



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

Citation: 2010 TMOB 91
Date of Decision: 2010-06-30

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Deeth Williams Wall LLP against
registration No. TMA587,391 for the trade-mark TIGER
GOLF in the name of Garry Wutzke**

[1] At the request of Deeth Williams Wall LLP (the requesting party), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on January 30, 2008 to Garry Wutzke (the registrant), the registered owner of the above referenced trade-mark.

[2] The trade-mark TIGER GOLF (the Mark) is registered for use in association with the following wares and services:

Wares: Hats, namely golf hats, ladies jackets and all weather jackets, golf shoes, golf gloves, running shoes, men's jackets and all weather jackets, golf balls, carbonated and non-carbonated mineral water, non carbonated juices and slushes, fruit juices and drink crystals.

Services: Organizing golf tournaments for others, the provision of issuing credit cards.

[3] Section 45 of the Act requires the registered owner of the trade-mark to show whether the trade-mark has been used in Canada in association with each of the wares and services specified in the registration at any time within the three year period immediately preceding the date of the notice, and if not, the date when it was last in use and the reason for the absence of such use since that date. In this case, the relevant period for showing use is between January 30, 2005 and January 30, 2008 (the "Relevant Period").

[4] The registrant is required to show use of the trade-mark with each of the wares and services set out in the statement of wares and services; 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 C.P.R. (2d) 62 (F.C.A.)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd. v. Lang Michener* (1996), 71 C.P.R. (3d) 477 (F.C.T.D.) at 480], and evidentiary overkill is not required [*Union Electric Supply Co. Ltd. v. Registrar of Trade Marks* (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)], sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with the wares and services specified in the registration, during the Relevant Period.

[5] Use in association with wares and services is set out in s. 4 of the Act:

4. (1) A trade-mark is deemed to be used in association with wares if, at the time of the 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 in 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.

(2) A trade-mark is deemed to be used in association with services if it is used or displayed in the performance or advertising of those services.

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

In this case, s. 4(1) and 4(2) apply.

[6] In response to the Registrar's notice, the registrant filed his own affidavit, sworn on August 19, 2008, together with Exhibits A through P. Both parties filed written submissions and were represented at an oral hearing.

[7] Mr. Wutzke is a businessman from Alberta. He states that he sold wares bearing the Mark at the Crossroads Market in Calgary, Alberta during the Relevant Period. As Exhibit A, he provides copies of 19 receipts (signed by him), dated from January 15, 2006 to December 2, 2007, showing sales of wares identified as hats, jackets, golf balls, vests, golf gloves and bottled

water. He states that each of the products referred to on the receipts bore the Mark. I note that the words “Crossroad Market” and “Crossroads” are handwritten at the top of each receipt; that the Mark is written in the body of the receipt beside each of the products; and that “pd cash” (paid in cash) is written on some of the receipts. The receipt dated December 2, 2007, for the wares “golf gloves”, includes the handwritten notation “COD July”, which indicates (since July 2008 is after the Relevant Period) that there was no payment for or transfer of these wares during the Relevant Period.

[8] Mr. Wutzke adds that he also sold wares bearing the Mark to various corporations and commercial enterprises. He attaches, as Exhibit B, a set of eight receipts dated December 15, 2007 through February 13, 2008, which he indicates reflect such sales. Each includes the name and address of the buyer, the Mark written beside each item, the price and applicable taxes, and details of payment and delivery terms. Only five of these receipts (relating to golf balls, golf hats, golf gloves, bottled water and vests) are dated during the Relevant Period. However, all five provide for payment terms of “payment on delivery” or COD (Cash On Delivery); two of the receipts (dated January 11, 2008 and January 21, 2008) do not include delivery dates, and three (dated December 15, 2007, January 8, 2008 and January 29, 2008) indicate delivery dates after the Relevant Period. Since it appears that no payment was made at the time the wares were ordered, I infer that these “receipts” are more in the nature of purchase orders. I note that there is no indication in the affidavit, which is dated six and a half months after the Relevant Period, that the wares ordered during the Relevant Period were ever delivered and paid for. Therefore these “receipts” must be disregarded, along with the three “receipts” dated after the Relevant Period.

