



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

**Citation: 2013 TMOB 164**  
**Date of Decision: 2013-10-04**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Norton Rose LLP against registration  
No. TMA518,277 for the trade-mark HONORS in the  
name of 673367 Ontario Ltd.**

[1] At the request of Norton Rose LLP the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on September 28, 2011 to 673367 Ontario Ltd, the registered owner of registration No. TMA518,277 for the trade-mark HONORS (the Mark).

[2] The Mark is registered for use in association with the wares “men’s, ladies’ and children’s wristwatches”.

[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 services 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 September 25, 2008 and September 25, 2011.

[4] For the purposes of this decision, the relevant definition of use 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 mere assertions of use are not sufficient to demonstrate use in the context of a section 45 proceeding [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co v Registrar of Trade Marks* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with each of the wares or services specified in the registration during the relevant period.

[6] In response to the Registrar's notice, the Registrant filed the affidavit of David Weiss, sworn December 16, 2011. Mr. Weiss is the President, sole Director and sole shareholder of the Registrant. Both parties filed written arguments and an oral hearing was held at which both parties were represented.

#### Preliminary Remark

[7] In coming to my decision I have considered all of the evidence and submissions made by the parties; however, only the portions of the evidence and submissions which are directly relevant to my findings will be discussed in the body of my decision.

#### Did the Registrant use the Mark in association with the wares during the relevant period?

[8] In his affidavit, Mr. Weiss explains that the Registrant sells its watches through two main channels namely: (a) to retailers who re-sell the watches to the public; and (b) directly to the public at individual sales events which take place over 2-3 days, often in hotel meeting rooms. Mr. Weiss explains that at these sales events the Registrant sells a variety of brands of watches, including HONORS branded watches.

[9] Mr. Weiss does not provide any evidence regarding sales of its watches through the first channel. Rather, the evidence is restricted to the second channel with evidence of three sales events – one in Surrey, BC in 2010, one in Ottawa, ON in 2010 and another in Ottawa, ON in 2011 – at which the Registrant allegedly sold watches directly to the public.

[10] With respect to each of these sales events, Mr. Weiss furnishes an invoice from a Chinese manufacturer; customs documentation; a bank statement; a sample advertising flyer; and a photograph of watches displaying the Mark (Exhibits C – M).

[11] Mr. Weiss explains that the Chinese watch manufacturer acts as the Registrant's agent and manufactures watches based upon the Registrant's specifications. Some of these watches are branded with the Mark for exclusive sale to the Registrant. In each instance the Chinese watch manufacturer issued an invoice to Telttime Watch (which Mr. Weiss explains is the Registrant's business name). Mr. Weiss attaches two such invoices to his affidavit – one dated August 9, 2010 (Exhibit C) and one dated August 9, 2011 (Exhibit I). Mr. Weiss explains that the watches referenced on the August 9, 2010 invoice as Telttime Ref. No. TY19 and TY19A are HONORS branded watches. The August 9, 2011 invoice specifies that some of the watches are to be branded with the Mark. Mr. Weiss makes the sworn statement that the Registrant strictly controlled the character and quality of the watches sold in association with the Mark.

[12] Mr. Weiss attaches to his affidavit copies of documents (both invoices and supporting documentation) provided to the Registrant by its customs broker, Clear Customs Brokers Ltd. (Exhibit D for the August 9, 2010 invoice and Exhibit J for the August 9, 2011 invoice). Mr. Weiss explains that these documents show importation details for the watches referenced in the invoices attached to his affidavit.

[13] Mr. Weiss then explains that watches from the August 9, 2010 invoice were sold at a sales event in Surrey, BC at the Sheraton Vancouver Guildford Hotel from October 10-12, 2010 as well as at the Chimo Hotel in Ottawa, ON from November 14-16, 2010. Watches from the August 9, 2011 invoice were sold at a sales event held in Ottawa, ON at the Hampton Inn & Conference Centre from November 20-22, 2011. I note that this second Ottawa sale is dated after the relevant period and thus I will not be considering it for the purposes of my decision.

[14] Mr. Weiss attaches to his affidavit sample advertising flyers which he states were used to promote the Registrant's sales events. He explains that these flyers were distributed by mail to thousands of potential customers as well as given out to shoppers at the sales events to advise them of the products available at the sale (Exhibit E for the Surrey, BC event; Exhibit G for the

Ottawa 2010 event). I note that the sample flyers feature photographs of a men's and a women's watch which display the Mark on the clock face.

[15] Mr. Weiss also attaches to his affidavit a photograph of two men's watches which display the Mark on their faces. Mr. Weiss explains that the Mark is displayed on the face of the watch and on the pricing sticker affixed to the back of the watch case. He also makes the sworn statement that the watch in the photograph at Exhibit M is identical to the men's watches sold in association with the Mark at the sales events in evidence.

[16] With respect to each of the sales events, Mr. Weiss explains that due to the temporary nature of these events the Registrant did not print receipts displaying the particular brand of watches sold to customers. However, Mr. Weiss makes the sworn statement that HONORS branded men's and women's watches as displayed in the sample flyers were sold to a number of customers during these sales events.

[17] It is unfortunate that the Registrant was unable to provide invoices in support of the sworn statement that sales of HONORS branded watches occurred during the relevant period. However, Mr. Weiss has provided a plausible explanation for his failure to provide invoices and I note that a lack of invoices is not fatal in a section 45 proceeding [*Lewis Thomson & Sons Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)].

[18] As corroborative evidence for his sworn statement regarding sales of the wares during the relevant period, Mr. Weiss provides copies of the Registrant's bank statements dated October 31, 2010 (Exhibit F) and November 10, 2010 (Exhibit H). He attests that these statements show deposits arising from sales of watches at the corresponding sales events which were paid for by Visa, Mastercard and debit card. Mr. Weiss states that while the bank statements do not show the brand names of the watches which were sold, "it is virtually certain that these deposits included payment for watches marked with the trade-mark HONORS".

[19] The Requesting Party submits that the evidence is ambiguous with respect to whether the Registrant sold watches bearing the Mark during the relevant period. While I agree that statements such as "it is virtually certain that" elicit a sense of ambiguity, I note that the evidence must be viewed as a whole and statements made in an affidavit must be accorded substantial

credibility [*Ogilvy Renault v Compania Roca-Radiadores SA*, 2008 CarswellNat 776 (TMOB)]. In this respect, as I have outlined in the preceding paragraphs, Mr. Weiss also makes clear sworn statements that the Registrant sold watches bearing the Mark during the relevant period. In combination with clear evidence of the Mark displayed on the wares, I am satisfied that these sworn statements regarding sales of the wares are sufficient to support a finding that the Registrant has established use of the Mark in association with the wares during the relevant period [see *Mantha & Associes/Associates v Central Transport, Inc* (1995), 64 CPR (3d) 354 (FCA)].

#### Disposition

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

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Andrea Flewelling  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office