



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

**Citation: 2013 TMOB 148**  
**Date of Decision: 2013-09-04**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Western Financial Group Inc. against  
registration No. TMA628,309 for the trade-mark  
FOUNDATIONAL LIFE in the name of Royal Bank of  
Canada – Banque Royale du Canada**

[1] At the request of Western Financial Group Inc. (the Requesting Party), the Registrar of Trade-marks forwarded a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on September 30, 2011 to Royal Bank of Canada – Banque Royale du Canada (the Registrant), the registered owner of registration No. TMA628,309 for the trade-mark FOUNDATIONAL LIFE.

[2] The Mark is registered for use in association with the services “insurance and financial services namely a life insurance product comprised of flexible investment options”.

[3] 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 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 between September 30, 2008 and September 30, 2011.

[4] “Use” in association with services is set out in section 4(2) of the Act:

4(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.

[5] 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 section 45 proceedings is quite low [*Woods Canada Ltd v Lang Michener* (1996), 71 CPR (3d) 477 (FCTD)], 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 services specified in the registration during the relevant period.

#### The Registrant's Evidence

[6] In response to the section 45 notice, the Registrant filed the statutory declaration of Catherine Preston, Vice President, Life & Health of RBC Life Insurance Company, sworn on December 12, 2011. Both parties filed written representations; only the Requesting Party participated in an oral hearing.

[7] In her declaration, Ms. Preston states that RBC Life Insurance Company is a subsidiary of the Registrant and has been licensed by the Registrant to use the Mark. She attests that, during the relevant period, RBC Life Insurance Company used the Mark in association with the registered services in Canada.

[8] In support, Ms. Preston attaches to her declaration, as three separate exhibits, blank forms which she attests were "used in the normal course of business by RBC Life Insurance Company and policyholders during the Relevant Period." Exhibit C is a form entitled "Foundational Life™ Investment Change Instructions" and is dated November 2008. Exhibit D is a form entitled "Application for Partial Surrender Foundational Life™" and is also dated November 2008. Exhibit E is a form entitled "Absolute Assignment (Transfer of Ownership)" and is dated December 2010. I note that the Mark appears on each of these forms. I also note that the aforementioned dates appear in the header of each form, from which it can be inferred that the forms were last amended within the relevant period.

[9] The Requesting Party argues that these forms do not constitute use of the Mark in association with the services as registered. In particular, it notes that the Registrant did not sell any new insurance policies under the Mark during the relevant period and further argues that “maintenance and amendment services in relation to previous existing policies do not constitute use of the trade-mark in association with the registered insurance and financial services.” However, it has previously been held that the maintenance of previously-sold insurance policies falls within the broad definition of the term “life insurance services” [see *Desjardins Sécurité Financière v Sun Life Assurance Company of Canada* (2006), 50 CPR (4th) 154 (TMOB)]. As it is apparent from the titles of these forms that their purpose is to manage and/or maintain active insurance policies, such services are encompassed by the services as registered.

[10] Nevertheless, the Requesting Party further submits that, in part because the exhibited forms are blank, the Registrant has provided no direct evidence that such forms were distributed to or even seen by active policyholders or other customers. It submits that the evidence indicates, at best, that the Registrant’s licensee had an inventory of blank forms bearing the Mark.

[11] I agree with the Requesting Party that the declaration contains insufficient assertions of facts to permit me to conclude that the forms constituted use of the Mark during the relevant period within the meaning of section 4(2) of the Act. For example, it would have been a simple matter for the Registrant to provide a clear indication of how and when any policyholder used one of these forms during the relevant period. Curiously, the declaration is silent in this respect. This lack of precision does not allow me to conclude that the forms were in fact used by policyholders (thus constituting performance of the services) or that the forms were at a minimum distributed or otherwise made available to customers (thus constituting advertising of the services) during the relevant period.

[12] In view of the foregoing, I am not satisfied that the Registrant has demonstrated use of the Mark in association with the services as registered within the meaning of sections 4 and 45 of the Act, and there is no evidence before me of special circumstances excusing the absence of use.

#### Disposition

[13] Accordingly, and pursuant to the authority delegated to me under section 63(3) of the Act, the registration will be expunged in compliance with the provisions of section 45 of the Act.

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