

**SECTION 45 PROCEEDINGS
TRADE-MARK: FLIGHT-LINE LEATHER STORE
REGISTRATION NO.: TMA 376,432**

On November 16, 1998, at the request of Kirby Eades Gale Baker, the Registrar forwarded a Section 45 notice to Hide Market (Acton) Limited, the registered owner of the above-referenced trade-mark registration.

The trade-mark FLIGHT-LINE LEATHER STORE is registered for use in association with operation of a business for the retail sale of clothing.

In response to the Registrar's notice, an affidavit of John Brison has been furnished. Only the requesting party filed a written argument. An oral hearing was not requested.

Mr. Brison, the Chief Financial Officer of the registrant, attests that the registrant operated a retail clothing store known as Flight-line Leather Store until 1993. At that time, due to a restructuring, all of the registrant's stores were consolidated into one building and a portion of that building is "well known in the community as the Flight-line Leather Store". He also states that "Aviator Style Garments and Accessories" sold in that portion of the building "are packaged in boxes and bags bearing the trade mark name and logo".

Section 45 of the *Trade-marks Act* requires the registered owner to furnish an affidavit or a statutory declaration showing, with respect to each of the wares or services specified in the registration, whether the trade-mark was in use in Canada at any time during the three year period immediately preceding the date of the notice and, if not, the date when it was last so in use and the reason for the absence of use since that date. The relevant three year period in this case is between November 16, 1995 and November 16, 1998. Although "evidentiary overkill" is not required, the affidavit must contain sufficient facts or there must be sufficient evidence to lead to the inference that the trade-mark has been used during the relevant period in association with each of the wares or services.

Subsection 4(2) of the *Act* 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.”

The registrant has failed to show how the trade-mark is used or displayed in the performance or advertising of its operation of a business for the retail sale of clothing. It should have been a simple matter for it to provide as exhibits photographs showing how the “trade-mark is clearly displayed in the building” (as alleged in paragraph 5 of Mr. Brison’s affidavit) or bags and boxes representative of the ones that allegedly bear the trade-mark. Although the onus on a registrant in Section 45 proceedings is a light one, this registrant has not satisfied it.

I am unable to tell from the evidence whether the exact mark FLIGHT-LINE LEATHER STORE has been used, whether FLIGHT-LINE LEATHER STORE has been used as a trade-mark, or whether any companies other than the registrant are associated with the mark. In addition, as the majority of Mr. Brison’s affidavit is drafted in the present tense, it is unclear if the “use” referred to occurred between November 16, 1995 and November 16, 1998. The affiant states that the registrant has operated its store continually since 1993 but he has not stated that the practices of using packaging bearing the trade-mark and displaying the trade-mark have been done continually. It is well established that ambiguities in Section 45 evidence must be interpreted against the registrant (*Aerosol Fillers Inc. v. Plough (Canada) Ltd.*, 45 C.P.R. (2d) 194 at 198).

I would also add that the restructuring of the registrant would not qualify as “special circumstances” excusing non-use during the relevant period.

For the foregoing reasons, I conclude that the registration ought to be expunged.

Pursuant to the authority delegated to me under Subsection 63(3) of the *Act*, registration No. TMA 376,432 will be expunged in compliance with the provisions of Subsection 45(5) of the *Trade-marks Act*.

DATED AT TORONTO, ONTARIO THIS 10th DAY OF OCTOBER, 2000.

**Jill W. Bradbury
Hearing Officer**