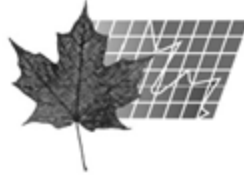


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LE REGISTRAIRE DES MARQUES DE COMMERCE
THE REGISTRAR OF TRADE-MARKS

Citation: 2017 TMOB 183

Date of Decision: 2017-12-27

IN THE MATTER OF A SECTION 45 PROCEEDING

Westfield Outdoors GmbH

Requesting Party

and

Krueger International, Inc.

Registered Owner

TMA524,168 for DURALITE

Registration

[1] At the request of Westfield Outdoors 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 September 1, 2015 to Krueger International, Inc. (the Owner), the registered owner of registration No. TMA524,168 for the trade-mark DURALITE (the Mark).

[2] The Mark is registered for use in association with the following goods:

(1) Furniture, namely, folding banquet tables.

(2) Folding banquet tables.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with the goods specified in the registration, at any time between September 1, 2012 and September 1, 2015. If the Mark had not been so used, the Owner was

required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definition of “use” in association with goods is set out in section 4(1) 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.

[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. As such, the evidentiary threshold that the registered owner must meet is quite low [*Performance Apparel Corp v Uvex Toko Canada Ltd*, 2004 FC 448, 31 CPR (4th) 270].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of its Assistant Secretary and Manager of Intellectual Property, Michael L. Novitski, sworn on November 9, 2015, in Green Bay, Wisconsin. Only the Owner filed written representations and was represented at an oral hearing.

THE OWNER’S EVIDENCE

[7] In his affidavit, Mr. Novitski states that the Owner is a large contract furniture manufacturer founded in 1941. He specifies that the Owner “manufactures a comprehensive and diverse line of office, commercial, institutional and educational furniture for a wide variety of customers in various markets, including colleges and universities, schools, hospitals, healthcare facilities, government agencies, and a diverse range of corporate and commercial environments”. He explains that the Owner is headquartered in Green Bay, but has an international workforce, including manufacturing facilities and “many showrooms” in Canada and the United States.

[8] With respect to the registered goods, Mr. Novitski states that the Owner manufactures several lines of folding tables for different “designed uses”, including DURALITE folding tables, which are “perfect for any application that requires repeated set up and tear down – such as banquets, seminars, catered events and multi-use spaces”.

[9] Mr. Novitski attests that the Mark has been used in association with such folding banquet tables in Canada continuously since at least as early as 2000 and throughout the relevant period. More specifically, he states that the Mark “is and has been prominently and consistently displayed on the underside of DURALITE folding tables”.

[10] With respect to Canadian sales, Mr. Novitski explains that the Owner sells many of its products in Canada through its subsidiary KI Pembroke, Inc. (previously Krueger International Canada Inc.), which acts as a distributor of DURALITE folding tables in Canada. He explains that Canadian customers typically place their orders through the distributor, who in turn places the order with the Owner, and then either ships the order to the Canadian customer or arranges such shipment directly from the Owner’s warehouse. Mr. Novitski attests to the sale of tens of thousands of DURALITE folding tables annually in Canada during the relevant period.

[11] Mr. Novitski adds that such tables have been “regularly promoted” in Canada through the Owner’s website, through the distribution of written materials, and through the Owner’s attendance at trade shows.

[12] In support of his statements, Mr. Novitski attaches the following exhibits to his affidavit:

- Exhibits B, C, and G through J contain excerpts from the Owner’s website at *www.ki.com*, including both “current” printouts and printouts of pages archived during the relevant period by the Internet Archive at *web.archive.org*. The exhibited webpages provide information on the Owner and its various furniture products, including “DuraLite® Folding Tables”. Several of the pages describe “DuraLite” tables as being “perfect” for banquets. A number of the pages contain product images, including images depicting the tables in their folded state.
- Exhibit D consists of two documents titled “Inspection Report”, featuring images of tables and their packaging and labelling from product inspections performed on September 10, 2012 and August 13, 2015. The images appear under captions such as “The legs fold test”, “Underside labels inspection” and “Carton printing”. Some of the images show the Mark on a label affixed to what appears to be the table’s underside. The packaging images are less clear, but in at least one of them, the Mark is recognizable on a

folded carton. Mr. Novitski attests that these images are “representative of labels applied to all DURALITE folding tables sold in Canada” during the relevant period.

- Exhibit E consists of seven invoice reprints showing sales from either the Owner or Kreuger International Canada to various Canadian institutions and business during the relevant period. Mr. Novitski attests that the various model numbers referenced in these invoices represent DURALITE folding tables. Indeed, the item and model codes in the invoices essentially match those shown on the aforementioned Inspection Reports and webpages for DURALITE tables. Some of the invoices also expressly describe the listed products as “DURALITE TABLE”.
- Exhibit F contains nine documents that Mr. Novitski describes as a “sampling of promotional and advertising materials”, representative of those “used to promote the DURALITE folding tables in Canada” during the relevant period. The documents provide ordering information as well as product specifications, instructions and warranties. The Mark is displayed or referenced on all but one of them.

ANALYSIS

[13] Mr. Novitski makes a clear assertion of use of the Mark in association with the registered goods in Canada during the relevant period. His assertion is supported by representative images of the Mark displayed on labels affixed to the goods and by invoices showing sales of such goods to various Canadian institutions and businesses during the relevant period. In view of Mr. Novitski’s attestations regarding the nature of the goods—corroborated by product images and descriptions from the Owner’s website—I accept that the goods sold in association with the Mark are furniture items corresponding to the registered goods “folding banquet tables”.

[14] Mr. Novitski attests to significant sales of such folding banquet tables in Canada during the relevant period. Although some of the invoices provided in support appear to be from the Owner’s subsidiary, Mr. Novitski explains how this subsidiary acts as a Canadian distributor for the Owner in the normal course of the Owner’s trade. Accordingly, I accept that the invoiced sales represent sales by the Owner in its normal course of trade.

[15] In view of the foregoing, I am satisfied that the Owner has demonstrated use of the Mark in association with the registered goods within the meaning of sections 4(1) and 45 of the Act.

DISPOSITION

[16] Accordingly, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with section 45 of the Act, the registration will be maintained.

Oksana Osadchuk
Hearing Officer
Trade-marks Opposition Board
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD
CANADIAN INTELLECTUAL PROPERTY OFFICE
APPEARANCES AND AGENTS OF RECORD**

HEARING DATE 2017-11-29

APPEARANCES

Peter C. Cooke

FOR THE REGISTERED OWNER

No one appearing

FOR THE REQUESTING PARTY

AGENTS OF RECORD

Borden Ladner Gervais LLP

FOR THE REGISTERED OWNER

ROBIC

FOR THE REQUESTING PARTY