[9] Mr. Wutzke states that in September, 2003 he contracted with Calsport Inc. to create a design incorporating the Mark that would be applied to every piece of merchandise which he would sell in association with the Mark. Attached as Exhibit M is a copy of a memorandum from Calsport Inc., dated September 29, 2003, illustrating a graphic design incorporating the Mark, which was accepted by Mr. Wutzke on September 30, 2003. I note that the design shown shows the words “Tiger Golf” in stylized font.

[10] Mr. Wutzke states that he ordered various wares bearing the Mark to be manufactured by Calsport Inc., and in Exhibit C provides copies of invoices, statements, memos and a packing

slip from Calsport Inc. reflecting these transactions. He states that each of the wares listed in these documents bore the Mark.

[11] The invoices show that jackets, vests, golf balls, ball caps/hats, shirts and garment embroidery were ordered by the registrant from Calsport Inc. in 2003 and 2005. Invoice no. 4320, dated October 10, 2003, includes orders for 10 ball caps and 10 “Garment Embroidery Front – puff logo”, and four dozen golf balls with printing. The invoice also includes orders for jackets, a vest and embroidery for a vest. Invoice no. 4408, dated November 17, 2003, includes orders for 6 hats, 6 “Cap Embroidery ‘Tiger’ logo in puff”. Invoice no. 4390, dated October 15, 2003 includes an order for 8 hats, and 8 “Garment Embroidery Front puff – Tiger Golf”.

[12] Exhibit C also includes a packing slip and corresponding invoice dated March 1, 2005, that lists the registrant under “bill to” and “ship to” and the sale of items including 12 caps and 12 “Garment Embroidery Tiger Puff”, as well as vests, a shirt, and other embroidery. Also included is a Sales Quote and a Memo, both dated May 5, 2005, discussing, among other things, pricing for hats and Tiger Puff. The last invoice is dated April 29, 2008, and includes orders for 132 hats, 132 “Garment Embroidery (Tiger Golf)”, golf balls, golf gloves, 6 vests and 6 “Garment Embroidery (Tiger Golf)”.

[13] Paragraphs 11 to 13 describe Mr. Wutzke’s attempts to license the Mark. Exhibits D to G are copies of correspondence between Mr. Wutzke and parties which he describes as potential licensees of the Mark. I note that Mr. Wutzke’s email dated April 26, 2005 to Tom Sampson, a representative of Forzani’s, specifically mentions that “I (Mr. Wutzke) have ma(d)e up some hats and vests with the Tiger Golf logo and would like to send you some for your review.” (Exhibit E).

[14] In paragraphs 14 to 17, Mr. Wutzke states that he donated “TIGER GOLF merchandise” to two charitable organizations. Exhibits H through K are letters from the Frank Lindsay Golf Foundation (January 24, 2006) and YMCA Calgary (May 24, 2005 and April 3, 2006) referring to donations by Mr. Wutzke. I note that none of these letters specify the items donated.

[15] Mr. Wutzke also explains that he investigated the costs of various methods for shipping “TIGER GOLF merchandise” in paragraph 18, and provides related documentation in Exhibit L.

[16] Mr. Wutzke further explains, in paragraph 20, that he developed various marketing ideas for promoting the sale of “Tiger Golf” products and services. In Exhibit N, he provides a copy of proposed playing cards that he states would be included in a board game that would incorporate the Mark. I note that neither playing cards nor board games are included in the statement of wares of the subject registration.

[17] In paragraphs 21 through 27, Mr. Wutzke explains that his plans to commercially exploit the Mark have been substantially delayed due to delays in the registrations of his two other trademark applications for “TIGER DOGS” and “TIGER IRONS”. In Exhibits O and P, he provides copies of the registration and application particulars for these marks.

[18] The balance of the affidavit deals with Mr. Wutzke’s belief that ETW Corporation is acting in bad faith in commencing these s. 45 proceedings as it regrets reaching an accommodation with Mr. Wutzke and withdrawing its opposition to his application for the Mark, and ETW Corporation’s application for the trade-mark TIGER WOODS. However, this evidence is irrelevant and will be disregarded, as the purpose and intent of s. 45 proceedings is to remove “deadwood” from the register, and not to settle *inter partes* disputes. Further, I note that ETW Corporation is not even a party to these proceedings.

