



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

**Citation: 2016 TMOB 45**  
**Date of Decision: 2016-03-23**

**IN THE MATTER OF A SECTION 45 PROCEEDING**

**Norton Rose Fulbright Canada  
LLP/S.E.N.C.R.L., S.R.L.**

**Requesting Party**

**and**

**Lehigh Hanson Materials Limited**

**Registered Owner**

**TMA671,518 HIGH-FLOW**

**Registration**

[1] At the request of Norton Rose Fulbright Canada LLP/S.E.N.C.R.L., S.R.L. (the Requesting Party), the Registrar of Trade-marks issued a notice under section 45 of the *Trade-marks Act* RSC 1985, c T-13 (the Act) on May 6, 2014 to Lehigh Hanson Materials Limited (the Owner), the registered owner of registration No. TMA671,518 for the trade-mark HIGH-FLOW (the Mark).

[2] The Mark is registered for use in association with “ready mix concrete”.

[3] The notice required the Owner to furnish evidence showing that the Mark was in use in Canada, in association with the goods specified in the registration, at any time between May 6, 2011 and May 6, 2014. If the Mark had not been so used, the Owner was required to furnish evidence providing the date when the Mark was last used and the reasons for the absence of use since that date.

[4] The relevant definition of use with respect to goods is set out in section 4(1) of the Act as follows:

4(1) A trade-mark is deemed to be used in association with goods if, at the time of the transfer of the property in or possession of the goods, in the normal course of trade, it is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred.

[5] It is well established that the purpose and scope of section 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 [*Uvex Toko Canada Ltd v Performance Apparel Corp* (2004), 31 CPR (4th) 270 (FC)].

[6] In response to the Registrar’s notice, the Owner furnished the affidavit of Randy Gifford, sworn on August 5, 2014. Neither party filed written representations; an oral hearing was not requested.

#### Owner’s Evidence

[7] In his affidavit, Mr. Gifford states that he is the Regional Manager, Technical Services & Marketing of Inland Concrete, which he attests is a division of the Owner.

[8] Mr. Gifford attests that “the Owner and/or its licensees, have used and continue to use” the Mark, in Canada, in association with ready mix concrete. He explains the HIGH-FLOW ready mix concrete is “a highly flowable, non-segregating concrete that is used for architectural applications, topping slabs and congested reinforcement.”

[9] In support, Mr. Gifford attaches the following exhibits to his affidavit:

- Exhibit A is a “marketing sheet”, which describes HIGH-FLOW concrete as “part of the ... series of mixes available from Inland Concrete”. I note that “Inland Concrete, a division of Lehigh Hanson Materials Limited” appears at the bottom of the page;
- Exhibit B consists of eight delivery tickets, which Mr. Gifford attests are for “the delivery of HIGH-FLOW ready mix concrete from 2012 to present”. Five of the delivery tickets are dated within the relevant period, issued by “Inland Concrete, a division of Lehigh Hanson Materials Limited” to Canadian customers in Alberta and British Columbia. The Mark appears in the body of all the delivery tickets dated within the relevant period as the

type of “mix”, with the exception of one instance where the trade-mark appears as “HIGHFLOW”; however, the latter also displays the Mark as registered as part of the product description. I note that the delivery tickets require the signature of the customer to confirm receipt of the concrete mix.

- Exhibit C consists of nine invoices, which Mr. Gifford attests are for “the sale of the HIGH-FLOW ready mix concrete from 2012 to present”. Five of the invoices issued by “Inland Concrete a division of Lehigh Hanson Materials Limited” are dated within the relevant period, four of which contain information that correspond with that found on the delivery tickets attached as Exhibit B. The Mark is displayed in the product description of each invoice, with the exception of one instance where the trade-mark appears as “HIGHFLOW”.

### Analysis

[10] With respect to the manner in which the Mark is shown, there is no evidence that the Mark was marked on the goods themselves or on the packages in which the goods were distributed. Instead, the evidence demonstrates that, during the relevant period, the Mark appeared in the body of the invoices and of the delivery tickets issued by Inland Concrete to its Canadian customers. In this regard, noting the aforementioned signature requirement, I accept that the delivery tickets accompanied the concrete mix at the time of delivery.

[11] As such, the purchaser would, at the time of transfer, have been provided with notice of association between the Mark and the goods [see *Riches, McKenzie & Herbert LLP v KOM Networks Inc* (2005), 51 CPR (4th) 65; *Novopharm Ltd v Novo Nordisk A/S* (2005), 41 CPR (4th) 188 (TMOB); *Bereskin & Parr v Star-Kist Foods, Inc* (2004), 37 CPR (4th) 188 (TMOB)].

[12] In any event, considering that four of the invoices and corresponding delivery tickets during the relevant period contain the same dates and addresses for billing and delivery, it would appear that the invoices also accompanied the goods even though Mr. Gifford provides no details in this regard.

[13] In view of the foregoing, I am satisfied that the Owner, through its division Inland Concrete, has demonstrated use of the Mark in association with the registered goods “ready mix concrete” during the relevant period within the meaning of sections 4 and 45 of the Act.

Disposition

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

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Pik-Ki Fung  
Member  
Trade-marks Opposition Board  
Canadian Intellectual Property Office

**TRADE-MARKS OPPOSITION BOARD  
CANADIAN INTELLECTUAL PROPERTY OFFICE  
APPEARANCES AND AGENTS OF RECORD**

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No Hearing Held

**AGENTS OF RECORD**

Bennett Jones LLP

For the Registered Owner

Norton Rose Fulbright Canada LLP/S.E.N.C.R.L., S.R.L.

For the Requesting Party