



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

**Citation: 2010 TMOB 219**  
**Date of Decision: 2010-12-09**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Osler, Hoskin & Harcourt LLP against  
registration No. TMA538,289 for the trade-mark PURE  
GOLD ENERGEX in the name of Viterra Inc.**

[1] At the request of Osler, Hoskin & Harcourt LLP (the Requesting Party), the Registrar of Trade-marks issued a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on July 21, 2008 to Viterra Inc. (the Registrant), the registered owner of registration No. TMA538,289 for the trade-mark PURE GOLD ENERGEX (the Mark). The Mark is registered for use in association with “horse feed” (the Wares).

[2] 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 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 between July 21, 2005 and July 21, 2008 (the Relevant Period).

[3] “Use” in association with wares is set out in s. 4(1) 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.

[4] It is well established that the purpose and scope of s. 45 of the Act is to provide a simple, summary and expeditious procedure for removing “deadwood” from the register and as such, the evidentiary threshold that the registered owner must meet is quite low (*Performance Apparel Corp. v. Uvex Toko Canada Ltd.* (2004), 31 C.P.R. (4th) 270 (F.C.)).

[5] In response to the Registrar’s notice, the Registrant filed the affidavit of David Dyble, Nutritionist for the Unifeed Chilliwack offices of Unifeed, a division of the Registrant, sworn on January 12, 2009, together with Exhibits A through E. Only the Registrant filed written representations; an oral hearing was not requested.

[6] Mr. Dyble states in his affidavit that the Registrant sells a variety of agricultural products including horse feed via a distribution chain in Canada. Mr. Dyble identifies various types of horse feed sold by the Registrant and its predecessors-in-title, and attaches photographs of sample packaging at Exhibit A. I note that the packaging prominently displays the Mark near the top of the packaging. As proof of sales of the Wares in Canada, Mr. Dyble attaches as Exhibit C representative invoices to various companies in Canada, all of which are dated within the Relevant Period. I note that the invoices include listings of product items identified in the affidavit as horse feed products bearing the Mark as shown in Exhibit A. Although Mr. Dyble states that the sample packaging at Exhibit A is representative of the packaging “sold in Canada by or on behalf of Viterra Inc., its licensees and/or its predecessor companies/predecessors-in-title” throughout the Relevant Period, the invoices at Exhibit C all appear to identify the seller as: Unifeed. In the affidavit, Mr. Dyble identifies Unifeed as both a “division” of the Registrant and as a licensee of the Mark. Although these statements are not necessarily contradictory, there does appear to be some ambiguity in the affidavit as to whether Unifeed was a division of the Registrant (and/or its predecessors-in-title) or a separate legal entity during the Relevant Period. Nonetheless, Mr. Dyble clearly states in his affidavit that during the Relevant Period, the Registrant and/or its predecessors-in-title maintained control over the Mark and the character and quality of the Wares. As such, regardless of whether Unifeed was a division or a licensee during the Relevant Period, the conclusion is the same. The requisite statement regarding control being present in the affidavit to satisfy the requirements of s. 50 of the Act, I conclude that the demonstrated use accrues to the benefit of the Registrant (*Gowling, Strathy & Henderson v. Samsonite Corp.* (1996) 66 C.P.R. (3d) 560 (T.M.O.B.)).

[7] I am satisfied that the Registrant has evidenced use of the Mark in association with the Wares within the meaning of s. 45 and s. 4(1) of the Act during the Relevant Period.

[8] Accordingly, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be maintained in compliance with the provisions of s. 45 of the Act.

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Darlene Carreau  
Chairperson  
Trade-marks Opposition Board  
Canadian Intellectual Property Office