



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

**Citation: 2011 TMOB 13**  
**Date of Decision: 2011-01-27**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Invicta Spa against registration  
No. TMA131,117 for the trade-mark INVICTA in the  
name of GLAZERS INC.**

[1] At the request of Invicta Spa (the Requesting Party), the Registrar of Trade-marks forwarded a notice under s. 45 of the *Trade-marks Act* R.S.C. 1985, c. T-13 (the Act) on March 10, 2009 to GLAZERS INC. (the Registrant), the registered owner of the above-referenced trade-mark (the Mark).

[2] The Mark is registered for use in association with the following wares:

Cigarette lighters, ash trays, wallets and coin purses, photo albums, key chains, rainbonnets and raincoats, rubber bands, knives, nail clippers.

[3] An application to extend the statement of wares is currently pending and is not relevant to the subject proceeding.

[4] 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 and 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 March 10, 2006 and March 10, 2009 (the Relevant Period).

[5] “Use” in association with wares is set out in s. 4 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.

[6] 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. As stated by Mr. Justice Russell in *Uvex Toko Canada Ltd. v. Performance Apparel Corp.* (2004), 31 C.P.R. (4th) 270 (F.C.) at 282:

[...] We know that the purpose of s. 45 proceedings is to clean up the "dead wood" on the register. We know that the mere assertion by the owner that the trade mark is in use is not sufficient and that the owner must "show" how, when and where it is being used. We need sufficient evidence to be able to form an opinion under s. 45 and apply that provision. At the same time, we need to maintain a sense of proportion and avoid evidentiary overkill. We also know that the type of evidence required will vary somewhat from case to case, depending upon a range of factors such as the trade-mark owners' business and merchandising practices.

[7] In response to the Registrar’s notice, the Registrant furnished the affidavit of Charles Kotler, Vice-President of Glazers Inc., sworn June 2, 2009, together with Exhibits 1 through 15. Only the Registrant filed written submissions; an oral hearing was not requested.

[8] In his affidavit, Mr. Kotler states that during the relevant period the Registrant sold ashtrays, wallets, coin purses, key rings, rain ponchos, knives and nail clippers to its retail customers in Canada. I note that Mr. Kotler refers to key rings in his affidavit although the registration was made for key chains. I am of the view, however, that it is reasonable and self-evident that any use shown of the Mark in association with key rings would support a finding of use on key chains. Similarly Mr. Kotler refers rain ponchos in his affidavit, although the

registration was made for raincoats. Again, I find it reasonable and self-evident that any use shown of the Mark in association with rain ponchos would support a finding of use on raincoats.

[9] The affiant makes no claim of use, provides no evidence showing use, nor advances special circumstances excusing the absence of use of the Mark in association with cigarette lighters, photo albums, rainbonnets and rubber bands.

[10] Mr. Kotler provides a number of representative invoices dated within the relevant period as Exhibit 2 to his affidavit. He also provides two coloured photographs of a representative ashtray, where the Mark can be seen on a bar code sticker applied to the ashtray along with a sticker on which appears the style number 52020 (Exhibit 3). This style number appears in the invoices next to wares described as “Ashtray 7” “melamine black”, and I am therefore satisfied that they evidence sales of ash trays in the normal course of trade.

[11] Also provided are photographs of a key ring, a poncho and a knife, all in their packaging, and on which the Mark is clearly printed (Exhibits 9, 11 and 13). A style number is found on each ware that corresponds with the number appearing in the invoices next to a description of each of these wares; again the invoices are dated during the relevant period and I am satisfied that they evidence sales of key chains, raincoats and knives.

[12] Finally, Mr. Kotler provides copies of header cards that form part of the packaging for wallets, coin purses and nail clippers (Exhibits 5, 7 and 15); the Mark is clearly seen on the header cards. As with the previous wares, a style number is found on each package that corresponds to those found on the invoices; I am satisfied that they evidence sales of wallets, coin purses and nail clippers.

[13] In view of the foregoing, I am satisfied that there was use of the Mark in Canada within the meaning of s. 45 and s. 4(1) of the Act in association with ashtrays, wallets, coin purses, key chains, raincoats, knives and nail clippers. As stated previously, Mr. Kotler made no claim of use, provided no evidence showing use nor did he advance special circumstances excusing the absence of use of the subject trade-mark in association with cigarette lighters, photo albums, rainbonnets and rubber bands.

[14] Accordingly, and pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be amended to delete the following wares: “cigarette lighters”, “photo albums”, “rainbonnets” and “rubber bands” in compliance with the provisions of s. 45 of the Act.

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P. Heidi Sprung  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office