



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

Citation: 2011 TMOB 252
Date of Decision: 2011-12-19

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by 88766 Canada Inc. against registration
No. TMA659,940 for the trade-mark XPLORE in the name
of Mark Michel Enterprises Ltd.**

[1] On April 6, 2009 at the request of 88766 Canada Inc. (the Requesting Party), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* R.C.S. 1985, c. T-13 (the Act) to Mark Michel Enterprises Ltd. (the Registrant), the registered owner of the trade-mark XPLORE registration No. TMA659,940 (the Mark).

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

Men's, ladies and children's clothing, namely pants, sweaters, shirts, turtlenecks, mocknecks, t-shirts, sweatshirts, ski suits, jackets, underwear, brassières, socks, skirts, dresses, coats, shorts; footwear, namely shoes, boots, ski boots, hiking boots, running shoes, slippers, sandals; headgear, namely caps, ski helmets, hockey helmets, bicycle helmets, soccer helmets, football helmets, hats, tuques, headbands, visors; bags, namely backpacks, tote bags, equipment bags, hockey bags, ski bags, sports bags, travel bags, fanny packs; cosmetics, namely lip balm, sunscreen, lotion, cream, shampoo, perfumes, toiletries, soaps; jewelry; watches; eyewear, namely sports goggles, ski goggles, swim goggles, swim masks and hockey visors.

[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/or services listed on 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 use since that

date. Thus, the relevant period in which use must be shown is between April 6, 2006 and April 6, 2009 (the Relevant Period).

[4] What qualifies as use of a trade-mark in association with wares is defined in s. 4 of the Act, the relevant portions of which are reproduced below:

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.

[5] In response to the s. 45 notice, the Registrant furnished the affidavit of Mark Michel, President of the Registrant. Written submissions were not filed. The Requesting Party was represented at the oral hearing and Mr. Michel also appeared representing himself.

[6] As a preliminary matter, I note that during his submissions Mr. Michel presented facts regarding use of the Mark and his company's future business plans that were not properly in evidence. Mr. Michel also made allegations with respect to the identity and motivation of the Requesting Party which cannot be considered within the limited scope of s. 45 proceedings. I have therefore disregarded those statements.

[7] In his affidavit, Mr. Michel states that his company has used the Mark continuously in the ordinary course of business in Canada in association with clothing, headgear, mocknecks, turtlenecks, t-shirts shirts, tank tops, v-necks, sweatshirts, sweaters, jackets, caps and underwear during the Relevant Period. I would observe that this assertion of use includes wares (tank tops, v-necks) that are not listed in the registration. The affiant also attaches as Exhibit 2 photographs of some of these clothing items, all of which bear the Mark on labels as well as on the front of the clothing and on the waistbands of the underwear. I note that the pictures are of the following wares: underwear, caps, as well as items that are arguably either sweaters, sweatshirts or jackets.

[8] The affiant states that in the normal course of trade the Registrant provides the wares to retailers in Canada. He describes Exhibit 3 as representative samples of invoices dated during the Relevant Period. I note that Exhibit 3 comprises 11 invoices: 10 to one company, Maine Knitting Inc., and one to Dollarama. The invoices appear to have been issued by either "Camille

Mark Michel” or “Mark Michel”. I am willing to accept that both these references are to the Registrant; however, I would observe that nothing turns on this finding.

[9] With respect to the particulars of the invoices, the affidavit states only that Exhibit 3 “is a representative sample of invoices demonstrating sales of the XPLOR products...” I would observe, however, that none of them itemize any wares at all. The invoices to Maine Knitting Inc. list only one line item, namely “XPLOR commission due” next to a dollar value; the lone invoice to Dollarama lists only “Royalty XPLOR...Balances: Re bankruptcy sale Main Knitting” next to dollar amounts and tax percentages. In fact, the invoices fail to demonstrate sales of anything; rather they appear to be an accounting of commission owed for an unspecified reason.

[10] Accordingly, in my view, the evidence is ambiguous as to whether or not there were sales of the wares, and further, even if there were some sales, whether they were in the Registrant’s normal course of trade as described in the affidavit. Clearly, the invoices relate to a commission paid to the Registrant; however, it is unclear what the commission is for. I am unable, on a reading of the affidavit as a whole, to make any inferences to resolve the ambiguity, and I agree with the Requesting Party that such ambiguities must be resolved against the Registrant.

Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd. v. Lang Michener* (1996), 71 C.P.R. (3d) 477 (F.C.T.D.)], 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 each of the wares or services specified in the registration during the relevant period. In addition, the entire burden is with the registrant [*88766 Inc. v. George Weston Ltd.* (1987), 15 C.P.R. (3d) 260 (F.C.T.D.)] and any ambiguities in the evidence are to be interpreted against the registrant [*Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1979), 45 C.P.R. (2d) 194, *aff’d* (1980), 53 C.P.R. (2d) 63 (F.C.A.)].

[11] Mr. Michel also provides advertising expenses incurred during the Relevant Period and printouts of his company’s website which became active sometime after July 18, 2008. I note that all but one of the web pages indicates that information on XPLOR wares is coming *in the future*. There is one page bearing the date “©2009” that appears to be an interactive page for shopping online. As the Requesting Party noted, of the seven wares shown, only one product - a

jacket, falls within Mr. Michel's assertion of use in his affidavit. In any event, it is not clear if that page was in existence during the Relevant Period and, further, no evidence of sales through the website at any time is provided. Accordingly, this evidence is of no relevance to the issue at hand; at best, it is evidence of promotion and advertising, which is not evidence of use of a Mark within the meaning of s. 4(1) of the Act.

[12] Since no use on any of the wares has been shown pursuant to s. 4 and there are no facts properly in evidence regarding special circumstances that would excuse the absence of use, the Registration must be expunged.

[13] In view of all of the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be expunged in compliance with the provisions of s. 45 of the Act.

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