[19] The requesting party submits that the evidence fails to describe the registrant’s normal course of trade, that no sample product or packaging was provided to show the Mark on these wares, that there is no indication in the affidavit that the receipts accompanied the wares, and that the evidence demonstrates only a minimal quantity of sales during the Relevant Period. The requesting party further argues that the registrant’s unsuccessful attempts to license the mark, his efforts to investigate shipping costs, and his efforts to develop designs and marketing ideas do not constitute use of the Mark; and, that the absence of use has been due to a deliberate and voluntary decision of the registrant.

[20] At the oral hearing, the registrant conceded that the evidence did not show use with the services “organizing golf tournaments for others” and “the provision of issuing credit cards” and that such services could be deleted from the registration. Accordingly, these services will be deleted from the registration.

[21] Concerning the wares, the registrant acknowledges that use of the Mark has not been shown in relation to each ware, but argues that “representative” use has been shown, relying on *Saks & Co. v. Registrar of Trade Marks* (1989), 24 C.P.R. (3d) 49 (F.C.T.D.). The registrant further argues that notwithstanding the minimal quantity of sales which are shown to have occurred, that there is no requirement to prove a certain level of commercial activity or continuous use in Canada in order to prove use [*Coscelebre, Inc. v. Registrar of Trade Marks* (1991), 35 C.P.R. (3d) 74 (F.C.T.D.)]. He cites *Philip Morris Inc. v. Imperial Tobacco Ltd.* (No. 2) (1987), 17 C.P.R. (3d) 237 (F.C.A), that a single sale in the normal course of trade can be sufficient to show use. The registrant also argues that the combination of the evidence, in conjunction with Mr. Wutzke’s statements, suffice to allow me to reach a conclusion that the Mark was used on all of the wares.

[22] In the alternative, the registrant argues that a combination of factors (i.e. poor market conditions combined with the registrant not finding a licensee or manufacturer, and delays in registering the associated marks), created special circumstances beyond the registrant’s control, which excuse non-use under s. 45.

Normal Course of Trade

[23] With respect to the issue of sales in the normal course of trade, on a fair reading of the affidavit as a whole, I find that the registrant was in the business of selling golf merchandise to companies and had some direct sales at the Crossroads Market during the Relevant Period, as evidenced by the receipts provided in Exhibit A. The receipts provided in Exhibit A to Mr. Wutzke’s affidavit show sales of “Tiger Golf” hats, jackets, golf balls, vests, and bottled water, to customers in Canada during the Relevant Period. Although the sales are relatively few in number, as pointed out by the registrant, in the context of these proceedings, evidence of a single sale may well be sufficient to establish use of the trade-mark (*Philip Morris*, supra). In the present case, the receipts show sales of the products to various buyers over several months within the Relevant Period. The affidavit also indicates that the registrant purchased these wares (hats, jackets, golf balls and vests), with related printing and embroidery from Calsport Inc. (Exhibit C) for resale.

[24] I have no reason to conclude that the sales demonstrated in Exhibit A were deliberately manufactured or contrived in order to protect the registration of the Mark, as the receipts show that sales took place as early as January 15, 2006, long before the notice issued. Therefore, I find that although minimal sales have been evidenced, having regard to the evidence as a whole, there is no reason to conclude that such sales were not bona fide sales in the registrant's normal course of trade.

Association of the Mark within the meaning of s. 4(1) of the Act

[25] With respect to the issue of association of the Mark with the wares at the time of transfer, taking into consideration Mr. Wutzke's sworn statement that each of the wares listed in the invoices with Calsport Inc. (Exhibit C) bore the Mark, the evidence that Calsport Inc. was embroidering and printing the Mark (as shown in the memorandum attached as Exhibit M) on the wares, and Mr. Wutzke's statement that all of the wares referred to on the receipts in Exhibit A bore the mark, I find it reasonable to conclude that the Mark appeared on the hats, jackets, golf balls and vests sold in Exhibit A.

[26] In any event, since the Mark is identified in the body of each receipt in Exhibit A beside each of the products, I am satisfied that the purchasers of the hats, jackets, golf balls, vests and bottled water listed on these receipts were provided with proper notice of the association of the Mark with the wares. Relying on *Riches, McKenzie & Herbert v. Pepper King Ltd.* (2000), 8 C.P.R. (4th) 471 (F.C.T.D.), the requesting party argues that these receipts cannot be used as evidence that notice was provided to customers of the association between the Mark and the wares, as it claims that there is no clear evidence that the receipts accompanied the wares at the time of the transfer of the wares to customers. However, this case is clearly distinguishable from the *Pepper King* case, based on the fact that unlike in that case, in the present case, the receipts show that these were "cash" sales. Therefore, I am prepared to infer that when the customer received the wares in exchange for cash, he or she would have been provided with the receipt. Consequently, I am satisfied that the receipts, on which the Mark is clearly identified in the body of the receipt with the product, accompanied the wares and constituted the requisite notice of association between the Mark and the wares in the manner required by s. 4(1) of the Act.

