



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

**Citation: 2013 TMOB 121  
Date of Decision: 2013-07-10**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Reliable Collision Centres Inc. against  
registration No. TMA678,472 for the trade-mark THE  
RELIABLE CHOICE in the name of Utility Trailer  
Manufacturing Company**

[1] At the request of Reliable Collision Centres Inc. (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 March 2, 2011 to Utility Trailer Manufacturing Company (the Registrant), the registered owner of registration No. TMA678,472 for the trade-mark THE RELIABLE CHOICE (the Mark).

[2] The Mark is registered for use in association with the following services: “design, construction, repair, maintenance and sales of trailer truck bodies”.

[3] The section 45 notice required the registered owner to furnish evidence showing that it had used the Mark in Canada in association with the services specified in the registration within the time period between March 2, 2008 and March 2, 2011.

[4] The definition of “use” in association with services is set out in section 4(2) of the Act:

4(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.

[5] It is well established that mere assertions of use are not sufficient in the context of section 45 proceedings [*Plough (Canada) Ltd v Aerosol Fillers Inc* (1980), 53 CPR (2d) 62 (FCA)].

Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener et al* (1996), 71 CPR (3d) 477 (FCTD)], and evidentiary overkill is not required [*Union Electric Supply Co v Canada (Registrar of Trade Marks)* (1982), 63 CPR (2d) 56 (FCTD)], sufficient facts must be provided such that the Registrar is able to arrive at a conclusion of use of the trade-mark in association with each of the wares and services specified in the registration during the relevant period.

[6] With respect to services, where the trade-mark owner is offering and prepared to perform the services in Canada, use of the trade-mark in advertising of those services meets the requirements of the Act [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (RTM)]. In other words, while advertising in Canada alone is insufficient to demonstrate use, if the services are available to be performed in Canada, the statutory requirement will be met.

[7] In response to the notice, the Registrant furnished the affidavit of Harold C. Bennett, President of the Registrant, sworn on September 30, 2011. Both parties filed written representations; an oral hearing was not held.

[8] In his affidavit, Mr. Bennett states that the Registrant performed the services in Canada during the relevant period through Canadian “dealer/distributors”. He identifies 11 such businesses and provides their full Canadian addresses. He attests that through these Canadian businesses, the services were provided in association with the Mark. Mr. Bennett also provides sales figures for the performance of the services. He attests that “sales in association with THE RELIABLE CHOICE trade mark Services” amounted to “greater than \$1000[USD]” for each year of the relevant period; however, he does not clearly state whether such sales took place in Canada. Furthermore, it is unclear whether he is simply referring to *sales* of trailer truck bodies, or one of the other registered services, namely: design, construction, repair or maintenance of trailer truck bodies. I note that Mr. Bennett does not corroborate his statement with any documentary evidence such as invoices that would provide such details.

[9] As the sole exhibit to his affidavit, Mr. Bennett includes a copy of a webpage from the website operated by one of the Registrant’s “dealer/distributors”, Ocean Trailer. He claims that the printout shows use of the Mark in association with the inventory of trailer truck bodies that Ocean Trailer offered for sale during the relevant period. The webpage shows two images of

trailer truck bodies with mud flaps marked with the Registrant's trade name, "Utility". I note that the Mark is not visible on the trucks pictured. However, the Mark does appear on the webpage directly above the two images and next to the Registrant's "Utility" logo. Between the two images, it appears that the webpage contains links to a "brochure" and "data sheet" available for download. I would note that the webpage does not clearly indicate that customers can purchase trailer truck bodies. Similarly, the remaining registered services are not clearly referenced in association with the Mark. At the top of the webpage, there is a link to "Parts & Services"; however, the link appears above Ocean Trailer's own logo and does not appear to be associated with the Mark appearing in the body of the webpage.

[10] In its written representations, the Requesting Party submits that the webpage is not from the Relevant Period as the printout was made on September 30, 2011 and, therefore, it cannot be inferred that the webpage was available to consumers in Canada during the Relevant Period. I would note, however, that Mr. Bennett attests that the webpage "shows, and showed during the relevant period", the Mark in association with the inventory of trailer truck bodies that Ocean Trailer offered for sale. In my view, this is sufficient to conclude that the printout of the webpage is representative of the webpage as it appeared during the relevant period.

