



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

Citation: 2012 TMOB 33
Date of Decision: 2012-03-12

**IN THE MATTER OF A SECTION 45 PROCEEDING
requested by Ridout & Maybee LLP against registration
No. TMA483,160 for the trade-mark ALL-TRA
BATTERY-BATTERIES FOR EVERYTHING &
DESIGN in the name of 519080 ALBERTA LTD.**

[1] At the request of Ridout & Maybee LLP (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 April 9, 2010 to 519080 ALBERTA LTD (the Registrant), the registered owner of the above referenced trade-mark Design (the Mark).



[2] The Mark (shown above) is registered in association with “batteries”.

[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 April 9, 2007 and April 9, 2010 (the Relevant Period).

[4] The relevant definition of “use” in association with wares is set out in subsection 4(1) of the *Trade-marks 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 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 *Performance Apparel Corp. v. Uvex Toko Canada Ltd.* (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.

[6] In response to the Registrar’s notice, the Registrant filed the affidavit of Robert Petersen, president of the Registrant, sworn on June 18, 2010. Neither party filed written arguments or requested an oral hearing.

[7] Mr. Petersen states in his affidavit that the Registrant’s normal course of trade is to sell and distribute a wide range of batteries of various kinds and sizes to Canadian wholesalers and retailers. He indicates that this is the Registrant’s primary source of revenue and that sales exceeded \$1,500,000 for each year of the Relevant Period. He also provides that at the time of the sale, a sticker that prominently displays the Mark (as illustrated at Exhibit A) is affixed to the

Registrant's batteries; he states that this was the case for the sales reflected in the attached invoices discussed below.

[8] Mr. Petersen attaches a representative collection of invoices from the Registrant's business records at Exhibit C. The invoices are dated during the relevant period, and each displays the Registrant's name and the quantity and pricing of batteries sold, in the body of the invoice.

[9] Having reviewed this evidence, I am satisfied that the Mark was used during the Relevant Period in association with the registered wares, in the normal course of trade of the Registrant in Canada, as set out in s. 4 and s. 45 of the Act.

[10] In view of all of the foregoing, pursuant to the authority delegated to me under s. 63(3) of the Act, the registration No. TMA483,160 will be maintained in compliance with the provisions of s. 45 of the Act.

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