

IN THE MATTER OF A SECTION 45 PROCEEDING  
respecting registration No. **334,998** for the trade-  
mark **MID PLUS** standing in the name of Head Sport  
Aktiengesellschaft

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On May 20, 1994, at the request of Messrs. Riches, McKenzie and Herbert, the Registrar forwarded a Section 45 Notice to Head Sport Aktiengesellschaft, the registered owner of the above referenced trade-mark registration No. 334,998. The trade-mark MID PLUS is registered for use in association with the following wares: "tennis rackets, squash rackets and golf clubs".

In response to the Registrar's notice, the registrant furnished the affidavit of Robert Holliday, Director of Head/Tyrolia Sports Canada Inc. on November 18, 1994. Both parties filed written submissions with the Registrar. An oral hearing was not conducted.

Section 45 of the Trade-Marks Act requires the registered owner to evidence use of its registered trade-mark within the two year period immediately preceding the date of the notice (i.e. between May 20, 1992 and May 20, 1994) for **each** of the registered wares (John Labatt v. Rainier Brewing Co. (1984), 80 C.P.R. (2d) 228 (F.C.A.) [hereinafter John Labatt]). If the registrant cannot show use within that period, it is required to show the date of last use of the mark and provide the reason for the absence of use since such date.

At paragraph 2 of his affidavit, Mr. Holliday explains that his company is a subsidiary of the registrant; that the registrant manufactures the wares while his company distributes them. At paragraph 3, he clearly states that his company distributes a number of brands of tennis rackets manufactured by the registrant including a tennis racket to which the trade-mark MID PLUS is applied by the registrant.

At paragraph 5 of his affidavit, Mr. Holliday asserts that "the property in and possession of tennis racquets so marked with the

trade-mark MID PLUS are transferred to sporting goods outlets in Canada in the normal course of trade through the sale in Canada of tennis racquets to bona fide retailers for sale to the public". As Exhibit A, he attached four photographs of a tennis racket depicting the trade-mark MID PLUS; as Exhibit B, he submits six invoices showing sales of tennis rackets to outlets in Canada bearing the mark MID PLUS which he states are identified in the body of the invoices by the letters "MP".

In its written submissions, the requesting party raised several arguments. These arguments can be summarized as follows: 1) use of the trade-mark by the registrant pursuant to Section 4(1) of the Trade-marks Act has not been shown during the relevant period and 2) use of the trade-mark has not been shown in association with squash raquets and golf clubs. I will address each of these submissions.

Concerning the requesting party's first argument, I respectfully disagree that use of the trade-mark by the registrant pursuant to Section 4(1) has not been shown during the relevant period. I acknowledge the fact that of the six invoices submitted, only two are dated within the two-year period preceding issuance of the notice. However, these two invoices do show some sales of tennis rackets which Mr. Holliday stated bore the trade-mark during the relevant period. Furthermore, Mr. Holliday has stated that the letters "MP" on the invoices indicated a tennis racket bearing the trade-mark MID PLUS. Consequently, this satisfies me that the tennis rackets would have borne the trade-mark. In Philip Morris Inc. v. Imperial Tobacco Ltd. (1987), 13 C.P.R. (3d) 289 (F.C.T.D.), it was held that evidence of even a single sale is sufficient to establish use of the trade-mark in the normal course of trade provided the evidence was not manufactured for the sole and deliberate purpose of protecting the trade-mark registration. Further, it has also been established that evidentiary overkill is not required when use can be shown in a simple, straightforward

fashion (Union Electric Supply Co. v. Registrar of Trade-Marks (1982), 63 C.P.R. (2d) 56 (F.C.T.D.)). There is nothing in this case to indicate that the sales were manufactured for the sole purpose of replying to the Section 45 notice. Mr. Holliday has submitted that the registrant manufactures the wares, and that the subsidiary distributes the wares to sporting goods outlets who sell them to the public. Consequently, the sale by the subsidiary to "Olympic Ski Shop" on April 7, 1994 would appear to be evidence of a sale made in the registrant's normal course of trade. As stated in Institut National des Appellations d'Origine des Vins et Eaux-de-Vie v. Registrar of Trade Marks et al., 71 C.P.R.(2d) 1, it is not the function of the Court (here the Registrar) to find and set standards of the normal course of trade. Consequently, if there is apparently genuine evidence as to the normal course of trade, the limited nature of Section 45 proceedings does not allow the Registrar to question that evidence on the basis of its own view, unsupported by evidence, as to what constitutes the normal course of trade (see Philip Morris Inc. v. Imperial Tobacco Ltd. (No.2), 17 C.P.R.(3d) 237 at 239. Therefore, I am satisfied that the evidence shows use pursuant to Section 4(1) of the trade-mark in association with "tennis rackets" during the relevant period.

I am not satisfied however that the use of the trade-mark has been shown in association with the other wares namely "squash rackets and golf clubs". None of the evidence submitted demonstrates use of the mark on these wares. Consequently, I conclude that the evidence does not show use of the trade-mark in association with the wares "squash rackets and golf clubs" and these wares shall be deleted from the registration. In this regard, I rely on the authority of John Labatt (supra).

In accordance with the provisions of Section 45(5) of the

Trade-Marks Act, Registration No. 334,998 will be amended to read:

"Tennis rackets".

DATED AT HULL, QUEBEC, THIS 30th DAY OF November, 1995.

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D. Savard  
Senior Hearing Officer