

TRADUCTION/TRANSLATION

**PROCEEDINGS UNDER SECTION 45
TRADE-MARK: OLIGOSOL
REGISTRATION NO.: TMA 347,513**

On March 1, 2004, at the request of Messrs. Sim & McBurney, the Registrar issued the notice prescribed in section 45 of the Act to Société d'Étude des Catalyseurs, the registered owner of the above-mentioned registration.

The OLIGOSOL trade-mark is registered for use in association with the following wares:

“Préparations pharmaceutiques et diététiques nommément: préparations à base d'oligo-éléments, essentiellement des métaux ou métalloïdes présentés seuls ou en combinaison de deux ou trois éléments et vendues sous forme de flacons, ampoules, gélules, capsules et comprimés”.

[TRANSLATION]

“Pharmaceutical and dietary preparations namely: trace-element preparations, essentially metals or metalloids used individually or in combination with two or three elements and sold in the form of flasks, glass tubes, gel capsules, capsules and tablets.”

Section 45 of the *Trade-marks Act* requires that the registered owner of the trade-mark indicate whether the trade-mark was in use in Canada in association with each of the wares or services specified in the registration at any time during the three year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of such use since that date.

The statutory declaration of Catherine Suck, accompanied by exhibits CS-1 to CS-4, was

filed in response to the notice. Each of the parties filed a written submission. Only the trade-mark holder was represented at the hearing.

Ms. Suck is a partner and manager at the Société d'Étude des Catalyseurs and President and pharmacist responsible for the company Labcatal ("manufacturer"). She states that the owner uses the trade-mark in Canada in association with pharmaceutical and dietary preparations namely: trace-element preparations, essentially metals or metalloids used individually or in combination with two or three elements and sold in the form of flasks ("products"). She indicates that OLIGOSOL products are manufactured in France by the manufacturer which is a licensee of the trade-mark in Canada. In addition, she specifies that the owner exercises control over the quality of OLIGOSOL products. She explains that as a partner and manager of the owner, she personally exercises quality control over OLIGOSOL products where she fills the role of president and chief pharmacist. She adds that OLIGOSOL products must, among other things, comply with the production standards applicable to the French pharmaceutical industry with respect to Good Manufacturing Practices.

The products are then distributed to Canada under the trade-mark by the company Heel Canada Inc. (the distributor). The sales figures of the manufacturer in Canada for OLIGOSOL products for the last two fiscal years and the year in progress (her affidavit was sworn September 8, 2004) appear in Exhibit CS-1.

She attaches as Exhibit CS-2 copies of invoices addressed to the distributor and she specifies that the OLIGOSOL trade-mark has appeared, inter alia, since the date of first

use, on the packaging of the products and as Exhibit CS-3 she attaches packaging and information leaflets enclosed inside the packaging, identical to those that have been used in recent years and are currently being used in Canada. As Exhibit CS-4 she attaches an example of advertising media published and/or distributed by the distributor in Canada.

The only issue raised by the requesting party is that the words “ampoules, gélules, capsules et comprimés” must be deleted from the registration.

In their written submission the owner’s agents submit that the use was demonstrated in association with the products “Préparations pharmaceutiques et diététiques nommément: préparations à base d'oligo-éléments, essentiellement des métaux ou métalloïdes présentés seuls ou en combinaison de deux ou trois éléments et vendues sous forme de flacons”.

At the hearing, the representative for the owner indicated that according to recent case law (*Ridout & Maybee LLP v. Omega SA*, 39 C.P.R. (4th) 261 and 43 C.P.R. (4th) 18), the present instance is one where the Registrar could maintain the statement of wares as such considering that the list of forms in which the product is sold, that is “flacons, ampoules, gélules, capsules et comprimés”, does not change the fact that the wares covered by the registration are trace-element preparations, essentially metals or metalloids used individually or in combination with two or three elements. She therefore submits that if the use is demonstrated in association with the preparations in question in one of the forms mentioned, that suffices for the purpose of section 45.

Having considered the evidence and submissions of the parties, I am satisfied that the evidence demonstrates that there have been sales of the wares in the form of “flacons” during the relevant period and that at the time of the transfer of the wares in the normal course of trade, the trade-mark appeared on the packaging of the wares in question. The use is by a licensee, and I accept that the use as demonstrated is in compliance with the provisions of section 50 of the Act. Therefore, I conclude that the use of the trade-mark accrues to the registered owner.

The only issue in this case is whether the statement of wares must be amended to delete “ampoules, gélules, capsules et comprimés”. On this matter, I agree with the registrant that in this particular case the list of the various forms under which the product may be sold does not change the fact that the wares covered by the registration are trace-element preparations composed essentially of metals or metalloids. Consequently, as the various forms listed do not change the nature of the wares, I accept that all the registrant has to do in this case in order to comply with the requirements of Section 45 of the Act is show use of the trade-mark in association with the trace-element preparations composed essentially of metals or metalloids in one or other of the forms listed. As this has been done, I conclude that the trade-mark registration ought to be maintained.

Registration No. 347,513 will be maintained in compliance with the provisions of subsection 45(5) of the *Trade-marks Act*.

MADE AT GATINEAU, QUEBEC, THIS 14TH DAY OF DECEMBER 2006.

D. Savard
Senior Hearing Officer
Section 45 Division