[27] I will now turn to the issue of exactly which wares can be said to have been sold during the Relevant Period and whether or not these wares are those as specified in the subject registration.

Golf Gloves

[28] Concerning the wares “golf gloves”, the only arguable evidence of sales of such wares is provided in the receipt dated December 2, 2007, which indicates that payment for and transfer of these wares was to take place after the Relevant Period. Similarly, the receipts provided in Exhibit B, which the registrant argues demonstrate sales to various corporations and commercial enterprises, cannot be considered as evidence of sales during the Relevant Period. There are no statements or other evidence provided by the affiant confirming that these transactions, all payable on a future delivery date according to the receipts, were in fact completed. Although there is some authority for accepting as evidence of use sales transactions that were commenced during the relevant period but not completed until after [see *Fetherstonhaugh & Co. v. ConAgra Inc.* (2002), 23 C.P.R. (4th) 49 (F.C.T.D.)], in this case there are no statements or other evidence provided by the affiant confirming that these transactions (all payable on a future delivery date), were in fact completed. Accordingly, I cannot infer that these sales were in fact ever completed much less that the transfer of the property in or possession of the wares indicated on these receipts occurred during the Relevant Period, as is required pursuant to s. 4(1). Accordingly, as there is no evidence of sales during the Relevant Period, I am unable to find that sales of “golf gloves” occurred during the Relevant Period.

[29] I note that the requesting party also raised the issue of whether the Mark would be perceived as a trade-mark. Although I do not consider this an appropriate issue for the Registrar’s determination under s. 45, I would comment that, having regard to the evidence as a whole, the Mark as it appears on the invoices would most likely be perceived as a trade-mark by the purchaser.

Jackets and Bottled Water

[30] In the present case, the registration covers “ladies jackets and all weather jackets” and “men’s jackets and all weather jackets”. The registrant has shown use with “jackets”. Although

the term “jackets” is a term that could be said to include “ladies jackets”, “men’s jackets” and “all weather jackets”, it is unclear in this case, in view of the specificity of the wares in the registration, if the jackets sold on the receipts in Exhibit A were men’s jackets, ladies’ jackets, men’s all weather jackets, or ladies all weather jackets. Consequently, as no evidence of use in association with the wares as specified in the registration has been provided, I am of the view that the ambiguity in this case should be resolved against the registrant [*Aerosol Fillers Inc. v. Plough (Canada) Ltd.* (1979), 45 C.P.R. (2d) 194 (F.C.T.D.), at 198; affirmed (1980), 53 C.P.R. (2d) 62 (F.C.A)]. Furthermore, it is a well accepted principle that where the registrant chooses to specify differences between wares of the same class, the implication is that one ware is somewhat different from the other and, therefore, that use must be shown on each ware [*John Labatt Ltd. v. Rainier Brewing Co.* (1984), 80 C.P.R. (2d) 228 (F.C.A.)]. Accordingly, since use on men’s jackets and all weather jackets, and ladies jackets and all weather jackets, has not been demonstrated, these wares will be deleted from the registration. By the same reasoning, as the registrant’s evidence only demonstrates use with bottled water and the registration specifies the wares “carbonated and non-carbonated mineral water”, in the absence of any information about the nature of the “bottled water”, these wares ought to be deleted.

Golf shoes, running shoes, non carbonated juices and slushes, fruit juices and drink crystals

[31] It is well established that the registrant is not required to engage in “evidentiary overkill” in order to demonstrate use of the mark for the purposes of s. 45 proceedings. However, there must be some evidence upon which the Registrar can conclude that the trade-mark has been used in association with each of the wares identified in the registration [*Aerosol Fillers*, supra; *John Labatt Ltd.*, supra]. While it is true that what is required to “show” use may vary from case to case, and in some instances it may not be necessary to provide direct evidence or documentary evidence with respect to each of the wares covered by the same category (*Saks*, supra), in the present case, the affidavit does not contain a clear assertion of use in Canada during the Relevant Period with golf shoes, running shoes, non carbonated juices and slushes or fruit juices and drink crystals. Nor does the affidavit provide any factual basis on which such use can be inferred. In fact, the evidence is completely silent regarding these wares. As the registration comprises a relatively short list of items, I do not find it unreasonable to expect the registered owner to have

furnished evidence of use with respect to each of these wares. Therefore, I conclude that the evidence is insufficient to show use with respect to “golf shoes”, “running shoes”, “non carbonated juices and slushes”, “fruit juices and drink crystals”. Consequently, these wares ought to be deleted from the registration.

