SECTION 45 PROCEEDINGS
TRADE-MARK: VANTAGE
REGISTRATION NO: TMA 369,091

At the request of Gowling Lafleur Henderson LLP (the "requesting party") the Registrar forwarded a notice under section 45 of the *Trade-marks Act* on August 30, 2004 to the Guardian Capital Group Limited, the registered owner of the above-referenced trade-mark.

The trade-mark VANTAGE is registered in association with:

Financial services, namely, distribution of mutual funds.

Section 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13, 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. In this case, the relevant period for showing use is any time between August 30, 2001 and August 30, 2004. What qualifies as use of the trade-mark in association with services is defined in s. 4(2) of the Act, which states:

> 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.

In response to the Registrar's notice, the registrant furnished the affidavit of C. Verner Christensen, the Vice-President, Finance and Secretary of Guardian Capital Group Limited. Both parties filed written arguments. An oral hearing was not conducted.

In paragraph 4 of the affidavit, C. Verner Christensen states that the Registrant has used the trade-mark VANTAGE in Canada in association with the services set forth in the registration: financial services, namely, distribution of mutual funds. C. Verner Christensen further describes a brief history of fundraising activities directed at raising funds for the distribution of mutual fund units of the **Guardian Vantage** Funds. The

Guardian Vantage Funds are stated as consisting of five mutual funds which were formed on November 30, 1988. Exhibit "A" is a copy of the front cover of the Partnership Offering Memorandum – the Private Placement Offering Memorandum used to raise funds to finance the distribution of mutual fund units of the **Guardian Vantage** Funds**.** This memorandum is dated January 9, 1989.

In paragraph 5 of the affidavit, C. Verner Christensen refers to Exhibit "B" as true copies of a couple of pages of Annual Information Forms of the Registrant which he states make reference to the trade-mark VANTAGE. Christensen states that such forms are filed with the securities regulatory authorities in all provinces of Canada, and are available to any person in Canada. The Annual Information Forms are dated September 24, 2001 and August 28, 2002. Underlined on such forms are the words **Guardian Vantage** Equity Fund, following the terms Nov. 30, 1988 – formed by Declaration of Trust.

The requesting party argues that the Registrant makes a bald assertion that it has used the trade-mark in association with the services but does not state that this use took place within the relevant period. Further, the requesting party adds that the Registrant has not produced any evidence that the trade-mark was used during the relevant period within the manner required by s. 4(2) of the Act.

It submits that the Partnership Offering Memorandum (Exhibit "A") and the Annual Information Forms (Exhibit "B") cannot be characterized as advertisements, but that even if they could be considered as advertisements, the Registrant has failed to file any evidence to establish performance of the services during the relevant period. Further, it states that the Partnership Offering Memorandum and the Annual Information Forms are not use of the trade-mark in the normal course of business. It adds that in any event, regardless of how the evidence is characterized, it clearly shows that the trade-mark has not been used since 1991. In this regard, it points out that it is clear from Exhibit "B" of the affidavit that the name of the Registrant's mutual fund was changed in 1991. Lastly, the requesting party argues that the Registrant has not filed any evidence of "special circumstances" to excuse the non-use of the mark during the relevant period.

The threshold for establishing use in a s. 45 proceeding 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 in order to properly reply to a s. 45 notice**.** Although invoices are not required (*Lewis Thomson & Sons Ltd. v. Rogers, Bereskin & Parr* (1988), 21 C.P.R. (3d) 483), sufficient facts must be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with the registered services during the relevant period. A bare statement of use is not sufficient [See *Plough (Canada) Ltd. v. Aerosol Fillers Inc.* (1980), 53 C.P.R. (4^{th}) 62].

Having considered the evidence, I agree with the requesting party that the evidence completely fails to show use of the trade-mark VANTAGE in association with the services during the relevant period in a manner complying with the requirements of s. 4(2) of the Act.

The memorandum of Exhibit "A" provides evidence of fundraising activities and Mr. Christensen has explained that the funds raised were used to finance the distribution of mutual fund units of the **Guardian Vantage** Equity Funds - five funds that were formed in November 1988 (I must say here that I doubt whether GUARDIAN VANTAGE would be perceived as use of the trade-mark VANTAGE. However, I need not elaborate further on this issue in view of the conclusion I have arrived at in this case). I note that the "offering period" described in the memorandum ended on February 2, 1989, which is more than twelve years prior to the relevant period. Consequently, this document is not evidence of advertising or distribution of mutual funds associated with the trade-mark VANTAGE during the relevant period.

As for Exhibit "B", the Annual Information Forms which are filed annually with the securities regulatory authorities in all provinces of Canada, they refer to the **Guardian Vantage** Equity Fund as the original name of the fund and they list amendments made including changes made to the name of the funds from 1991 to 2002. Mr. Christensen has not explained and I do not see how the filing of these Annual Information Forms can be

considered as showing use of the trade-mark in the advertising or performance of the services.

In addition, the reference on Exhibit B to GUARDIAN VANTAGE is as a "historical mark" rather than as an active trade-mark (in this regard I rely on the registrant's written argument). In fact, the registrant has conceded in its written argument that the name **Guardian Vantage** Equity Fund was changed in 1991 to **Guardian Growth Equity Fund**, which changed yet again in 2000 to **GGOF Guardian Canadian Equity Fund**, and which then was finally amended in 2002 to **GGOF Canadian Equity Fund** (i.e. the current name of the fund). Consequently, from the above it seems clear that GUARDIAN VANTAGE or the word VANTAGE is no longer being used as a trade-mark in association with the services and has not been so used since 1991. The fact that it forms part of the "history" of the fund is not considered a use in association with the services in a manner complying with the requirements of the Act.

As I have concluded that the evidence fails to show that the trade-mark VANTAGE was being used in association with the services during the relevant period in the manner required by the Act, and as I find that there are no special circumstances that excuse such absence of use, I conclude that the trade-mark registration ought to be expunged.

Registration No. 369,091 will be expunged in compliance with the provisions of Section 45(5) of the Act.

DATED AT GATINEAU, QUEBEC THIS 19TH DAY OF DECEMBER 2007.

D. Savard
Senior Hearing Officer
Section 45 Division