[11] As such, although Mr. Bennett's statements regarding sales are ambiguous, I consider the evidence sufficient to show that the Registrant's trailer truck bodies were advertised in association with the Mark. It can be reasonably inferred, even though the webpage does not explicitly make reference to sales of the trailer truck bodies displayed, that the webpage was created and maintained by Ocean Trailer for this purpose and Mr. Bennett states in paragraph 7 of his affidavit that the webpage displays the inventory that Ocean Trailer offers, and offered, for sale.

[12] However, the Requesting Party also asserts that the Registrant's evidence must show use by a proper licensee pursuant to section 50 of the Act. It argues that there is no evidence that public notice has been given such that the "dealer/distributor's" use of the Mark is licensed and, thus, there can be no presumption that use of the Mark by the "dealer/distributor" is use licensed by the Registrant. Furthermore, it notes that Mr. Bennett fails to provide the requisite statement of control that would indicate that such a relationship exists.

[13] Conversely, the Registrant submits that use of the mark by its Canadian “dealer/distributors” satisfies the definition of use under the Act. It argues that the relationship between the Registrant and Ocean Trailer is not one of licensor/licensee but, rather, that of a distributorship. In support of this assertion, the Registrant cites *Aurora Ltd v Acuity Brands, Inc* (2009), 78 CPR (4th) 139 (TMOB), in which it was held that a manufacturer of wares need not provide evidence of direct or indirect control over its distributors.

[14] I would note that the case cited by the Registrant involved a distributorship of wares, whereas the present case involves services only. Nonetheless, in some circumstances, distributorships in the context of services have been contemplated in the jurisprudence. For example, in *Venice Simplon-Orient-Express Inc v Société Nationale des Chemins de Fer Français SNCF* (2000), 9 CPR (4th) 443 (FCA)], the Court of Appeal stated that “any use of the trade-mark along the chain of distribution is sufficient to demonstrate use” [at paragraph 12]. That case did involve travel services, rather than wares, but the Court of Appeal confirmed that the Registrar had evidence before him of sales by the registered owner to travel agents. Even though this was not a sale to the ultimate customer, it did constitute display and use of the Mark *by the registered owner* in the performance of the registered services, and as such was sufficient to maintain the registration. The Court of Appeal also found that “invoices supplied by the registrant clearly indicate that the company sending out the invoices was [the registered owner]” [at paragraph 13].

[15] In this case, there is no evidence of display of the Mark in association with the Services *by the Registrant* in any manner or in any context, in particular with respect to its dealings with Ocean Trailer, by way of sales or otherwise. Nor is there any evidence that the sales services were provided by or on behalf of the Registrant. If the display of the Mark on the exhibited webpage was authorized use, there is no evidence of that before me, and given the ambiguous nature of the evidence, I am not prepared to infer that a distributorship relationship existed between the Registrant and Ocean Trailer with respect to the registered services.

[16] The Registrant’s submission appears to conflate the definition of “use” in relation to wares with the definition of “use” with regards to services. In this case, the Mark is registered, in part, in association with the services “*sales of trailer truck bodies*”, and not in association with

any wares. As such, the Registrant cannot establish use of the Mark in association with the registered services by using principles relevant only to section 4(1) of the Act. As a result, the way in which the Registrant has evoked the concept of a distributorship does not accurately characterize the relationship between the Registrant and its third party “dealer/distributors”, in particular, Ocean Trailer.

[17] Indeed, the reasoning in *Aurora* does not lend itself to the current circumstances. While a manufacturer, by virtue of its position, has inherent control over the quality and character of its wares and, thus, use of a trade-mark anywhere along the distribution chain may be considered use that enures to the benefit of the manufacturer of those wares, the same cannot be inferred of services. In a “distributorship” of services, the services do not originate from the registrant in the same way as wares from a manufacturer, as the services are provided by a third party. Thus, even if I were to accept that the Mark’s display on the website is in association with the sale of trailer truck bodies, the webpage is operated by Ocean Trailer. As such, it is necessary for the Registrant to establish that it exercises control over the character or quality of Ocean Trailer’s sales services, such that use of the Mark was licensed use enuring to the Registrant’s benefit. However, no such evidence is before me.

#### Disposition

[18] In view of all of the foregoing, I am not satisfied that the Registrant has demonstrated use of the Mark in association with the “design, construction, repair, maintenance and sales of trailer truck bodies” within the meaning of sections 4 and 45 of the Act, and there is no evidence before me of special circumstances excusing the absence of use.

[19] Consequently, pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office