



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

Citation: 2013 TMOB 203
Date of Decision: 2013-11-25

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Miller Thomson LLP against registration
No. TMA645,665 for the trade-mark COMFORT
SOLUTIONS in the name of Satpanth Capital Inc.**

[1] At the request of Miller Thomson LLP (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 December 13, 2011 to Satpanth Capital Inc. (the Registrant), the registered owner of registration No. TMA645,665 for the trade-mark COMFORT SOLUTIONS (the Mark).

[2] The Mark is registered for use in association with the following wares: “furniture, namely, beds, mattresses and box springs”.

[3] 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 December 13, 2008 and December 13, 2011.

[4] The relevant definition of “use” in association with wares is set out in section 4(1) 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.

[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 Registrant furnished the affidavit of Alykhan Sunderji, President of the Registrant, sworn on March 9, 2012. Both parties filed written representations and attended an oral hearing.

[7] In his affidavit, Mr. Sunderji attests that the Registrant “specializes in the manufacture and sale of furniture, including branded beds, mattresses and box springs to numerous local and national retailers across Canada”. He explains that these retailers in turn sell directly to consumers at retail store locations in Canada. At paragraph 5 of his affidavit, Mr. Sunderji provides pictures of six bed models, apparently taken from the Registrant’s 2010 catalogue. I note that while the Mark appears in five of the pictures, Mr. Sunderji does not attest to the catalogue’s distribution or use by customers. However, with respect to the nature of the wares, I note that each bed is composed of a mattress and box spring. As well, a product code identifies the particular bed model.

[8] With respect to the manner in which the Mark was associated with the wares, Mr. Sunderji attaches, as Exhibit E to his affidavit, “representative specimens of labels” that he attests were affixed to the wares sold by the Registrant to its authorized dealers during the relevant period. I note that the exhibit consists of what appears to be a label sheet, displaying six labels. Each label shows the Mark above a particular model name, such as “CAMELOT”, “CHARMING” and “COVENTRY”, which correspond with the bed models shown at paragraph 5 of the affidavit.

[9] In addition, Mr. Sunderji attaches, as Exhibit D to his affidavit, samples of “bed end cards” that he attests are provided to the Registrant’s dealers to market the beds. He explains that these cards are posted to the ends of the beds displayed in the stores. I note that the Mark is

displayed prominently on the cards, along with other marks and information regarding the material composition of the particular mattress model. Although other marks are displayed, it is well established that there is nothing to prevent the display of two or more trade-marks at the same time. In my view, consumers would perceive use of the Mark as well as use of the other marks [see, for example, *AW Allen Ltd v Warner-Lambert Canada Inc* (1985), 6 CPR (3d) 270 (FCTD); *Blaney, McMurty, Stapells, Friedman v Spectra Computer Services Ltd* (2000), 5 CPR (4th) 106 (TMOB); *Cie Générale des Établissements Michelin – Michelin & Cie v Continental General Time Canada Inc* (2000), 8 CPR (4th) 417 (FCTD)].

[10] As proof of transfers of the wares in the normal course of trade during the relevant period, Mr. Sunderji attaches, as Exhibit G to his affidavit, 16 representative invoices, which he attests show sales of “COMFORT SOLUTIONS brand furniture” by the Registrant to its authorized dealers in Canada. He further attests that sales of “COMFORT SOLUTIONS brand furniture” by the Registrant to its dealers in Canada during the relevant period exceeded \$225,000. Although the Requesting Party submits that the affiant’s reference to “furniture” is arguably broader than the wares as registered, I note that the product descriptions of some of the wares shown on the exhibited invoices correspond to the product codes and model names for the Registrant’s bed products evidenced at Exhibits D and E and in paragraph 5 of the affidavit.

[11] In its representations, the Requesting Party submits that, although Mr. Sunderji attests to having personal knowledge of all the matters set out in his affidavit, “it is clear on reading the affidavit that [Mr. Sunderji] cannot have personal knowledge of all the matters therein set out.” For example, Mr. Sunderji attests to activities of the Registrant’s predecessor-in-title which pre-date his becoming President of the Registrant in 2009; he also attests to the manner of sales activities conducted by the Registrant’s authorized dealers without stating how he acquired such information. As such, the Requesting Party submits that the affidavit as a whole is unreliable.

[12] I would note, first of all, that the Requesting Party’s submissions in this respect are premised on the assumption that it would be impossible for Mr. Sunderji to have personal knowledge of the aforementioned activities. However, as the Registrant notes in its representations, notwithstanding that Mr. Sunderji was not explicit in describing how he came to attain such knowledge, “it is probable and reasonable to expect that a person holding the affiant’s

office would, of his own knowledge, be aware of the particular facts attested to” [for similar evidence and conclusion, see *Marks & Clerk v Cristall USA Inc* (2007), 59 CPR (4th) 475 (TMOB)].

[13] In any event, I would note that sworn statements made in an affidavit must be accorded substantial credibility [*Ogilvy Renault v Compania Roca-Radiadores SA*, 2008 CarswellNat 776 (TMOB)], and that even if I were to consider Mr. Sunderji’s statements regarding the activities of the Registrant’s predecessor-in-title or authorized dealers as being hearsay, any concerns can go to weight, rather than admissibility [*I459243 Ontario Inc v Eva Gabor International, Ltd* (2011), 90 CPR (4th) 277 (FC)].

[14] In this case, the Registrant has furnished sufficient evidence of its sales of the registered wares in Canada during the relevant period and provided adequate evidence of the manner by which the Mark was displayed in association with the wares, both at the time of sale to the Registrant’s authorized dealers and at the time of sale to the ultimate consumer. As such, and in view of all of the foregoing, I am satisfied that the Registrant has demonstrated use of the Mark in association with “furniture, namely, beds, mattresses and box springs” within the meaning of sections 45 and 4(1) of the Act.

Disposition

[15] 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.

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