Donations

[32] With respect to the donations by the registrant to charitable organizations, I note that the evidence furnished does not specify the items donated. In any event, in the absence of evidence that the registrant’s donations of TIGER GOLF merchandise to charitable organizations were part of an overall activity carried on for the purpose of making a profit and developing goodwill in the Mark [*Lin Trading Co. v. CBM Kabushiki Kaisha* (1985), 5 C.P.R. (3d) 27 (T.M.O.B.), affirmed (1987), 14 C.P.R. (3d) 32 (F.C.T.D.) and (1988), 21 C.P.R. (3d) 417 (F.C.A.)], I am unable to conclude based on this evidence that his donations constituted use of the Mark in the normal course of trade.

[33] Altogether, I find that use of the Mark has been shown in association with golf hats, golf balls and vests in Canada during the Relevant Period and that such use was in the normal course of trade. However, I note that “vests” are not covered by the registration, therefore for the purposes of these proceedings, I find that use has been shown with the following registered wares: golf hats and golf balls. Accordingly, these wares will be maintained.

[34] Having found use of the Mark with golf hats and golf balls, I will now consider whether the evidence demonstrates sufficient special circumstances excusing the absence of use in Canada during the Relevant Period with the remaining wares.

Special Circumstances

[35] Three criteria must be considered when assessing whether or not there are circumstances that would excuse non-use. Hearing Officer Barnett summarized the approach as follows in *Bereskin & Parr v. Bartlett* (2008), 70 C.P.R. (4th) 469 (T.M.O.B.):

A determination of whether there are special circumstances excusing non-use involves the consideration of three criteria. The first is the length of time during

which the mark has not been in use. The second is whether the reasons for non-use were beyond the control of the registered owner and the third is whether there exists a serious intention to shortly resume use: *Canada (Registrar of Trade Marks) v. Harris Knitting Mills Ltd.* (1985), 4 C.P.R. (3d) 488 (F.C.A.). "Special circumstances" with respect to the second criteria, that is, whether non-use of the mark was due to circumstances beyond the owner's control, mean "circumstances that are unusual, uncommon or exceptional" (*John Labatt Ltd. v. Cotton Club Bottling Co.* (1976), 25 C.P.R. (2d) 115 (F.C.T.D.)).

The Federal Court of Appeal in the recent decision, *Scott Paper Ltd. v. Smart & Biggar*, 2008 FCA 129 (F.C.A.), has offered further clarification with respect to the interpretation of the special circumstances criterion in *Harris Knitting* supra. Based on an analysis of *Harris Knitting Mills*, the Court determined that the proper test when assessing whether there are special circumstances, which would excuse non-use of a mark, must refer to the cause of the absence of use, and not to some other consideration. It would appear from this analysis, that the second criterion of the *Harris Knitting Mills* test must be satisfied in order for there to be a finding of special circumstances excusing non-use of a mark. However, as I understand it, this is not to say that the other two criteria are not relevant factors to consider, but just that those factors, in isolation, cannot constitute special circumstances. In any event, the intent to resume use must be substantiated by the evidence (*Arrowhead Spring Water Ltd. v. Arrowhead Water Corp.* (1993), 47 C.P.R. (3d) 217 (F.C.T.D.); *NTD Apparel Inc. v. Ryan* (2003), 27 C.P.R. (4th) 73 (F.C.T.D.)).

[36] In the circumstances of this case, I am not satisfied that sufficient details have been provided substantiating the registrant's claim that special circumstances existed justifying the absence of use.

