



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

**Citation: 2011 TMOB 108**  
**Date of Decision: 2011-06-10**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Trade Mark Reflections Ltd. against  
registration No. TMA 370, 590 for the trade-mark  
TRANQUILITY in the name of The Governor and  
Company of Adventurers of England trading into  
Hudson's Bay, commonly called Hudson's Bay Company**

[1] On August 27, 2008, at the request of Trade Mark Reflections Ltd. (the Requesting Party), the Registrar issued the notice prescribed by s. 45 of the *Trade-marks Act*, R.S.C. 1985, c. T-13 (the Act) to The Governor and Company of Adventurers of England trading into Hudson's Bay, commonly called Hudson's Bay Company (Hbc), the registered owner of registration No. TMA 370,590 for the trade-mark TRANQUILITY (the Mark). The Mark is registered in association with "mattresses and box springs" (the Wares).

[2] Section 45 requires the registered owner of a trade-mark to show whether the mark has been used in Canada in association with each of the wares and services listed in the registration at any time during the three years preceding the date of the notice, in this case between August 27, 2005 and August 27, 2008 (the Relevant Period). If the mark has not been used during that time

period then the registered owner is required to indicate the date on which it was last used and the reason why it has not been used since that date.

[3] What constitutes the “use” of a trade-mark is set out in s. 4 of the Act, which provides:

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] Section 45 establishes an expeditious method of removing from the register “dead wood,” or marks that have fallen into disuse. The onus in a s. 45 proceeding rests upon the registered owner [*88766 Inc v. George Weston Ltd* (1987), 15 C.P.R. (3d) 260 at 266]. In response to the s. 45 notice, the registered owner filed the affidavit of David Hunt (the Hunt Affidavit), who identifies himself as a buyer of mattresses, bedroom, and dining room furniture for Hbc. The evidence demonstrates that Hbc sold approximately 1305 units of TRANQUILITY mattresses and box springs to Canadian consumers through Hbc’s “The Bay” department stores. Attached to the Affidavit as Exhibit A are copies of Hbc’s sales reports by brand for 2005-2007 demonstrating sales of TRANQUILITY. Certain of these sales reports identify TRANQUILITY as “the brand” and Sealy Canada Ltd. as “the vendor”. Attached as Exhibit B are representative invoices for TRANQUILITY Wares. However, the invoices are marked with a SEALY trade-mark, “SEALY Canada Ltd., Ltee” at the top of each of the invoices and “Thank you for buying Sealy Product” at the bottom of each invoice. Accordingly, the invoices clearly demonstrate sales of TRANQUILITY mattresses and box springs by Sealy Canada Ltd., Ltee. to “The Bay” as purchaser.

[5] Exhibit C consists of representative advertisements from October 2005 and February 2006 of Hbc flyers advertising TRANQUILITY Wares. The advertisements demonstrate the

manner in which the Mark is applied to the Wares and I note that some of the mattresses advertised for sale are marked with both a SEALY trade-mark and the TRANQUILITY mark.

[6] I am satisfied that there was use of the Mark in Canada during the Relevant Period. The issue in this case is whether there was use of the TRANQUILITY mark in Canada by the registered owner or use that accrues to the registered owner. The evidence clearly demonstrates that “The Bay” purchased TRANQUILITY Wares from SEALY Canada Ltd., Ltee during the Relevant Period and that Hbc subsequently sold SEALY Canada Ltd., Ltee’s TRANQUILITY Wares through Hbc’s The Bay department stores during the Relevant Period. The fact that SEALY Canada Ltd., Ltee’s TRANQUILITY mattresses and box springs were sold through Hbc department stores does not evidence use of the TRANQUILITY Mark by Hbc in Canada in association with the Wares within the meaning of s. 4(1) of the Act. Instead the evidence shows use of the Mark by Sealy Canada Ltd., Ltee, with Hbc acting merely as a distributor or retailer of the TRANQUILITY Wares.

***Disposition***

[7] For the foregoing reasons, pursuant to my delegation under s. 63(3) of the Act, I conclude that the registration ought to be expunged in accordance with the provisions of s. 45(5) of the Act.

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

