



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

**Citation: 2010 TMOB 58**  
**Date of Decision: 2010-04-27**

SECTION 45 PROCEEDINGS  
TRADE-MARK: RUMOURS  
REGISTRATION NO.: TMA530,905

[1] At the request of Jeanne Lanvin (une société anonyme) (the “requesting party”), the Registrar forwarded a notice under section 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the “Act”) on April 25, 2007 to Lander Co. Canada Limited, the registered owner of the above-referenced trade-mark. Following the issuance of the notice, the Canadian Intellectual Property Office recorded a change of name effective June 11, 2007 from Lander Co. Canada Limited (“Lander”) to Ascendia Brands (Canada) Ltd. (the “registrant”) on October 25, 2007.

[2] The trade-mark RUMOURS (the “Mark”) is registered for use in association with the following wares:

Hair care products namely, shampoos, conditioners, combination shampoos and conditioners, cream rinses, wave solutions, hair sheens, neutralizer shampoos, setting lotions, anti-dandruff shampoos, hair setting gels, hair setting creams, hair setting sprays, hair lotions and permanent wave solutions; cosmetics, toiletries and personal care products namely, skin lotions, soaps, eau de toilette, eau de cologne, cologne, perfume, bath powder, bubble bath, milk bath cream, after bath oil, dusting powders, talcum powders, bath foams, bath gels, bath beads, bath fragrances, body sprays, essential oils, sun tan lotions, sun tan creams, sun screens, skin creams, skin lotions, skin cleansers, astringents, moisturizers, body shampoos, baby oils, baby powder, baby lotions, baby soap, toilet water, bath salts, face powder, vanishing cream, massage cream, muscle oil cream, pore cleansers and creams, bleach creams, eye lash creams, depilatory cream, black head

remover, hair tonic, liquid hairdressing, cuticle softener, cuticle cream, cleansing products for female and male intimate hygiene namely, soaps and deodorants, antiperspirants, lipstick, eye shadow, eye pencils, foundations, mascara, blushes, eyeliner, aftershave lotions, aftershave colognes, aftershave moisturizer, shaving cream, aftershave balm, deodorant sticks, moisture balm, skin creams, beauty masks, body lotion, liquid and cream make-up, toner, nail enamel, nail enamel remover, make-up remover, medicated and non-medicated hair straighteners, petroleum jelly, toothpaste, tooth powders, tooth brushes, dentifrice, mouthwashes, dental floss, dental and denture cleaners and adhesives for dentures.

[3] Section 45 of the Act requires the registered owner to show whether the trade-mark has been used in Canada in association with each of the wares or 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 is any time between April 25, 2004 and April 25, 2007 (the “relevant period”).

[4] “Use” in association with wares is set out in sections 4(1) and 4(3) of the Act:

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.

[...]

(3) A trade-mark that is marked in Canada on wares or on the packages in which they are contained is, when the wares are exported from Canada, deemed to be used in Canada in association with those wares.

In this case, section 4(1) applies.

[5] In response to the Registrar’s notice, the registrant furnished the affidavit of Cindy Pierre, sworn on October 5, 2007 together with Exhibits “A” through “D” (the “Pierre

Affidavit”), as well as a supplemental affidavit of Ms. Pierre sworn on November 1, 2007 together with Exhibit “A” (the “Supplemental Pierre Affidavit”). Ms. Pierre states that she has been working at Lander since 1991 and that she held the position of marketing coordinator at the registrant since June 2007. Both parties filed written submissions; no oral hearing was held.

[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 C.P.R. (2d) 62 (F.C.A.)]. Although the threshold for establishing use in section 45 proceedings 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, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with the wares or services specified in the registration during the relevant period.

[7] At the outset of the Pierre Affidavit, the affiant explains that following Lander’s amalgamation with the registrant on or about June 11, 2007, the registrant proceeded with a change of name on a number of trade-mark registrations held by Lander at that time, including the subject registration. In support, a copy of the corporation profile report obtained from the Ontario Ministry of Consumer and Business Services documenting the amalgamation and a copy of the letter addressed to the Canadian Intellectual Property Office requesting the record of the new owner’s name are attached as Exhibits “A” and “B”.

[8] In terms of the manner in which the trade-mark is associated with the registered wares, photographs of representative samples of personal care products with close-ups of bilingual labels applied to the front and back of these products are produced as Exhibit “C” of the Pierre Affidavit. I note that the Mark appears prominently on the front labels of the items shown. The following products can be observed in the photographs: “foam bath”, “3 in 1 bubble bath/shower gel/shampoo”, “body wash” and “skin cream”. Ms.