[37] Turning to the important question of whether the reasons for non-use were beyond the registrant's control, the registrant appears to be submitting that market conditions combined with his failure to find a licensee and a manufacturer, and the delays in registering his other marks, affected his ability to use the mark. However, I have not been persuaded that the circumstances arising during this period were beyond the control of the registrant. Mr. Wutzke provides no particulars concerning the difficulties encountered in finding licensees or the efforts made by him to overcome them. Thus, it remains unclear whether these difficulties were simply factors that influenced the registrant's decision not to use the trade-mark or if they were truly beyond the registrant's control. Furthermore, since there is evidence that the registrant used the trade-mark with some wares, it is not clear how this factor affected the registrant's use with certain wares but not others.

[38] Mr. Wutzke also states in his affidavit that “Due to substantial delay which I experienced in successfully registering the mark TIGER DOGS caused by the oppositions filed on behalf of Asia Pacific Breweries Limited and Executive Golf Products Inc., my plans for the commercial exploitation of the mark TIGER GOLF have been substantially delayed. Specifically, I did not want to commercially exploit the mark TIGER DOGS as a single registered trademark. Instead, I wanted to complete the registration of the mark TIGER GOLF, TIGER DOGS and TIGER IRONS simultaneously or as closely as possible to each other so that I would receive the registration of these three trademarks in closely proximity to each other, so as to further enable my plans to commercially exploit the use and/or licensing of each of these trademarks.” This strongly suggests that the registrant’s decision not to use the Mark in Canada for the period of 4.5 years was a deliberate business decision of the registrant, not a circumstance outside of his control.

[39] Regarding the length of non-use, as pointed out in *Ridout & Maybee v. Sealy Canada Ltd./Ltée* (1999), 87 C.P.R. (3d) 307 (F.C.T.D.), s. 45(1) of the Act is clear, the registered owner must show the date when the trade-mark was last in use. In this case, the registrant did not provide the date the trade-mark was last in use. However, this is not fatal; generally the registration date will be used as the date of last use or, if the mark has been the subject of an assignment, the date of the assignment may be used [*GPS (U.K.) Ltd. v. Rainbow Jean Co.* (1994), 58 C.P.R. (3d) 535 (T.M.O.B.)]. In the present case, the appropriate date to accept as the last date of use is the registration date, namely, August 19, 2003. Consequently, the period of non-use from the date of registration to the date of the s. 45 notice is 4.5 years. In my view this is a relatively long period of time for commonly manufactured and available wares such as golf related clothing and accessories.

[40] With regard to the third criteria, as stated in *Lander Co. Canada Ltd. v. Alex E. Macrae & Co.* (1993), 46 C.P.R. (3d) 417 (F.C.T.D.) at 421, the intention to resume use shortly must be “substantiated by factual elements such as purchase orders or, at least, a specific date of resumption.” With respect to the wares for which use has not been found, as set out above, there is no indication in the affidavit that use will resume shortly. Although it appears that “golf gloves” were ordered during the Relevant Period there is no evidence that they were ever delivered. In any event, given the failure to establish that absence of use was beyond the

registrant's control, the intention to resume use by itself is not a determining factor in finding that special circumstances excused the absence of use [see *Scott Paper Ltd. v. Smart & Biggar*, 2008 FCA 129 (F.C.A.)]. As a result, I find that the registrant's evidence fails to establish special circumstances excusing non-use.

[41] Lastly, at the oral hearing, in response to the requesting party's submission that no sample products or packaging showing the Mark on the products have been provided, counsel for the registrant stated that he has photographs which were not before the Registrar and requested the issuance of a second notice under s. 45 of the Act. However, in light of the Federal Court of Appeal's remarks discouraging the practice of maintaining a registration and simultaneously issuing a second notice in *Spirits International N.V. v. Canada (Registrar of Trade-Marks)* (2007), 60 C.P.R. (4th) 31, a second notice will not be issued.

Disposition

[42] In view of the foregoing, and pursuant to the authority delegated to me under s. 63(3) of the Act, registration No. TMA587,391 for the trade-mark TIGER GOLF will be maintained in respect of "hats, namely golf hats" and "golf balls", and amended to delete the following wares: "[...] ladies jackets and all weather jackets, golf shoes, golf gloves, running shoes, men's jackets and all weather jackets, [...] carbonated and non-carbonated mineral water, non carbonated juices and slushes, fruit juices and drink crystals", and services: "organizing golf tournaments for others, the provision of issuing credit cards", in compliance with the provisions of s. 45 of the Act.

P. Heidi Sprung
Member
Trade-marks Opposition Board
Canadian Intellectual Property Office