

**SECTION 45 PROCEEDINGS
TRADE-MARK: WRANGLER
REGISTRATION NO.: TMA 272,876**

At the request of Messrs. Osler, Hoskin & Harcourt, the Registrar forwarded a Section 45 notice on October 13, 1993 to United States Tobacco Company, the registered owner of the above-referenced trade-mark. The trade-mark is registered for the wares "smokeless tobacco".

In response, the registrant furnished the affidavit of Robert D. Rothenberg, the Executive Vice President of the registrant company. Both the requesting party and the registrant made written submissions; an oral hearing was not conducted.

In his affidavit, Mr. Rothenberg states that smokeless tobacco is made by the registrant and is distributed and sold in Canada under license by the registrant's wholly owned subsidiary National Tobacco Company Limited (herein referred to as "National Tobacco"). Exhibit "A" contains two invoices from U.S. Tobacco bearing dates in 1987 and 1988. These invoices, however, are irrelevant in showing sales of the wares by the registrant during the relevant period. Exhibit "B" contains invoices of National Tobacco bearing dates within the two years preceding the date of the notice and Exhibit "C" is stated to be an example of the registrant's WRANGLER labelling.

The requesting party argues that Mr. Rothenberg has no personal knowledge of the activities of National Tobacco, consequently, the evidence in this regard ought to be disregarded. Furthermore, it adds that there is no evidence that the WRANGLER tobacco apparently sold was smokeless tobacco or tobacco manufactured by the registrant. It also argues that any sales made in Canada by National Tobacco do not accrue to the registrant as the evidence does not show that the registrant had control over the character and quality of the wares sold by National Tobacco. The requesting party also contends that there is no evidence that the label submitted as Exhibit "C" was the same or similar to any label attached to the wares sold by National Tobacco, assuming that there was a label attached to the wares.

I agree that the evidence filed is not overwhelming and that it could have been more informative. However, given the fact that Mr. Rothenberg has stated that the wares are manufactured by the registrant and distributed by its licensee, I am prepared to accept that that is the normal course of trade for the wares and that the registrant has control over the quality and character of the wares distributed by National Tobacco, as it is the manufacturer. The words "MADE IN USA FOR...NATIONAL TOBACCO" appearing in Exhibit "C" would appear to confirm that the wares

are not manufactured by National Tobacco but by a US entity which I assume would be the registrant. Consequently, in accordance with Section 50 of the Trade-marks Act, I accept that any use by National Tobacco is deemed to be use by the registrant. Furthermore, having regard to the evidence in its totality, and particularly paragraphs 3 and 5, I am willing to infer that the reference to WRANGLER in the invoice dated September 25, 1992 is a reference to the registrant's smokeless tobacco.

Concerning evidence of a single sale, as stated in Philip Morris Inc. v. Imperial Tobacco Ltd. et al., 13 C.P.R. (3d) page 289, evidence of a single sale, whether wholesale or retail, in the normal course of trade may suffice so long as it is not seen as having been deliberately manufactured to protect the registration. In my view, the sale evidenced appears to be a genuine sale in the registrant's normal course of trade. Consequently, I accept it as such.

Concerning the manner the trade-mark was associated with the wares at the time of transfer, Mr. Rothenberg has submitted a label showing the trade-mark and has stated that it represents an example of the registrant's labelling with respect to "WRANGLER". Consequently, the logical assumption is that such labelling would have been applied to the wares as it is the registrant that manufactures the wares that are distributed and sold in Canada by National Tobacco under license as stated in paragraph 3 of the affidavit.

Concerning the requesting party's argument that there is no evidence to show that Mr. Rothenberg holds any position with National Tobacco or has any knowledge of any of the activities of National Tobacco, it seems to me on balance in view of his position with the registrant company and in view of the normal course of trade for the registrant's wares, and the fact that National Tobacco is a licensee for the registrant's wares that Mr. Rothenberg was manifestly in a

position to know whereof he deposed (see Union Electric Supply Co. Ltd. v. RTM, 63 C.P.R.(2d) at page 56.

Accordingly, although the evidence is not overwhelming, I find that when taken in its entirety, it permits me to conclude that the trade-mark was being used and that such use is deemed use by the registrant. As use in Canada occurred during the relevant period in association with the wares "smokeless tobacco", I conclude that the trade-mark ought to be maintained on the register.

Disposition:

In accordance with the provisions of Section 45(5) of the Trade-marks Act, Registration No. TMA 272,876 will be maintained.

DATED AT HULL, QUEBEC, THIS 31st DAY OF August, 1995.

D. Savard
Senior Hearing Officer
Section 45 Division