Pierre adds that all of the products manufactured, distributed and sold by Lander “were labelled in the same manner as illustrated [...] in Exhibit C”.

[9] The requesting party submitted that the registrant failed to indicate whether these photographs are representative of the wares sold *during the relevant period*. Bearing in mind the affiant’s statements regarding Lander’s sale of numerous RUMOURS products in Canada since 2000 and of six specific ones during the relevant period (paragraphs 8 and 11 of the Pierre Affidavit), nothing in the evidence suggests that Ms. Pierre’s statement that “all of the RUMOURS products manufactured, distributed and sold by Lander were labelled in the same manner as illustrated on the representative labels of the products found in Exhibit C” would exclude those sold during the relevant period. Having considered the photographs with the affiant’s statements, I am satisfied that the Mark was associated with the personal care products sold by Lander in the manner shown in Exhibit “C” during the relevant period.

[10] With respect to sales in the normal course of trade in Canada, Ms. Pierre explains that over the last decade, “Lander carried on the business of manufacturing, distributing and selling a wide range of personal care products to retailers who, in turn, sold these products to the consuming public”. In addition, as discussed earlier, the affiant attests that since 2000, “Lander continuously manufactured, packaged, distributed and sold the RUMOURS line of personal care products in Canada”. In terms of the types of personal care products sold during the relevant period, Ms. Pierre provides that:

During the three-year period prior to April 25, 2007, Lander distributed and sold the following RUMOURS products:

Hair care products namely, shampoos; toiletries and personal care products namely, bubble bath, bath foams, bath gels, skin creams, body shampoos.

(Paragraph 11 of the Pierre Affidavit)

[11] In support, approximate sales figures from March 31, 2006 to March 31, 2007 for each of the six wares mentioned above are shown in Table 1 of the Pierre Affidavit. Moreover, a copy of the registrant’s “SKU RATIONALIZATION report” dated August

28, 2007 showing “sales of the RUMOURS products to Wal-Mart Canada for the fiscal year 2007” is produced as Exhibit “A” of the Supplemental Pierre Affidavit. Even though most of the items in the report are identified by acronyms (with the exception of the entry “RUMOURS SPA BODY WASH”), based on the photographs discussed earlier and Ms. Pierre’s statement with respect to the types of products sold during the relevant period, I conclude that the items described as “RUMOURS 3IN1” represent “3 in 1 bubble bath/shower gel/shampoo” and that those described as “RUMOUS F/B” represent “foam bath”.

[12] The requesting party raised several questions regarding the registrant’s evidence in this regard. First, it submitted that the affiant failed to clarify whether these sales occurred in Canada. Although such statements would have been helpful, when the evidence is viewed as a whole, I find it reasonable to infer that a Canadian manufacturer who has been selling a wide range of personal care products bearing bilingual labels to retailers in Canada for the last decade, including to Wal-Mart Canada during the relevant period, sold the six specific products listed by the affiant *in Canada*.

[13] Second, the requesting party argued that the “SKU RATIONALIZATION report” should be disregarded because it was generated after the relevant period and that the mere mention of Wal-Mart Canada in the report does not evidence sales. As explained by Ms. Pierre, the report simply provides the sales figures of several RUMOURS products to Wal-Mart Canada during the 2007 fiscal year. It does not purport to be an invoice issued during the relevant period. Although the requesting party suggested that the registrant should have provided several representative invoices, it is well established that there is no one particular type of evidence required to show use of a trade-mark and that invoices are generally not necessary to establish sales in these proceedings [*Lewis Thomson & Sons Ltd. v. Rogers, Bereskin & Parr* (1988), 21 C.P.R. (3d) 483 (F.C.T.D.)].

[14] Third, the requesting party was of the opinion that the sale of a product described as “RUMOURS three-in-one bubble bath, shower gel and shampoo” cannot serve as evidence of use of the Mark in association with three distinct wares. The registrant in

turn submitted that the question of “whether the wording of the registration accurately expresses or defines the registrant’s rights” is not an issue to be determined in these proceedings, citing *Ridout & Maybee s.r.l. v. Omega SA* (2005), 4 C.P.R. (4<sup>th</sup>) 18 (F.C.A.) and *Renaud Cointreau & Cie. v. Cordon Bleu International Ltd.* (2002), 18 C.P.R. (4<sup>th</sup>) 415 (F.C.A.). I note that the bottles seen in the photographs attached as Exhibit “C” are labelled as “3 in 1 Bubble Bath/Shower Gel/Shampoo”; since this particular item was sold to the retailers and to the consuming public as three separate products in one bottle, I am satisfied that the evidence is consistent with showing use of the trade-mark in association with “bubble bath”, “shower gel” and “shampoo” in this instance.

