

IN THE MATTER OF A SECTION 45 PROCEEDING
respecting registration No. **368,252** for the trade-
mark **GOLDEN LEGS** standing in the name of Rosalia
Goldstein d.b.a. Goldstone Sportswear Co.

On August 4, 1994, at the request of Mendelsohn, Rosentzveig, Shacter, the Registrar forwarded a Section 45 Notice to Rosalia Goldstone, doing business as Goldstone Sportswear Co., the registered owner of the above referenced trade-mark registration No. 368,252. The trade-mark GOLDEN LEGS is registered for use in association with the following wares: "Hosiery for men, women and children".

In response to the Section 45 notice, the registrant furnished the affidavit of Zolton Goldstein, an employee of Goldstone Sportswear Co., on February 23, 1995.

Both the requesting party and the registrant made written submissions in regard to the present proceedings. No oral hearing was conducted.

Prior to January 1, 1996, Section 45 of the Trade-Marks Act (hereinafter "the Act") required the registered owner to demonstrate use of its trade-mark at any time during the two years preceding the date of the Notice. However, Section 45 as amended by the World Trade Organization Agreement Implementation Act now requires the registrant to demonstrate use at any time during the **three year period** preceding the date of the notice for each of the registered wares and/or services. The Trade-marks Opposition Board applies Section 45 as amended to all Section 45 cases whether they were commenced before or after January 1, 1996. Consequently, the relevant period in this case is between August 4, 1991 and August 4, 1994. If the registrant cannot show use within this period, it is required to show the date of last use and provide the reason for the absence of use since such date.

In his affidavit, Mr. Goldstein states that the registrant has sold

hosiery in Canada in association with the mark GOLDEN LEGS since at least as early as 1984. He also asserts that typically a Canadian customer purchases the registrant's goods from one of the registrant's American distributors but that on some occasions there have been direct sales by the Registrant to customers in Canada. He adds that currently the registrant sells hosiery for men and women in Canada in association with the trade-mark. At paragraph 8 of his affidavit, he states that the registrant has sold approximately \$2,500 U.S. worth of men's and women's hosiery in Canada under the trade-mark GOLDEN LEGS in the years 1990 to 1994 inclusive. As Exhibit F, he attaches what he refers to as an example of a typical hosiery product sold in the relevant time period, "that is, in the two or three years prior to August 4, 1994". Mr. Goldstein filed as Exhibit A representative invoices showing sales of hosiery under the trade-mark GOLDEN LEGS to Canadian customers prior to and during the relevant period. Packaging for children's tights depicting the trade-mark was attached as Exhibit B. Mr. Goldstein submits that the entire package is typical of the form under which the registrant's hosiery has been sold in Canada since 1984 up to and including 1991, 1992, 1993 and 1994. Some promotional literature, an information sheet and a flyer purported to be distributed in Canada were filed as Exhibits C, D, and E.

The arguments of the requesting party can be summarized as follows: 1) the allegations of Mr. Goldstein may not be in his personal knowledge; 2) the use purported to be shown is use by "Goldstone Hosiery Company" and not use by the registrant, "Rosalia Goldstein doing business as Goldstone Sportswear Co."; and 3) use of the mark in association with the registered wares, particularly children's hosiery, has not been shown. I will address each of these submissions.

Concerning the requesting party's submission that the allegations of Mr. Goldstein may not be in his personal knowledge, the

registrant has pointed out in its written submissions, that Mr. Goldstein has established in his affidavit that he is an employee of Rosalia Goldstein and, therefore, entitled to speak on behalf of the registrant. In my view, as there is nothing in the evidence to suggest that Mr. Goldstein does not have personal knowledge of the allegations he has made in his affidavit, I am not prepared to conclude otherwise. Consequently, I accept that Mr. Goldstein had personal knowledge of the facts deposed to in his affidavit.

With respect to the requesting party's second argument, I acknowledge that Mr. Goldstein should have commented on the name "Goldstone Hosiery Co." , the name appearing on the invoices. However, I am not prepared to conclude that "Goldstone Hosiery Co." is a separate entity from the registrant. The fact that the address of the registrant and "Goldstone Hosiery Co." is the same, and the fact that "Goldstone Sportswear Co." itself is a trading style under which the registrant conducts business, leads me to conclude that "Goldstone Hosiery Co." would be another trading style or trade-name of the registrant.

Regarding the requesting party's third argument, I respectfully disagree that use of the mark in association with men's and women's hosiery has not been shown pursuant to Section 4(1) of the Trade-Marks Act. Section 4(1) of the Trade-Marks Act states the following:

"a trade-mark is deemed to be used in association with the wares if, at the time of 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 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".

In addition to providing a representative sales figure to demonstrate sales of men's and women's hosiery sold in association with the mark in Canada between 1990 and 1994, Mr. Goldstein attaches as Exhibit A invoices illustrating sales of hosiery to customers in Canada, several of which show sales during the

relevant period. Mr. Goldstein has deposed at paragraph 3 that the hosiery identified in the invoices is hosiery sold in association with the trade-mark GOLDEN LEGS. I have no reason to doubt his sworn statement. Further, by attaching a representative photocopy of a package for hosiery (Exhibit F), he has demonstrated the manner in which the trade-mark GOLDEN LEGS is used in association with the wares. Consequently, I am satisfied that use of the mark GOLDEN LEGS pursuant to s.4(1) of the Trade-Marks Act has been shown in association with men's and women's hosiery.

I also disagree with the requesting party's submission that use of the mark in association with children's hosiery has not been shown. The requesting party pointed out that advertising alone is insufficient to establish use (Parker-Knoll Ltd. v. Registrar of Trade-Marks (1977), 32 C.P.R. (2d) 148). I agree. However, in this case, in addition to submitting the promotional material contained in Exhibits C, D and E, the registrant states that what is submitted as Exhibit B is "a photocopy of a package showing how the mark GOLDEN LEGS is associated with children's tights". He also asserts that Exhibit B is "...typical of the form under which the registrant's hosiery has been sold in Canada since 1984, up to and including 1991, 1992, 1993 and 1994...". Further, included in Exhibit A is Invoice No. 1483, which demonstrates a sale of "girls' tights" by the registrant to a wholesaler in Canada during the relevant period. I am satisfied that "girls'tights" would fall under the category "children's hosiery". In view of the evidence as a whole, I am satisfied that use of the mark in association with children's tights has been shown.

Registration No. 368,252 will be maintained accordingly, unless an

appeal from this decision is initiated under the provisions of Section 56 of the Trade-Marks Act within the prescribed time.

DATED AT HULL, QUEBEC, THIS 6th DAY OF February, 1996.

D. Savard
Senior Hearing Officer