



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

**Citation: 2012 TMOB 31**  
**Date of Decision: 2012-02-29**

**IN THE MATTER OF A SECTION 45 PROCEEDING  
requested by Thales against registration No. TMA593,210  
for the trade-mark NETRACS & Design in the name of  
Shaw Satellite Services Inc.**

[1] At the request of Thales (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 June 19, 2008 to Canadian Satellite Communications Inc., the registered owner of registration No. TMA593,210 for the trade-mark NETRACS & Design (the Mark), shown below:



[2] Further to a change of name recorded by the Registrar on October 16, 2008, the subject registration currently stands in the name of Shaw Satellite Services Inc. (the Registrant).

[3] The Mark is registered for use in association with the following services:

(1) Providing server-based access to computer software via the Internet, for data collection, management and evaluation and for vehicle tracking, messaging and positioning for use in the transportation industry;

(2) Providing global positioning services utilizing satellite technology (the Services).

[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 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 June 19, 2005 and June 19, 2008 (the Relevant Period).

[5] “Use” in association with services is set out in subsection 4(2) of the Act:

4.(2) 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.

[6] It is well established that mere assertions of use are not sufficient to demonstrate use in the context of section 45 proceedings [*Plough (Canada) Ltd v. Aerosol Fillers Inc.* (1980), 53 CPR (2d) 62 (FCA)]. Although the threshold for establishing use in section 45 proceedings is quite low [*Woods Canada Ltd. v. Lang Michener* (1996), 71 CPR (3d) 477 (FCTD) at 480], and evidentiary overkill is not required, sufficient facts must still be provided to permit the Registrar to arrive at a conclusion of use of the trade-mark in association with the services specified in the registration during the relevant period.

[7] In response to the s. 45 notice, the Registrant filed the affidavit of Kate Rahn, Director, Marketing Development of the Registrant, sworn on December 15, 2008. Both parties filed written representations; only the Registrant participated in an oral hearing.

[8] In her affidavit, Ms. Rahn states the Registrant first began using the name “Netracs” and a NETracs logo in 2000. She attests that the current logo, the Mark, was first used in 2001 and has been in use continuously since then for “all of the services listed in the registration”. More specifically, she states that the Mark “is used and has been used in the last 7 years in relation to a service allowing Canadian truck fleets to use the Internet to message and track vehicles anywhere in North America”.

[9] In support, Ms. Rahn attaches as Exhibit C what appears to be a printout from the website *investing.businessweek.com* dated November 26, 2008, but which she identifies as a copy of a press release dated September 2000, “listing NETracs as one of the company’s products”. I note that while “NETracs” is referenced in the body of the press release, the Mark as registered does not appear on the page.

[10] Attached as Exhibit D is a document that Ms. Rahn identifies as “a copy of NETracs sell sheet, which outlines the target market, the benefits, the requirements and competitive advantages of the NETracs product”. I note, however, that while the Mark appears prominently at the top of the document, Ms. Rahn provides no particulars that this document was printed or distributed during the Relevant Period. I am further unable to infer from the document itself that the sell sheet would have been distributed during the Relevant Period or that it was ever intended as anything other than an internal document of the Registrant.

[11] Ms. Rahn also attaches a copy of “a visor card used for customer support” as Exhibit E, which displays a variation of the Mark. The variation features an ellipse over the word “NETracs”, with the latter half of the word in lowercase characters and a star located at the end behind the letter “s”, rather than at the beginning next to the “N”. Notwithstanding the Requesting Party’s submission that use of this variation does not constitute use of the Mark as registered, I again note that there is no evidence that the visor card was distributed during the Relevant Period. Ms. Rahn simply states that the exhibit “is a copy of a visor card used for customer support”, without specifying that it was used during the Relevant Period in Canada.

[12] Finally, attached as Exhibit F is a document which Ms. Rahn identifies as a printout of NETracs’ customer base in 2008. I note that, as what appears to be an internal document, it cannot in itself demonstrate use of the Mark in association with the Services. In any event, the Mark as registered does not appear on the document and Ms. Rahn does not indicate whether any of the approximately 160 customers listed were registered before or after the expiry of the Relevant Period. Furthermore, there is no indication that any of these customers are located or operate in Canada.

[13] While it may have otherwise been logical to infer that at least some of the Registrant’s customers were located in Canada and were registered during the Relevant Period, I note that this absence of clear detail is characteristic of Ms. Rahn’s affidavit. At the oral hearing, the Registrant submitted that the affidavit should be read as a whole and not dissected. However, even if the affidavit is given a generous reading to accept that, for example, the visor card shown in Exhibit D was used by customers in Canada, I am not satisfied that the Registrant has demonstrated that it was used during the Relevant Period. Furthermore, although the visor card

references what appears to be the Registrant's tracking website at <http://netracs.cancom.ca>, the Registrant chose to provide, at Exhibit A, evidence taken from a third party website outside of the Relevant Period that references the Mark only in passing. It would have been a simple matter to provide screen shots from the Registrant's own website or at least attest to its operation and availability during the Relevant Period. Curiously, the affidavit is silent in this respect.

[14] In any event, as the affidavit does not clearly specify that the Mark or its variations were displayed in the advertisement or performance of the Services *during* the Relevant Period, I find the Registrant has failed to establish a *prima facie* case of use. As evidence in s. 45 proceedings is not subject to cross-examination, in the absence of additional details, I find it appropriate that the ambiguities in the evidence should be interpreted against the interests of the Registrant [see *Plough, supra*, and *Diamant Elinor Inc. v. 88766 Canada Inc.* (2010), 90 CPR (4th) 428 (FC)].

[15] In view of the above, I am not satisfied that there was use of the Mark with respect to the Services within the meaning of s. 45 and s. 4 of the Act during the Relevant Period. Furthermore, the Registrant has not advanced any special circumstances that would excuse such non-use.

[16] Accordingly, and pursuant to the authority delegated to me under s. 63(3) of the Act, the registration will be expunged in compliance with the provisions of s. 45 of the Act.

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Andrew Bene  
Hearing Officer  
Trade-marks Opposition Board  
Canadian Intellectual Property Office