LE REGISTRAIRE DES MARQUES DE COMMERCE

THE REGISTRAR OF TRADE-MARKS

Citation: 2013 TMOB 134
Date of Decision: 2013-08-23

IN THE MATTER OF A SECTION 45 PROCEEDING requested by Derby Cycle Werke GmbH against registration No. TMA674,745 for the trade-mark RAVEN in the name of Infinité Cycle Works Ltd.

[1] At the request of Derby Cycle Werke GmbH (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 June 27, 2011 to Infinité Cycle Works Ltd. (the Registrant), the registered owner of registration No. TMA674,745 for the trade-mark RAVEN (the Mark).

[2] The Mark is registered for use in association with the wares "bicycles".

[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 specified in 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 such use since that date. In this case, the relevant period for showing use is between June 27, 2008 and June 27, 2011.

[4] The relevant definition of "use" in association with wares is set out in section 4(1) 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] It is well established that the purpose and scope of section 45 of the Act is to provide a simple, summary and expeditious procedure for removing "deadwood" from the register and, as such, the evidentiary threshold that the registered owner must meet is quite low [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar's notice, the Registrant furnished the affidavit of Shaun Morris, President of the Registrant, sworn on September 23, 2011. Neither party filed written representations; an oral hearing was not held.

[7] In his affidavit, Mr. Morris does not provide any evidence of use of the Mark by the Registrant but rather provides evidence of sales of the wares by its predecessor-in-title, namely A. Mordo & Sons Ltd (Mordo). Mr. Morris explains that the Registrant acquired the Mark by virtue of a sale and assignment dated July 19, 2010 from Deloitte & Touche Inc., in its capacity as Receiver Manager of Mordo. I note that the assignment of the Mark was recorded by the Registrar on March 21, 2011.

[8] In particular, Mr. Morris provides the following exhibits to his affidavit:

- Exhibit B consists of a copy of an invoice dated March 16, 2009 by Mordo to Re-Route Sports and Consignment of Squamish, British Columbia for one bicycle described as "Raven B Recon 3".
- Exhibit C consists of a copy of an invoice dated May 3, 2010 by Mordo to Sports Junkies of Vancouver, British Columbia for four bicycles described as "Raven B Recon 3" and seven bicycles described as "SPORTEK RAVEN DNP GROUP BIKES".
- Exhibit D consists of a photograph of a bicycle, which Mr. Morris identifies as being one of the seven bicycles identified in the Exhibit C invoice. I note that the Mark is displayed on the top tube of the bicycle shown in the photograph.

[9] The evidence in this case is not strong. For example, as the sales records in evidence were obtained by the Registrant through Mordo's Receiver Manager, the records are *prima facie* hearsay. However, in view of the purpose of these proceedings and the circumstances of this section 45 proceeding in particular, I am not prepared to treat such records as inadmissible. As stated by the Federal Court, "a stricter approach to hearsay evidence may be appropriate under

section 57, where adversarial proceedings are intended to determine the rights of parties…", but with respect to section 45 proceedings, "…concerns with respect to the hearsay nature of [the] evidence can go to weight, rather than admissibility" [*1459243 Ontario Inc v Eva Gabor International, Ltd et al* (2011), 90 CPR (4th) 277 (FC) at 280].

[10] As well, I note that Mr. Morris makes no explicit statements regarding the nature of Mordo's business. While the affidavit could have provided such details, it is well-established that the evidence as a whole must be considered [*Kvas Miller Everitt v Compute (Bridgend) Limited* (2005), 47 CPR (4th) 209 (TMOB)] and reasonable inferences can be made from the evidence provided [*Eclipse International Fashions Canada Inc v Shapiro Cohen* (2005), 48 CPR (4th) 223 (FCA)]. In the present case, it can be reasonably inferred from the evidence that Mordo sold bicycles to third party retail stores. In view of the information shown on the exhibited invoices, specifically that multiple bicycles were shipped to such customers in Canada and that GST was administered, I am satisfied that the evidenced sales of RAVEN bicycles by Mordo were in the normal course of trade.

[11] As such, in view of all the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark in association with "bicycles" within the meaning of sections 4 and 45 of the Act.

[12] Pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be maintained in compliance with the provisions of section 45 of the Act.

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