



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

Citation: 2015 TMOB 114
Date of Decision: 2015-06-22

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Smiths IP against registration
No. TMA498,081 for the trade-mark INSIGHT in the
name of Mechtronix Inc.**

[1] At the request of Smiths 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 June 5, 2013 to Mechtronix Inc. (the Owner), the registered owner of registration No. TMA498,081 for the trade-mark INSIGHT (the Mark).

[2] The Mark is registered in association with the goods “flight training devices to be used by pilots learning to fly planes powered by twin-turboprop or piston-driven engines and software and hardware for flight simulation”.

[3] The section 45 notice required the Owner to furnish evidence showing that it had used the Mark in Canada in association with each of the goods specified in the registration within the time period between June 5, 2010 and June 5, 2013.

[4] The definitions of “use” with respect to goods are set out in section 4 of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is

in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

...

4(3) A trade-mark that is marked in Canada on goods or on the packages in which they are contained is, when the goods are exported from Canada, deemed to be used in Canada in association with those goods.

Owner's Evidence

[5] In response to the Registrar's notice, the Owner furnished the affidavit of Fernando Petruzziello, sworn December 13, 2013 in Montreal, Quebec. Only the Requesting Party filed written representations; an oral hearing was not held.

[6] In his affidavit, Mr. Petruzziello identifies himself as President of the Owner, located in St. Laurent, Quebec. His affidavit is brief, consisting only of the following substantive paragraphs and no exhibits:

2. That the said trademark has been actively used within the context of the Company's activities during the three years preceding the date of the notice;
3. That the trademark is continuously used by the Company;
4. That amongst other uses of this trademark, the trademark is featured in various publications of the Company including marketing material and on various flight simulator units with third parties worldwide.

Insufficiency of Evidence

[7] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in a section 45 proceeding is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co Ltd 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 goods specified in the registration during the relevant period.

[8] While Mr. Petruzziello asserts that the Mark is displayed on “marketing material and on various flight simulator units”, he provides no exhibits in support of this assertion. In the absence of supporting exhibits such as representative photographs of the flight simulator units, their packaging, or associated marketing materials, I am unable to conclude that the Mark was displayed as registered at the time of any sale or transfer.

[9] In any event, display of a trade-mark in advertising and promotional materials is not in itself sufficient to establish use in association with goods. As noted by the Requesting Party, for such materials to be sufficiently associated with the goods to constitute use of any displayed trade-mark therein, the materials must be given at the time of transfer of the goods [citing *Nissan Canada Inc v BMW Canada Inc*, 2007 FCA 255, 60 CPR (4th) 181].

[10] In this case, the Owner provides no evidence of transfers of any of the registered goods, in Canada or elsewhere. Although invoices are not mandatory in order to satisfactorily reply to a section 45 notice [*Lewis Thomson & Son Ltd v Rogers, Bereskin & Parr* (1988), 21 CPR (3d) 483 (FCTD)], use must be shown in association with each of the goods as registered [*John Labatt Ltd v Rainier Brewing Co et al* (1984) 80 CPR (2d) 228 (FCA)]. As such, some evidence of transfers in the normal course of trade in Canada during the relevant period is necessary. Such evidence can be in the form of documentation like invoices or sales reports, but can also be through clear sworn statements.

[11] In the absence of supporting exhibits or further particulars, Mr. Petruzziello’s statements amount to a mere assertion of use only, rather than statements of fact showing use of the Mark [per *Plough, supra*].

[12] In view of the foregoing, I am not satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4 and 45 of the Act. Furthermore, there is no evidence of special circumstances excusing non-use of the Mark before me.

Disposition

[13] Accordingly, 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