

**SECTION 45 PROCEEDINGS**  
**TRADE-MARK: A8S**  
**REGISTRATION NO.: TMA 313046**

On February 24, 2004, at the request of Goudreau Gage Dubuc (the “Requesting Party”), the Registrar forwarded a notice under the provisions of s.45 of the Trade-marks Act (the “Act”) to Bijouterie Baroque Inc (the “Registrant”) the recorded owner of the trade-mark A8S (the “Mark”), registration number TMA313046.

The Registrant was called upon to furnish an affidavit or statutory declaration showing, with respect to each of the wares or services that have been on the register for at least three years, whether the Mark has been used in Canada at any time within the last three years (February 24, 2001 to February 24, 2004, the “relevant period”), and if not, the date when it was last in use and the reason for the absence of use since that date.

The Mark is registered for rings, bracelets, ear-rings, chains, charms, necklaces, pins and brooches (the “Wares”). In response to the Registrar’s notice, the Registrant furnished the affidavit of Mr. Armen Sirinyan. Both parties filed written submissions. An oral hearing has not been requested in this proceeding.

Mr. Sirinyan is the Registrant’s president. He describes the Registrant as a manufacturer and wholesaler of jewellery. The affiant admits that the Registrant has not sold necklaces and chains during the relevant period in association with the Mark. The explanations provided for non-use, namely financial reasons, competition, needs of capital to finance the equipment necessary for the manufacture of those type of jewellery, do not constitute special circumstances within the meaning of s. 45(3) of the Act that would justify the non-use of the Mark during the relevant period. Moreover, the Registrant has not indicated when it expects to resume use or what steps it is taking towards that end. [See *Registrar of Trade-marks v. Harris Knitting Mills Ltd.* (1985), 4 C.P.R. (3d) 488] Accordingly, the registration shall be amended to delete those wares.

He filed extracts of various catalogues on which are depicted various jewellery items, including the Wares except for chains and necklaces. Each piece of jewellery illustrated on these extracts has an identification number and the Registrant’s trade-name appears on most of the pages. The Mark does not appear on any of

these extracts. Invoices to evidence the sale of jewellery by the Registrant to jewellery stores during the years 2000, 2001, 2002, 2003 and 2004 were filed. As stated in the Requesting Party's written arguments, the Mark does not appear on those invoices. However this fact is not fatal to the Registrant's registration.

The central issue concerns photographs that seem to have been taken with a zoom as per the size of the jewellery on each photograph. They represent samples of jewellery sold by the Registrant during the relevant period. The affiant alleges that the Mark is engraved on each of the Wares (I shall use such defined term hereinafter to identify bracelets, ear-rings, charms, pins and brooches), sold by the Registrant. The Requesting Party argues that the photographs are blurry such that, even with the use of a zoom, we cannot see the Mark. I disagree. It is true that some of the photographs are not that clear but on some of them we can see the entire Mark while on others we can see clearly at least two of the symbols comprising the Mark. The photographs support the affiant contention that the Mark is engraved on the Wares themselves.

The Registrant, in its written submissions, provides a lot of information on the purpose of such engraving. Those facts should have been introduced in its evidence and I shall disregard them.

The Requesting Party is arguing that such engraving does not constitute use of a trade-mark as defined in s. 4 of the Act. It claims that there exists no association in the mind of a consumer between the Mark and the Registrant as the marking is too small. The absence of such association would result in the non-use of the Mark at the time of transfer of ownership of the Wares.

Section 45 proceedings are simple and expeditious that serves the purpose of clearing the register of "deadwood" and as such the threshold test is quite low. [See *Smith Lyons v. Vertag Investments Ltd.* (2000), 7 C.P.R. (4<sup>th</sup>) 557] The Registrant must establish use of the Mark within the meaning of s. 4 of the Act which states that :

"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 it is in any other manner so associated with the wares that notice of association is then given to the person to whom the property or possession is transferred"

The Act does not specify the form of the marking of the trade-mark on the wares. As stated above, the Mark is visible through the naked eye, perhaps not for some people with difficulty. I am satisfied that such evidence is sufficient to conclude that the Registrant has met its burden to prove use of the Mark in association with the Wares.

By reason of the evidence filed, I have concluded that the Mark is in use in Canada in association with “rings, bracelets, ear-rings, charms, pins and brooches” only and that consequently its registration should be amended so that the statement of wares will read: “rings bracelets, ear-rings, charms, pins and brooches”, the whole in accordance with the provisions of Section 45(4) of the Act.

Registration number TMA313046 will be amended accordingly in compliance with the provisions of Section 45(5) of the Act.

DATED, IN MONTREAL, QUEBEC, THIS 20th DAY OF February 2006.

Jean Carrière,  
Member of Trade-marks Opposition Board