[15] Accordingly, bearing in mind the principle that “one is not to be astutely meticulous when dealing with language used in a statement of wares” [*Levi Strauss & Co. v. Canada (Registrar of Trade-marks)* (2006), 51 C.P.R. (4<sup>th</sup>) 434 (F.C.T.D.)] and in view of Ms. Pierre’s statement of sales during the relevant period, I am prepared to accept the products shown in Exhibit “C” of the Pierre Affidavit identified as “foam bath”, “3 in 1 bubble bath/shower gel/shampoo”, “body wash” and “skin cream” as consistent with showing use of the trade-mark in association with the registered wares “bath foams”, “bubble bath”, “body shampoos”, “shampoo”, “bath gels” and “skin creams”.

[16] In terms of the remaining registered wares for which no evidence has been provided, citing *Saks & Co. v. Registrar of Trade Marks et al.* (1989), 24 C.P.R. (3d) 49 (F.C.T.D.), the registrant appears to be submitting that since the evidence has demonstrated use of the Mark in association with “many of the wares” within “the broad categories” of hair products, cosmetics, toiletries and personal care products, the registration should be maintained for all of the registered wares. I respectfully disagree. The *Saks* case discussed the unreasonable burden of requiring *direct evidence or documentary proof* for each and every ware of the twenty-eight distinct categories. In the present case, not only is there no direct evidence or documentary proof of use beyond the six wares mentioned earlier, there is also no statement attesting to the use of the Mark in

association with each of the registered wares. In fact, Ms. Pierre specifically states that only six products were sold during the relevant period; the evidence is completely silent with respect to the remaining ninety or so registered wares. Under these circumstances, there is simply insufficient factual basis on which such use can be inferred for all the wares specified in the registration. Consequently, since no evidence of use has been provided for the remaining wares, nor have special circumstances been advanced to excuse non-use, these wares ought to be deleted from the registration.

[17] In view of the foregoing, I am satisfied that there was use of the Mark within the meaning of sections 45 and 4(1) of the Act in association with the wares “hair care products namely, shampoos”, and “cosmetics, toiletries and personal care products namely, bubble bath, bath foams, bath gels, skin creams, body shampoos”. Accordingly, and pursuant to the authority delegated to me under section 63(3) of the Act, registration TMA530,905 for the trade-mark RUMOURS will be amended to delete:

[...], conditioners, combination shampoos and conditioners, cream rinses, wave solutions, hair sheens, neutralizer shampoos, setting lotions, anti-dandruff shampoos, hair setting gels, hair setting creams, hair setting sprays, hair lotions and permanent wave solutions; [...], skin lotions, soaps, eau de toilette, eau de cologne, cologne, perfume, bath powder, [...], milk bath cream, after bath oil, dusting powders, talcum powders, [...], bath beads, bath fragrances, body sprays, essential oils, sun tan lotions, sun tan creams, sun screens, [...], skin lotions, skin cleansers, astringents, moisturizers, [...], baby oils, baby powder, baby lotions, baby soap, toilet water, bath salts, face powder, vanishing cream, massage cream, muscle oil cream, pore cleansers and creams, bleach creams, eye lash creams, depilatory cream, black head remover, hair tonic, liquid hairdressing, cuticle softener, cuticle cream, cleansing products for female and male intimate hygiene namely, soaps and deodorants, antiperspirants, lipstick, eye shadow, eye pencils, foundations, mascara, blushes, eyeliner, aftershave lotions, aftershave colognes, aftershave moisturizer, shaving cream, aftershave balm, deodorant sticks, moisture balm, skin creams, beauty masks, body lotion, liquid and cream make-up, toner, nail enamel, nail enamel remover, make-up remover, medicated and non-medicated hair straighteners, petroleum jelly, toothpaste, tooth powders, tooth brushes, dentifrice, mouthwashes, dental floss, dental and denture cleaners and adhesives for dentures.

in compliance with the provisions of section 45 of the *Trade-marks Act*, R.S.C. 1985, c.  
T-13.

DATED AT MONTREAL, QUEBEC THIS 27<sup>TH</sup> DAY OF APRIL 2010.

P. Fung  
Hearing Officer  
Trade-marks Opposition Board