" that a 10 foot long CLIFFHANGER banner is used to promote the game at such venues.

[18] Although it may be possible to otherwise infer the Registrant's normal course of trade from these statements, I would again note that there is no indication that any of the statements in the Registrant's letters are sworn to be true.

[19] In any event, as noted by the Requesting Party, the Registrant provides no supporting exhibits or evidence of any kind showing actual use of the Mark, such as labels, packaging or copies of invoices displaying the Mark. As such, I would consider the Registrant's references to the "CLIFFHANGER" board game to be mere assertions, and that the Registrant has failed to *show* use of the Mark [see *Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

Disposition

[20] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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