



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

Citation: 2013 TMOB 206
Date of Decision: 2013-11-29

IN THE MATTER OF SECTION 45 PROCEEDINGS
requested by Heidi Jensen – Jensen & Company against
registration Nos. TMA422,577 and TMA548,780 for the
trade-marks CAMPERS CHOICE and CAMPERS
CHOICE & Design in the name of Atlas Trailer Coach
Products Ltd.

[1] At the request of Heidi Jensen – Jensen & Company (the Requesting Party), the Registrar of Trade-marks issued notices under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) to Atlas Trailer Coach Products Ltd. (the Registrant), the registered owner of registration No. TMA422,577 for the trade-mark CAMPERS CHOICE and registration No. TMA548,780 for the trade-mark CAMPERS CHOICE and Design, shown below:



[2] With respect to CAMPERS CHOICE, the section 45 notice issued on October 11, 2011; the mark is registered in association with the following:

WARES:

Clothing, namely, caps, hats, T-shirts, sweatshirts, sweatpants, jackets, shorts, track suits, sweaters, mits, socks and jerseys; outdoor leisure equipment namely tents, sleeping bags, foamies, mattresses, stoves, lanterns, sinks, tables, chairs, toilets, cooking utensils, back packs, fishing rods, fishing reels, fishing tackle, water skis, tow ropes, wet suits, golf clubs, golf balls, bags, bicycles, knives, guns, wind surf boards and sails; marine

equipment namely boats, motors, oars, life jackets, boat parts; recreational vehicles and hardware namely tent trailers, travel trailers, truck campers, fifth-wheel trailers, van conversions, motorhomes and parts.

SERVICES:

Operation of a retail store and mail order business dealing with the sale, rental, servicing, maintenance, repair and installation of clothing, namely, caps, hats, T-shirts, sweatshirts, sweatpants, jackets, shorts, track suits, sweaters, mits, socks and jerseys; outdoor leisure equipment namely tents, sleeping bags, foamies, mattresses, stoves, lanterns, sinks, tables, chairs, toilets, cooking utensils, back packs, fishing rods, fishing reels, fishing tackle, water skis, tow ropes, wet suits, golf clubs, golf balls, bags, bicycles, knives, guns, wind surf boards and sails; marine equipment namely boats, motors, oars, life jackets, boat parts; recreational vehicles and hardware namely tent trailers, travel trailers, truck campers, fifth-wheel trailers, van conversions, motorhomes and parts.

- [3] With respect to CAMPERS CHOICE & Design, the section 45 notice issued on October 3, 2011; the mark is registered in association with the following:

WARES:

Clothing, namely, T-shirts; outdoor leisure equipment namely stoves, lanterns, sinks, tables, chairs, toilets, cooking utensils, tow ropes, bags and knives; recreational vehicles and hardware, namely tent trailers, travel trailers, truck campers, fifth-wheel trailers, van conversions and motorhomes parts.

SERVICES:

Operation of a mail order business dealing with the sale of clothing namely, T-shirts; outdoor leisure equipment namely stoves, lanterns, sinks, tables, chairs, toilets, cooking utensils, tow ropes, bags and knives; recreational vehicles and hardware, namely tent trailers, travel trailers, truck campers, fifth-wheel trailers, van conversions and motorhomes parts.

- [4] 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 with respect to CAMPERS CHOICE is between October 11, 2008 and October 11, 2011; with respect to CAMPERS CHOICE & Design, the relevant period is anytime between October 3, 2008 and October 3, 2011.

[5] The relevant definitions of “use” are set out in sections 4(1) and 4(2) of the Act as follows:

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.

[6] 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 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in these proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], 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 and services specified in the registration during the relevant period. With respect to services, the registered owner needs to show that it was prepared to perform the services in Canada during the relevant period [*Wenward (Canada) Ltd v Dynaturf Co* (1976), 28 CPR (2d) 20 (RTM)].

[7] In response to the Registrar’s notices, the Registrant filed affidavits of Garry Bewernick, both sworn on May 2, 2012. I note that the evidence furnished with respect to both registrations is substantively the same. Both parties filed written representations and attended an oral hearing.

[8] In his affidavits, Mr. Bewernick identifies himself as the “principal” of the Registrant, having direct or indirect control over the character and quality of the wares and services used in association with the marks. He states that the Registrant provides an online order service for the sale of “a multitude of wares”. More specifically, he states that “the 2011 online catalogue for “Campers Choice” RV Parts & Accessories...can be found at the internet website, *www.camperschoice.ca* [the Website]...” He further states that the wares “advertised” in the catalogue includes “outdoor leisure equipment ... recreational vehicles and hardware, tent trailers, travel trailers, truck campers, fifth-wheel trailers, van conversions and motorhome parts”.

[9] Although he attests that the Registrant has “continuously updated the Website since the Website was created [in 2008]”, Mr. Bewernick does not provide any images from the website purporting to be from the relevant period, such as representative screenshots showing the wares available via the Website. The only exhibit he provides that displays the marks is Exhibit A, which consists of “a copy of an *excerpt* obtained on *May 2, 2012* from the Website showing the cover of the Catalogue which displays the Trade-mark” (emphasis added). I note that the excerpt consists only of a picture of the cover and that, aside from Mr. Bewernick’s assertion, there is no indication that the picture is from a website. Although the title displayed is “2011 RV parts & accessories” and the design mark appears at the top of the picture, Mr. Bewernick makes no statements as to the availability or appearance of the Website to Canadians during the relevant period.

[10] Instead, he merely provides copies of five invoices from a website designer, Unified RV, to the Registrant “pertaining to programming and design work done by Unified RV for [the Registrant] over the past 3 years” (at Exhibits B to F). Even if I were to otherwise consider such invoices to be of any value to the question of use of the subject marks, I would note that neither the invoices themselves nor Mr. Bewernick’s own statements make it clear that such invoices even pertain to the Website, rather than some other website operated by the Registrant.

[11] As noted by the Requesting Party, Mr. Bewernick makes no clear statements regarding the content of the Website, and more particularly the appearance of the marks on the Website during the relevant period. It should have been a simple matter to provide screen shots of the Registrant’s website, showing both the marks displayed and, at a minimum, a sampling of the wares available. Instead, by furnishing copies of invoices from its website programmer, the Registrant chose a curiously circuitous means of demonstrating that it operated a website during the relevant period. As a result, the inferences that the Registrar would need to make go too far; at best, it is ambiguous that the invoices are with respect to the Website, that Canadians viewed the Website at the URL *camperschoice.ca*, or that the Website displayed the marks at all.

[12] Furthermore, as Mr. Bewernick makes no clear statements that the Registrant was prepared to sell and ship its goods to Canadian customers during the relevant period, I am not prepared to conclude that the Registrant’s “retail store” and “mail order” services were available

to Canadians during the relevant period [see *Lapointe Rosenstein LLP v West Seal Inc* (2012), 103 CPR (4th) 136 (TMOB)]. As such, I cannot conclude that the Registrant has demonstrated use of the subject marks in association with the registered services within the meaning of sections 4 and 45 of the Act.

[13] With respect to the registered wares, Mr. Bewernick provides no evidence of sales of any goods to Canadian customers, either via the Website or otherwise. Absent evidence of transfers of the wares in Canada in the normal course of trade, I cannot conclude that the Registrant has demonstrated use of the subject marks in association with any of the wares as registered.

[14] Finally, the Registrant has furnished no evidence of special circumstances that would excuse non-use of the marks with respect to the registered wares and services.

Disposition

[15] In view of the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act and in compliance with the provisions of section 45 of the Act, the registrations will be expunged.

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